

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 29 June 2011

**Public Authority:** Suffolk County Council  
**Address:** Endeavour House  
Russell Road  
Ipswich  
Suffolk  
IP1 2BX

### Summary

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The complainant made a request under the Freedom of Information Act 2000 (the "Act") to Suffolk County Council (the "council") for a copy of the Combined Aerial Rescue Pump Report. The council refused to disclose this information and applied section 40(2), section 41 and section 43(2). During the course of the Commissioner's investigation the council withdrew its application of section 41 and section 43(2), it also applied section 36(2)(b)(i) and (ii) and section 36(2)(c). The Commissioner considers that section 36(2)(b)(i) was correctly applied in this case however the public interest arguments in favour of disclosure outweigh the public interest arguments in favour of maintaining the exemption and therefore the information should be disclosed. The Commissioner considers that section 36(2)(b)(ii) and section 36(2)(c) were incorrectly applied in this case. The Commissioner does however consider that section 40(2) was correctly applied to some parts of the information and therefore this information should be withheld.

### 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 Combined Aerial Rescue Pump Report which was requested in this case was an evaluative report compiled by a company called Firebuy Ltd on the procurement of a fire rescue vehicle by Suffolk Fire and Rescue Service.

## **The Investigation**

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### **Request**

3. The complainant made a request which was received by the Council on 23 March 2010. The request was for a copy of the Combined Aerial Rescue Pump Report.
4. On 13 April 2010 the Council responded to the request for information. It confirmed that it held the information that the complainant had requested but stated that it was exempt from disclosure under section 40, section 41 and section 43.
5. As the complainant was dissatisfied with the response he had received, on 23 April 2010 he asked the Council to conduct an internal review of its decision.
6. On 2 June 2010 the Council wrote to the complainant with the result of the internal review, it upheld its original decision.

### **Scope of the case**

7. On 10 June 2010 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 whether or not the council had been correct to withhold the requested information.

### **Chronology**

8. On 28 July 2010 the Commissioner wrote to the council to ask it to provide him with a copy of the withheld information.
9. On 20 August 2010 the council provided the Commissioner with a copy of the withheld information.

10. On 18 January 2011 the Commissioner wrote to the council to ask it to provide its further arguments in support of the exemptions applied.
11. On 23 February 2011 the council responded to the Commissioner, it provided its further submissions in support of the exemptions applied. It also suggested that in retrospect it should have applied section 36.
12. On 24 March 2011 the Commissioner asked the Council if it was now applying section 36 in this case.
13. On 12 April 2011 the Council confirmed that it did wish to apply section 36 and provided its submissions in support of this. It also withdrew its application of section 41 and section 43(2).

## **Analysis**

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### **Exemptions**

#### **Section 36**

14. Sections 36(2)(b)(i) and (ii) and section 36(2)(c) state that:  
"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-  
(b) would, or would be likely to, inhibit –  
    (i) the free and frank provision of advice, or  
    (ii) the free and frank exchange of views for the purposes of deliberation  
  
(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
15. A full text of section 36 is available in the Legal Annex at the end of this Notice.
16. The Commissioner has firstly considered the application of section 36(2)(b)(i).

### **Section 36(2)(b)(i)**

17. Information may be withheld under section 36(2)(b)(i) if its disclosure, in the reasonable opinion of a qualified person, would or would be likely to prejudice the free and frank provision of advice. It was stated in the Tribunal decision of *Guardian Newspapers Ltd & Heather Brooke v the Information Commissioner & the BBC* (EA/2006/0011 & EA/2006/0013) that, "On the wording of section 36(2)(c) we have no doubt that in order to satisfy the statutory wording the substance of the opinion must be objectively reasonable..." (paragraph 60). On the weight to be given to the process of reaching a reasonable opinion, the Tribunal further noted that, "...in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at..." (paragraph 64) "...can it really be said that the intention of Parliament was that an opinion reached, for example, by the toss of a coin, or on the basis of unreasoned prejudice, or without consideration of relevant matters, should qualify as 'the reasonable opinion of a qualified person' under section 36 merely because the conclusion happened to be objectively reasonable?" The Commissioner considers that these comments are equally applicable to section 36(2)(b)(i).
18. In determining whether section 36(2)(b)(i) was correctly engaged by the council the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
- Establish that an opinion was given;
  - Ascertain who was the qualified person or persons;
  - Ascertain when the opinion was given; and
  - Consider whether the opinion was objectively reasonable and reasonably arrived at.
19. The council has explained that the Monitoring Officer is the qualified person and his opinion was obtained on 22 February 2011. As the qualified opinion was given during the course of the Commissioner's investigation to Commissioner asked the Council to demonstrate that the qualified person only took factors into account which were relevant at the time of the request. The council explained that the Monitoring Officer had been consulted in relation to section 36 at the time of the request and had at

- that time provided a verbal opinion that section 36 was engaged. However as at that stage the council believed that section 41 and 43 were applicable it had not deemed it necessary to apply section 36 also. Furthermore it explained that when the qualified person's opinion was confirmed in writing on 22 February 2011 he had only taken factors into account which were relevant at the time of the request. It explained that as the request was focused on a single (but substantial and complex) report evaluating the procurement of a particular vehicle, as the procurement process was still not complete by 22 February 2011, the issues surrounding the potential disclosure of the report remained the same.
20. The council has provided the Commissioner with a copy of the submissions which were put to the qualified person and a copy of the qualified person's opinion. It was submitted to the qualified person that due to the nature of the report, if it were released it would be likely to damage its ability to receive an objective report reviewing its procurement processes and as yet the procurement of the vehicle in question remained ongoing. It was submitted that the council must be able to gather free and frank advice and assessment of its procurement processes and disclosure may hinder this.
21. In this case the council has not specified whether the prejudice would or would be likely to occur. The Commissioner's position is that the lower threshold of "likely to prejudice" should be applied, unless there is clear evidence that it should be the higher level. As there is no such evidence in this case the Commissioner has looked at whether the prejudice would be likely to occur.
22. In dealing with the issue of the likelihood of prejudice, the Commissioner notes that in the case of *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005), the Information Tribunal confirmed that where it is claimed that prejudice "would be likely to" occur "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk" (paragraph 15). He has viewed this as meaning that the risk of prejudice need not be more likely than not, but must be substantially more than remote.

23. The Commissioner considers that at the time of the request the procurement process was incomplete and therefore the information contained within the withheld information was still being relied upon. The Commissioner considers that the timing of the request increases the likelihood of the prejudice occurring.
24. Upon viewing the withheld information the Commissioner does consider that it contains very free and frank advice and information surrounding the procurement of the Combined Aerial Rescue Pump. He accepts that it was reasonable for the qualified person to conclude that if this information were disclosed, particularly whilst the procurement process is ongoing, this would be likely to prejudice the frankness of future evaluation reports conducted by third parties such as Firebuy, in relation to similar issues. This is because third parties such as Firebuy may be less candid in their evaluation of a procurement process if they believed their report might be disclosed into the public domain.
25. Upon considering the withheld information to which section 36(2)(b)(i) has been applied to, the submissions put to the qualified person and the qualified person's opinion, the Commissioner accepts that it was reasonable to conclude that disclosure would be likely to inhibit the free and frank provision of advice in the future.
26. As the Commissioner has decided that the exemption is engaged, he has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke Appeal").
27. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by s 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the

extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would be likely to inhibit the free and frank provision of advice.

### **Public arguments in favour of disclosing the requested information interest**

28. The council has acknowledged that disclosure would promote better government through transparency, accountability and better public understanding of decisions made.

### **Public interest arguments in favour of maintaining the exemption**

29. The council has suggested that timing is a factor which strongly supports the public interest in favour of maintaining the exemption. It explained that the report bears upon a process which is still on-going and so there is a strong public interest in the council being able to continue to obtain free and frank advice in the form of evaluative reports on this and future procurement processes.

### **Balance of the public interest arguments**

30. The Commissioner acknowledges that in this case there is a public interest in promoting transparency, accountability and better public understanding of decisions. However he also considers that there is a very strong public interest in providing information as to the evaluation of the procurement process of the Combined Aerial Rescue Pump, as significant sums of public money were spent on the procurement of this equipment. The report contains information which would demonstrate whether or not this was an effective use of public funds.
31. The Commissioner acknowledges that whilst the timing of the request in this case does add weight to the public interest arguments in favour of maintaining the exemption, he considers that the severity of the prejudice is lower than that argued by the council. Whilst the Commissioner accepts that Firebuy or other such third parties contracted to evaluate such procurement

processes may not be so free and frank when providing advice in the future, they are being remunerated for carrying out a profession and in the Commissioner's view would still provide sufficiently candid advice to meet the requirements of the report which they have been engaged to complete. Therefore the Commissioner does not attribute as much weight to the arguments in favour of maintaining the exemption as the council did.

32. Whilst the Commissioner considers that there is a public interest in the council being able to continue to obtain free and frank advice in the form of evaluative reports on this and future procurement processes, in this case it does not outweigh the public interest factors in favour of disclosure. The need for transparency is heightened in this case because significant sums of money were spent on procuring the Combined Aerial Rescue Pump. In this case the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

### **Sections 36(2)(b)(ii) and 36(2)(c)**

33. In relation to the application of section 36(2)(b)(ii) and section 36(2)(c), the Commissioner has carefully considered the content of the submissions that were made to the qualified person in this case. He notes that arguments relevant to these subsections were clearly considered under the heading "Deliberations by Information Compliance Officers". However, he also notes that the "Decision by Information Compliance Officers" which was endorsed by the qualified person only actually related to prejudice to the Council's ability to gather free and free advice. The evidence in this case is therefore that although arguments under all three subsections were originally considered the qualified person's actual decision was restricted to the application of s36(2)(b)(i). The Commissioner has not therefore considered the application of sections 36(2)(b)(ii) and 36(2)(c) any further.

### **Section 40(2)**

34. Section 40(2) of the Act provides an exemption for information that constitutes the personal data of third parties:

*"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."*

35. Section 40(3)(a)(i) of the Act states 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),"*

36. The full text of section 40 can be found in the legal annex attached to this decision notice.

37. The Commissioner will determine whether or not the council correctly applied section 40(2) in order to make two redactions to the requested information.

38. In this case the council has explained that a number of officers and job titles are cited throughout the withheld information however redactions were made to the name of an individual and some information relating to this individual at paragraph 12 of one of the withheld documents and some sensitive personal data relating to another individual at paragraph 14. It has said that this information is exempt under section 40(2) of the Act by virtue of section 40(3)(a)(i). It said that this was because to release this information would breach the data protection principles. In addition to this the Commissioner notes that there is similar sensitive personal data contained at paragraphs 3.2.6.4 and 3.2.6.8 of the same document which he considers should be subject to the same considerations.

39. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:

a. from that data, or

- b. from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
40. The Commissioner considers that the first redaction made under section 40(2) would constitute information from which the data subject would be identifiable. In relation to the second redaction the Commissioner considers that this would amount to the sensitive personal data of the data subject who would be identifiable. The Commissioner also considers that there is similar sensitive personal data contained at paragraphs 3.2.6.4 and 3.2.6.8 from which the data subject would be identifiable.
41. Such information is exempt if either of the conditions set out in sections 40(3) and 40(4) of the Act are met. The relevant condition in this case is at section 40(3)(a)(i) of the Act, where disclosure would breach any of the data protection principles. The council has argued that disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully". Furthermore at least one of the conditions in Schedule 2 should be met.
42. In reaching a decision as to whether disclosure of the requested information would contravene the first data protection principle the Commissioner has considered the following: -

### **Likely Expectation of the Data Subject**

43. The council has explained that in relation to the first redaction, this contains information which criticises the actions of an individual and until the procurement process is complete and the criticisms have been validated or otherwise the data subject would not expect this information to be disclosed into the public domain. The council has explained that in relation to the second redaction this contains sensitive personal data about the physical or mental health or condition of another individual who would not expect this information to be disclosed into the public domain. The Commissioner considers that there is also sensitive personal data contained in paragraphs 3.2.6.4 and 3.2.6.8 which relates to the physical or mental health or condition of another individual who would not expect this information to be disclosed into the public domain.

44. The Commissioner has viewed the redacted information and considers that in relation to the first redaction the data subject would not expect this information to be disclosed into the public domain, particularly as the procurement process is incomplete. In relation to the second redaction the Commissioner considers that the data subject would not expect this sensitive personal data to be disclosed into the public domain.

### **Damage and Distress to the Data Subject**

45. The Commissioner considers that in relation to the first redaction, disclosure of this information which criticises the actions of an individual whilst the procurement process is ongoing and therefore before those criticisms have been validated, would cause damage and distress to the data subject.
46. In relation to the second redaction made to paragraph 14 and the sensitive personal data contained at paragraphs 3.2.6.4 and 3.2.6.8 this contains information about an individual's physical or mental health or condition. As this information is extremely private information relating to the individual, disclosure would cause damage and distress to the data subject.

### **Legitimate Interests**

47. In relation to the first redaction, the Commissioner does not consider that there is a legitimate public interest in disclosing unfounded criticisms about the individual whilst the procurement process is ongoing and whilst those criticisms have not been founded conclusively. In relation to the second redaction made, as the information relates to the individual's physical or mental health or condition, as this information is very private to the individual and therefore the data subject's sensitive personal data, the Commissioner does not consider that there is a legitimate public interest in disclosing this.
48. In relation to the first redaction made, taking into account all of the above, as the procurement process was ongoing and therefore the criticisms about the individual were not conclusive, the Commissioner considers that it would be unfair to disclose this information.
49. In relation to the second redaction made and the sensitive personal data contained at paragraphs 3.2.6.4 and 3.2.6.8, the

Commissioner notes that the information in this case falls under s2(e) of the Data Protection Act 1998 as it relates to the data subject's physical or mental health or condition. As such, by its very nature, this has been deemed to be information that individuals regard as the most private information about themselves. Further, as disclosure of this type of information is likely to have a detrimental or distressing effect on the data subject and the data subject would not expect this information to be disclosed, the Commissioner considers that it would be unfair to disclose the requested information.

50. The Commissioner therefore considers that it would be unfair to disclose the redacted information in this case and therefore section 40(2) with section 40(3)(a)(i) was correctly engaged to this information.

## **The Decision**

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51. The Commissioner's decision is that the council incorrectly applied sections 36(2)(b)(i) and (ii) and section 36(2)(c). However it correctly applied section 40(2) to the redactions made to paragraph 12 and 14 of one of the withheld documents.

## **Steps Required**

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52. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
  - Apart from the two redactions made by the council under section 40(2) at paragraphs 12 and 14, and the further exempt information that the Commissioner has identified at 3.2.6.4 and 3.2.6.8 the council should disclose the withheld information.
53. 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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54. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the

Reference: FS50317447



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.

## Right of Appeal

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55. 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)

56. 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.
57. 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 29 day of June 2011**

**Signed .....**

**Lisa Adshead**

**Group Manager**

**Information Commissioner's Office**

**Wycliffe House**

**Water Lane**

**Wilmslow**

**Cheshire**

**SK9 5AF**

## Legal Annex

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### General Right of Access

#### **Section 1(1) provides that -**

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

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

#### **Section 2(3) provides that –**

“For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (c) section 21
- (d) section 23
- (e) section 32
- (f) section 34
- (g) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (h) in section 40 –
  - (i) subsection (1), and
  - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
  - (iii) section 41, and
  - (iv) section 44”

## **Prejudice to effective conduct of public affairs.**

**Section 36(1)** provides that –

“This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

**Section 36(2)** provides that –

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
  - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
  - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
  - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
  - (i) the free and frank provision of advice, or
  - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

**Section 36(3)** provides that –

“The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).”



**Section 36(4)** provides that –

“In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words “in the reasonable opinion of a qualified person”.

**Section 36(5)** provides that –

“In subsections (2) and (3) “qualified person”-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
- (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
- (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
- (d) in relation to information held by the House of Commons, means the Speaker of that House,
- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
- (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
- (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
- (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
  - (i) the public authority, or
  - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
- (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
- (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
- (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
- (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
  - (i) the public authority, or
  - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,

- (m) in relation to information held by the Greater London Authority, means the Mayor of London,
- (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
- (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
  - (i) a Minister of the Crown,
  - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
  - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown."

**Section 36(6)** provides that –

"Any authorisation for the purposes of this section-

- (a) may relate to a specified person or to persons falling within a specified class,
- (b) may be general or limited to particular classes of case, and
- (c) may be granted subject to conditions."

**Section 36(7)** provides that –

A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-

- (a) disclosure of information held by either House of Parliament, or
- (b) compliance with section 1(1)(a) by either House, would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.

### **Personal information.**

**Section 40(1)** provides that –

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

**Section 40(2)** provides that –

"Any information to which a request for information relates is also exempt information if-

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

**Section 40(3)** provides that –  
"The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
  - (i) any of the data protection principles, or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

**Section 40(4)** provides that –  
"The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data)."

**Section 40(5)** provides that –  
"The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

- (b) does not arise in relation to other information if or to the extent that either-
  - (i) 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)."

**Section 40(6)** provides that –

"In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded."

**Section 40(7)** provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.