

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 5 January 2011**

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

### Summary

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The complainant made a freedom of information request to the Cabinet Office for information relating to emails sent by Damian McBride, a special adviser to the then Prime Minister Gordon Brown. The Cabinet Office refused the request under section 40(2) of the Act on the grounds that the information is personal data and disclosure would contravene the first data protection principle which requires that data be processed fairly and lawfully. The Commissioner has investigated the complaint and has upheld the Cabinet Office's application of section 40(2) for most of the information requested. However the Commissioner found that the times and dates on which the emails were sent were not exempt under section 40(2) and he requires the public authority to make this information available to the complainant within 35 calendar days of the date of this notice.

### 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 17 April 2009 the complainant made a request to the public authority for information relating to emails sent by Damian McBride a former government Special Adviser who resigned after it was revealed

that he had sent inappropriate emails regarding a number of individuals. The request read as follows:

This is a request under the Freedom of Information Act relating to emails sent by Damian McBride on 12, 13 and 14 January 2009.

For each email sent by him on any of those dates, please send me the following information:

- a) The date and time sent
  - b) The recipient(s), including all those listed in CC or BCC fields
  - c) The subject line
  - d) Whether or not this email was deleted from his normal email sent folder
  - e) The full text of the email (incorporating [sic] other emails he was replying to or forwarding where his emails did so)
3. The public authority responded to the request on 19 May 2010 to say that it had interpreted the request 'to mean that you are particularly interested in those emails which have been the subject of recent discussion'. However, it said that the content of these emails 'is a series of highly personal remarks' and that therefore the information was being withheld under the exemption in section 40(2) of the Act. It explained that the exemption was engaged because the information constituted personal data as defined in the Data Protection Act 1998 (DPA 1998) and its disclosure would breach the data protection principles, especially the first principle which provides that information shall be processed fairly and lawfully.
4. The public authority acknowledged that there was a wider public interest "in knowing that action had been taken to ensure that such behaviour [the emails sent by Mr McBride] does not happen again". It then went on to explain what action had been taken in the wake of the emails coming to light. It explained that the Secretary of the Cabinet, Sir Gus O'Donnell KCB had already confirmed that no other member of No 10 staff, or Ministers or the media were involved either as an author or copy recipient. It said that the Prime Minister had accepted the resignation of the author of the emails who it confirmed had received no severance pay. The complainant was also referred to a statement by the Prime Minister in the House of Commons and was provided with a copy of a letter from the Prime Minister to Sir Gus O'Donnell and two letters from Sir Gus O'Donnell to the then Shadow Minister for the Cabinet Office, Francis Maude MP, which outlined what action had been taken to address the issues arising from this matter.

5. As part of its response the public authority also provided the complainant with the following:
  - A copy of the guidance issued by the then Head of the Home Civil Service in July 2004 on the handling of emails.
  - A written Prime Ministerial statement by the Prime Minister in July 2008 which gives special advisers' pay ranges for 2008-2009, the number of special advisers in each pay band by department and the total pay bill of special advisers for 2007-2008.
  - An excerpt from the updated *Code of Conduct for Special advisers* on party political activity.
6. The complainant asked the public authority to undertake an internal review of its handling of his request on 21 May 2009. In particular the complainant objected to what he saw as the public authority's decision to narrow his request. It said that it had interpreted his request to mean that he was "particularly interested in those emails which have been the subject of recent discussion." The complainant reminded the public authority that his request was for information relating to all emails sent by Mr McBride on 12, 13 and 14 January 2009. The complainant also said that he did not accept that the information which it had considered was exempt from disclosure, for the following reasons:
  - Not all of the information consists in its entirety of personal information.
  - Information which is known or believed to be inaccurate is not necessarily personal data, and even if it is, it would not be unfair to disclose it as this can be made clear so as to put into context.
  - Given the circumstances, it would not be unfair to release information relating to Damian McBride.
  - The public authority had apparently ignored the fact that parts of the request were for information such as subject lines of emails, times they were sent, recipients etc.
7. By 7 August 2009 the complainant had not received a response and so contacted the public authority to ask for an update on when he could expect to receive the outcome of the internal review. By the time the complainant submitted his complaint to the Commissioner an internal review had not been completed.

## The Investigation

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### Scope of the case

8. On 23 September 2009 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 public authority's failure to disclose the requested information and its decision to interpret his request in a way which the complainant said was much narrower than the request he actually made.
9. As stated above, by the time the complainant submitted his complaint the public authority had still not completed its internal review. After contacting the public authority the Commissioner subsequently decided to exercise his discretion and consider the complaint even though the complainant had not exhausted the public authority's internal complaints procedure. The Commissioner has considered the public authority's handling of the complainant's request for an internal review in the 'other matters' section at the end of this decision notice.

### Chronology

10. On 26 October 2009 the Commissioner wrote to the public authority with details of the complaint. The Commissioner asked the public authority if it had completed its internal review.
11. Having not received a response the Commissioner wrote to the public authority again on 12 January 2010 to explain that he intended to consider the complaint in the absence of an internal review. The Commissioner asked to be provided with copies of the information falling within the scope of the request.
12. On 16 April 2010 the public authority invited the Commissioner to view the requested information at its premises in light of the sensitive nature of the information.
13. On 4 August 2010 the Commissioner visited the premises of the public authority to inspect the withheld information in situ. The Commissioner discussed with the public authority why it did not hold all of the emails sent by Mr McBride on the dates referred to by the complainant in his request. The Commissioner followed up this meeting with an email in which he asked the public authority to confirm why it only held some of the emails sent by Mr McBride on the dates referred to in the complainant's request.

14. The public authority replied to the Commissioner on 28 September. It explained that it did not hold all of the emails sent by Mr McBride because some emails had been deleted in accordance with its records management policy. It provided the Commissioner with further details on its email retention policy.

### Findings of fact

15. Damian McBride resigned from his post as a special adviser to the Prime Minister on 11 April 2009 after it was revealed that he had sent a series of emails which made highly personal and disparaging remarks about several opposition politicians.
16. On 22 April 2009 the then Prime Minister, Gordon Brown MP, made the following statement to the House of Commons:

*"We should all say that what has happened has no part to play in the politics of this country. It is wholly inappropriate and unacceptable, and that is why there will be new rules and procedures to govern the behaviour of political advisers".<sup>1</sup>*

17. On 13 April 2009 Gordon Brown wrote to the head of the Home Civil Service, Sir Gus O'Donnell, with proposals to tighten up the Code of Conduct for Special Advisers. The relevant section of the Code of Conduct reads as follows (with the new amended text in bold).

"Special advisers should not use official resources for party political activity. They are employed to serve the objectives of the Government and the Department in which they work. It is this which justifies their being paid from public funds and being able to use public resources, and explains why their participation in party politics is carefully limited. They should act in a way which upholds the political impartiality of civil servants and does not conflict with the Civil Service Code. They should avoid anything which might reasonably lead to the criticism that people paid from public funds are being used for party political purposes. The highest standards of conduct are expected of special advisers and, specifically, the preparation or dissemination of inappropriate material or personal attacks has no part to play in the job of being a special adviser as it has no part to play in the conduct of public life. Any special adviser ever found to be disseminating inappropriate material will automatically be dismissed by their appointing Minister."

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<sup>1</sup> Hansard HC Vol 491 Col 233 (22 April 2009)

18. On 21 April 2009 Sir Gus O'Donnell wrote to Francis Maude MP, Shadow Minister for the Cabinet Office, in which he said that he had investigated the emails in question and could confirm that "no member of No 10 Staff or Ministers, other than Mr McBride, were involved either as an author or copy recipient". He added that he "did not find the emails were part of a broader pattern of activity of propagation of unfounded personal allegations".

## Analysis

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19. A full text of the relevant provisions of the Act which are referred to in this section are contained within a legal annex attached to this decision notice.

## Substantive Procedural Matters

### Scope of the request

20. The complainant has argued that the public authority interpreted his request too narrowly by only choosing to consider the emails sent by Mr McBride "which have been the subject of recent discussion". In fact the complainant's request was wider in scope insofar as it asked for information relating to all emails sent by Mr McBride on 12, 13 and 14 January 2009.
21. The Commissioner asked the public authority for its response to this aspect of the complaint. It explained that any emails beyond those which it held and considered in relation to the complainant's request would have been deleted in line with its records management policy. It said that its policy on the retention of emails was that they should be kept if they are required as part of a departmental record, or if there is a business need which requires them to be kept. Otherwise they should be deleted, it said. At the same time, it said that its IT systems automatically delete emails after three months.
22. The Commissioner understands that the stories regarding the emails sent by Mr McBride surfaced in the press on 11 April 2009. At this point, once his actions had been revealed, the emails "which were the subject of recent discussion" had been recovered by the public authority as part of the investigation into Mr McBride. These particular emails would not have been automatically deleted as the three month period had not elapsed. Instead the public authority continued to hold these emails because the investigation into Mr McBride meant that there was now a business need for this information to be retained.

These were the emails which the Commissioner reviewed at the public authority's premises. By the time the complainant submitted his request on 17 April 2009 any other emails sent by Mr McBride which were not the subject of the investigation into his actions would have been deleted automatically as the three month period had then elapsed.

23. The Commissioner has also considered whether the public authority could have recovered any additional emails sent by Mr McBride on the dates referred to in the complainant's request beyond the emails retained as part of the investigation. In reaching his view on this point the Commissioner is mindful of the findings of the Information Tribunal in *Harper v The Information Commissioner and Royal Mail* which considered to what extent electronic information which has been deleted can be considered to be 'held' by a public authority for the purposes of the Act.<sup>2</sup> In this case the Tribunal described how electronic information may be 'deleted' or 'emptied' from an area on a computer's operating system but will still be available on that computer until it has actually been eliminated by being overwritten by other data. Until the information is overwritten it will be possible to recover that information by using specialist software or programmes on the computer's operating system.
24. The Commissioner's view is that public authorities are entitled to delete information they no longer require – indeed they should do so, in accordance with good records management practice. If information is still said to be held when it has been intentionally and properly deleted, in line with the public authority's disposal schedule, the concept of deletion and disposal becomes meaningless. In such cases a public authority will not consider the information to be held and will make no use of it. Therefore the Commissioner's view is that in most cases, information which has been properly and intentionally deleted from a 'recycle bin' or 'deleted items' area of a computer but not yet overwritten will no longer be held for the purposes of the Act. In this case the public authority has explained that any other emails, beyond those it considered when responding to the request, would have been deleted, including information held in any 'deleted items' folder. In light of this the Commissioner's view is that any additional emails sent by Mr McBride were no longer held by the public authority at the time of the request. Only those emails "which were the subject of recent discussion" were held by the public authority as they had been recovered, not in response to the complainant's request, but as part of the investigation into Mr McBride's actions. It is these emails which the Commissioner inspected during his visit to the public authority.

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<sup>2</sup> Harper v The Information Commissioner and Royal Mail Group PLC [EA/2005/0001]

25. The Commissioner has confirmed that the public authority holds some of the emails sent by Mr McBride on the dates referred to by the complainant in his request. Therefore the Commissioner has found that the public authority holds information falling within the scope of parts (a), (b), (c) and (e) of the request. As regards part (d) of the request the public authority has confirmed that when it recovered the emails "which were the subject of recent discussion" it was only interested in recovering the emails themselves. Having printed off the emails for the purpose of the investigation no other information was retained and the public authority did not seek to establish whether Mr McBride had deleted the emails from his email sent folder. In light of this the Commissioner is satisfied that, for the purposes of the Act, the public authority did not hold the information falling within the scope of part (d) of the request at the time the request was received.

## Exemptions

### Section 40 – Personal information

26. Section 40(2) of the Act provides that information is exempt from disclosure if it constitutes the personal data of someone other than the applicant and disclosure would satisfy one of two conditions. In this case the relevant condition is the first condition which is that disclosure would contravene any of the data protection principles. The public authority has argued that disclosure would prejudice the first data protection principle which requires that data be processed fairly and lawfully.

#### Is the information personal data?

27. In deciding whether the exemption applies it is first necessary to consider whether the withheld information constitutes personal data. Personal data is defined in the DPA 1998 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 intentions of the data controller or any other person in respect of the individual."

28. The public authority has explained that the information it holds constitutes a number of emails which contain a series of 'highly personal remarks' about certain identifiable individuals. The Commissioner has reviewed the emails and is satisfied that all of the information requested by the complainant constitutes personal data. The complainant had suggested that information will not necessarily constitute personal data if it is known to be inaccurate. The Commissioner rejects this argument. The information only has to be related to living individuals who can be identified from that information. Whether the information is accurate or not is irrelevant. Indeed, the obligation to keep personal data accurate as required by the 4<sup>th</sup> data protection principle would be meaningless if inaccurate personal data did not fall within the scope of the DPA 1998. The Commissioner would stress that there has never been any suggestion that the information about third parties contained within the emails is accurate.
29. The complainant has also suggested that some elements of the emails, for example the dates and times sent, does not constitute personal information. The Commissioner rejects this argument. The emails have to be considered as a whole and, given that the request is for emails sent by a named individual and given the nature of the emails, the Commissioner is satisfied that the totality of the information held which is relevant to this request is the personal data of Mr McBride or of the individuals who feature in those emails.

#### The first data protection principle

30. Having satisfied himself that the information is personal data the Commissioner has gone on to consider whether disclosure would contravene the first data protection principle. The first data protection principle states that:

'1. 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 met.'

#### Fairness

31. In considering the fairness of disclosure the Commissioner has taken into account the following factors:
- The expectations of the individuals
  - The possible consequences of disclosure
  - Nature and content of the information

32. As regards the expectations of the individuals concerned, the Commissioner notes that the information consists of scurrilous personal attacks by a paid government employee. The individuals to whom the information relates would have had no expectation that this information was either held or could be disclosed. Given the content of the information the Commissioner is also of the view that disclosure would be distressing to the individuals concerned.
33. The Commissioner is aware that at the time of Mr McBride's resignation the content of the emails was the subject of some discussion in the press to the extent that it could be argued that the information had already entered the public domain. The Commissioner rejects this argument, not least because he does not think that all of the information contained within the emails has entered the public domain and in any event, official disclosure would be likely to fuel further public discussion about this matter which would be just as distressing to the individuals concerned.
34. However, the Commissioner's view is that, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose requested information if it can be argued that there is a more compelling public interest in disclosure. Therefore the Commissioner has carried out a balancing exercise, balancing the rights and freedoms of the individuals whose names feature in the requested information (the data subjects) against the public interest in disclosure. The Commissioner considers that the public interest lies in knowing the extent of public officials' involvement in the emails sent by Mr McBride and ensuring that those involved are held accountable. However, the Commissioner is mindful of the steps taken by the government to address these concerns. In particular the Head of the Home Civil Service, as noted at paragraphs 15 -18 above, has already confirmed that there was no wider involvement of Ministers or civil servants working at 10 Downing Street and that the emails were not part of a broader pattern of activity. Subsequently, action was taken to strengthen the code of conduct for special advisers. Disclosure would of course reveal the exact nature of the 'highly personal remarks' but the Commissioner sees no significant public interest in revealing these unfounded rumours and when balanced against the harm that would be caused the Commissioner is satisfied that disclosure of most of the information would be unfair.
35. The Commissioner considers that the above arguments apply to parts (b), (c) and (d) of the request. The Commissioner does not think that the information within part (a) of the request raises the same concerns. Indeed, since it is known that Mr McBride sent emails on the

dates referred to by the complainant it is difficult to see how disclosure of this information could be unfair to him or the recipients.

A schedule 2 condition?

36. The Commissioner believes that it is useful to also consider whether disclosure of any of the information would meet a condition in schedule 2 of the DPA 1998. The condition which is most likely to be relevant is the 6<sup>th</sup> condition. The 6<sup>th</sup> condition is that:

“The processing is necessary for the purposes of the legitimate interests pursued by the data controller or by the third party or third 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.”

37. The Commissioner’s approach is to consider whether the 6<sup>th</sup> condition is met by way of the following 3 part test which must be satisfied:

- there must be legitimate interests in disclosing the information,
- the disclosure must be necessary for a legitimate interest of the public 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(s).

38. As regards parts (b), (c) and (d) of the request the Commissioner has already outlined what he considers to be the legitimate interests in disclosure when considering the issue of fairness. However, as the Commissioner noted at that point, the action taken by the Head of the Home Civil Service has already addressed those concerns which means that disclosure is not necessary for those legitimate interests. It is important to make a distinction here between the legitimate interests in the wider issue of the role of special advisers and in knowing who was involved, and the disclosure of the emails themselves which would not serve any public interest given that we know that the emails make false allegations and those involved have already been held accountable. Consequently, the Commissioner has decided that disclosure would breach the first data protection principle and that therefore section 40(2) is engaged.

39. For part (a) of the request the Commissioner finds that there is a very slight public interest in disclosure insofar as this would confirm that the emails sent by Mr McBride were within the dates referred to in the complainant’s request. As the Commissioner has already noted, he does not think that releasing this information would be unfair to Mr

McBride or the recipients of the emails and neither would it cause any unwarranted interference to their rights, freedoms or legitimate interests. Therefore, the Commissioner accepts that the schedule 2 condition is satisfied in this instance and that disclosure of this information would not contravene the first data protection principle. Consequently the Commissioner has decided that the information falling within the scope of part (a) of the request is not exempt from disclosure under section 40(2) of the Act.

### **Procedural requirements**

40. By failing to disclose the Information within part (a) of the request the public authority breached section 1(1)(b) of the Act. By failing to disclose this information to the complainant within 20 working days the public authority also breached section 10(1) of the Act.
41. By failing to inform the complainant that it did not hold the information in part (d) of the request the public authority breached section 1(1)(a) of the Act which requires public authorities to inform an applicant whether it holds information of the description specified in the request.

### **The Decision**

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42. 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 public authority dealt with the request in accordance with the Act to the extent that it correctly refused to disclose the information falling within parts (b), (c) and (e) of the request under the exemption in section 40(2) of the Act.
43. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
  - The public authority breached section 1(1)(b) of the Act by failing to disclose the information falling within the scope of part (a) of the request.
  - The public authority breached section 10(1) of the Act by failing to disclose the information falling within the scope of part (a) of the request within 20 working days.

- The public authority breached section 1(1)(a) of the Act by failing to inform the complainant that it did not hold the information falling within the scope of the request.

## Steps Required

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44. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
  - Disclose to the complainant the information it holds which falls within the scope of part (a) of the request.
45. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## Failure to comply

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

Part VI of the 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. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. In this case the complainant asked the public authority to carry out an internal review of his request on 21 May 2009. By the time the Commissioner commenced his investigation an

internal review had still not been completed. The Commissioner considers this a significant failure to conform to the Code of Practice.

## Right of Appeal

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48. 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 5<sup>th</sup> day of January 2011**

**Signed .....**

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

## Legal Annex

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### **Section 1(1) provides that –**

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

### **Section 10(1) provides that –**

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

### **Section 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.”