

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 16 June 2011

**Public Authority:** Cranfield University  
**Address:** Cranfield  
Bedfordshire  
MK43 0AL

### Summary

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The complainant made two requests for information relating to the possible restructuring and reorganising of certain departments at the University; together with information relating to discussions about and proposals for any associated redundancies. The University withheld this information under sections 36, 40 and 43. The Commissioner decided that the University had correctly relied upon section 36. In addition to this it had correctly relied upon section 40 to withhold some information. However, he has also decided that sections 40 and 43 were not engaged in relation to some of the information. Therefore some of the withheld information should be disclosed. The University also failed to meet the requirements of sections 10 and 17.

### 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 Requests

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2. This notice relates to two cases. The complainant made two requests for information to Cranfield University (the "University") – which are detailed below. The requests, and the University's subsequent handling of them, resulted in two complaints to the Commissioner which were assigned the case reference numbers shown at the top of this notice. However, given the close nature of the requests, the Commissioner has

decided to issue one decision notice for both cases. Given the related nature of the requests, the withheld information for both requests is inextricably mixed. Therefore, references in this notice to the 'withheld information' should be read in relation to both cases.

### **Case Reference FS50346728**

3. The complainant wrote to the University on 5 June 2010 and requested the following information,

*"All electronically transmitted, handwritten or reproduced documents, including all correspondence either generated or received by Cranfield University between 1<sup>st</sup> September 2009 and 5<sup>th</sup> June 2010 in relation to:*

- *Discussion of, plans or proposals for, a restructuring or reorganisation of Groups or Departments involving the Security Studies Institute and/or Resilience Centre (DASSR) and/or Centre for Defence Management & Leadership (DESM) and/or Centre for Security Sector Management (DESM) at Shrivenham.*
- *Discussion of, plans or proposals for, the withdrawal, amalgamation or introduction of graduate programmes involving the Security Studies Institute (DASSR) and/or Resilience Centre (DASSR), Centre for Defence Management & Leadership (DESM) or Centre for Security Sector Management (DESM) at Shrivenham.*
- *Discussion of, plans or proposals for the transfer of existing graduate programmes or short courses between Security Studies Institute (DASSR) and/or Resilience Centre (DASSR), Centre for Defence Management & Leadership (DESM) or Centre for Security Sector Management (DESM) at Shrivenham."*

4. The University wrote to the complainant on 2 July 2010. It confirmed that it held information that fell within the scope of her request, and informed her that it was considering whether sections 36, 40 and 43 applied to this information. However, it informed her that it was still considering the public interest test in relation to sections 36 and 43. It estimated that it would be able to respond by 19 July 2010.
5. Following an exchange of correspondence the University provided a substantive response in a letter dated 16 July 2010. It informed the complainant that it believed that the requested information was exempt from disclosure under sections 36, 40 and 43. In relation to section 40, it informed her that it believed that sections 40(2) and 40(3) applied, as

the disclosure of some of the requested information would breach the first principle of the Data Protection Act 1998 (the "DPA").

6. The complainant wrote to the University on 19 July 2010 and requested an internal review.
7. The University carried out an internal review and responded on 11 August 2010. It stated that it believed that the requested information was exempt under sections 36, 40 and 43. In relation to section 36 it referred to the qualified person's opinion that disclosure would, or would be likely to, inhibit the free and frank provision of advice, the free and frank exchange of views for the purposes of deliberation, or would otherwise prejudice the effective conduct of public affairs.

### **Case Reference FS50346729**

8. The complainant wrote to the University on 5 June 2010 and requested the following information,

*"All electronically transmitted, handwritten or reproduced documents, including all correspondence either generated or received by Cranfield University between 1<sup>st</sup> September 2009 and 5<sup>th</sup> June 2010 in relation to:*

*Discussion of, or proposals for, redundancies at Cranfield University, Shrivenham*

*This request includes but is not limited to:*

- *The posts at risk of redundancy*
- *Identification of posts which may be at risk of redundancy*
- *Selection of posts at risk of redundancy*
- *Possible or actual use of Agresso data/returns in identification of posts at risk of redundancy*
- *Reasons for redundancies*
- *Timetables for redundancies*
- *Numbers of posts at risk of redundancy by academic group, department, service or school*
- *Notification of posts at risk of redundancy*
- *The formation of a Redundancy Committee*

*I am aware that posts, not people, are made redundant."*

9. The University wrote to the complainant on 2 July 2010. It confirmed that it held information that fell within the scope of her request, and informed her that it was considering whether sections 36, 40 and 43 applied to this information. However, it informed her that it was still considering the public interest test in relation to sections 36 and 43. It estimated that it would be able to respond by 19 July 2010.
10. Following an exchange of correspondence the University provided a substantive response in a letter dated 16 July 2010. It informed the complainant that it believed that the requested information was exempt from disclosure under sections 36, 40 and 43. In relation to section 40, it informed her that it believed that sections 40(2) and 40(3) applied, as the disclosure of some of the requested information would breach the first principle of the DPA.
11. The complainant wrote to the University on 19 July 2010 and requested an internal review.
12. The University carried out an internal review and responded on 11 August 2010. It stated that it believed that the requested information was exempt under sections 36, 40 and 43. In relation to section 36 it referred to the qualified person's opinion that disclosure would, or would be likely to, inhibit the free and frank provision of advice, the free and frank exchange of views for the purposes of deliberation, or would otherwise prejudice the effective conduct of public affairs.

## **The Investigation**

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### **Scope of the case**

13. On 27 August 2010 the complainant contacted the Commissioner and complained about the way that each of her requests for information had been handled. The complainant specifically asked the Commissioner to consider whether the University was correct to withhold the information she had asked for in these requests.
14. During the course of the Commissioner's investigation into these two cases the University disclosed a substantial part of the previously withheld information. Therefore this notice relates only to the outstanding withheld information.
15. Therefore the scope of this notice will be to consider the University's use of sections 36(2)(b)(i), 36(2)(b)(ii), 36(2)(c), 40(2) in conjunction with

40(3)(a)(i), and 43(2) to withhold the outstanding requested information.

16. In addition to this, the Commissioner has considered whether the University complied with the requirements of sections 10 and 17.

### **Chronology**

17. Following initial letters from the Commissioner in relation to both complaints the University provided initial submissions in two letters dated 10 November 2010, together with a copy of the withheld information. In these letters it provided submissions to support its use of the cited exemptions. In addition to this, it also informed the Commissioner that some of the withheld information was also exempt under section 41 of the Act.
18. The Commissioner wrote to the University on 10 January 2011 and asked it to provide further submissions to support its use of the exemptions. In relation to its application of section 41 he informed it that, given the nature of the withheld information, it was his initial view that this exemption was not engaged. Therefore he asked it to confirm whether it still intended to rely upon this exemption.
19. Following an exchange of correspondence, the University provided a substantive response on 24 February 2011. It confirmed that it was no longer seeking to rely upon section 41 to withhold any of the requested information. It also informed the Commissioner that it now intended to disclose a large amount of the previously withheld information. It provided the Commissioner with a copy of the withheld information, with the parts it now intended to disclose marked.
20. The Commissioner wrote to the University on 11 March 2011 and asked it to confirm to him when it had disclosed the information that it no longer sought to withhold. He also asked it for some clarification as to its use of the exemptions in relation to some of the outstanding withheld information.
21. The University responded on 28 March 2011, and provided the additional clarification that the Commissioner had requested. Following this, it wrote to him again on 7 April 2011 and confirmed that it had now disclosed the information that it had identified for disclosure to the complainant.

## Analysis

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### Exemptions

22. The University has applied sections 36, 40 and 43 to withhold the outstanding requested information. The Commissioner has considered the application of each of these exemptions in turn.

#### Section 36

23. In these cases the University has relied upon sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) to withhold some of the withheld information.

24. The relevant parts of section 36(2) 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, or*

*(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."*

25. This is a qualified exemption, and is therefore subject to the public interest test.

26. The full text of section 36 is available in the legal annex at the end of this notice.

27. The Commissioner has first considered the application of section 36(2)(b)(ii).

28. Information can only be exempt under section 36 if, in the reasonable opinion of a qualified person, disclosure would, or would be likely to lead to the adverse consequences described in that part of the exemption, in this case the inhibition of the free and frank exchange of views for the purposes of deliberation. In order to establish whether the exemption has been applied correctly the Commissioner will first consider whether the opinion was reasonably arrived at. He will then go on to consider whether the opinion was reasonable in substance.

29. If the Commissioner decides that the exemption is engaged he must then go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.
30. The Commissioner has first considered whether the opinion was reasonably arrived at.
31. During the course of the investigation the University provided the Commissioner with details of the decision taken by the qualified person, in order for him to ascertain that an opinion was given, how it was made by the appropriate person, and whether it was made at the appropriate time.
32. The University has advised that the decision to apply sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) was made by the Vice Chancellor on 13 July 2010. The Commissioner has noted that this was after the University's letter dated 2 July 2010 in which it explained to the complainant that the section 36 exemption was engaged. The fact that the opinion was not obtained prior to the exemption being cited as a basis for refusal represents a flaw in the process followed to apply section 36. However, it was remedied prior to the letter to the complainant dated 16 July 2010 and also by the completion of the internal review.
33. The University has explained that the Vice Chancellor is the qualified person for the purposes of section 36. The Commissioner accepts that the Vice Chancellor was the qualified person at the time of the requests.
34. The University has informed the Commissioner that, prior to making his decision to apply section 36, the qualified person was provided with the following:
  - a copy of both of the requests;
  - an outline of section 36;
  - a sample of the information held by the University to which section 36 might apply; and
  - arguments as to why section 36 might be engaged.
35. Further to this, the University has also provided the Commissioner with a copy of the submission provided to the qualified person in order to assist him in making his decision as to whether to apply the exemption.
36. The University has also provided the Commissioner with details of the factors that were taken into account by the qualified person in reaching his opinion. These were:



- "1. Cranfield's strategy in any restructuring and redundancy was at the time of the request not concluded.*
  - 2. Accordingly, it remained necessary for senior colleagues within Cranfield to consult on a strictly confidential and internal basis on matters which may have had a significant personal bearing for any employees who were ultimately affected when the decision on any restructuring and redundancy was made.*
  - 3. Employees of the University potentially affected by any restructuring or redundancy exercise were being consulted appropriately by Cranfield in accordance with its established HR procedure.*
  - 4. Cranfield as an employer owes a duty of trust and confidence to those employees not to disclose to the wider public information relating to their employment beyond that which is necessary.*
  - 5. Disclosure to the public of information relating to the possibility of restructuring and redundancy would, or would be likely to:*
    - (a) lead to concern or unrest on the part of Cranfield employees, with the consequence that Cranfield's operations and delivery of its public functions would be affected;*
    - (b) result in those tasked with the decision making process feeling inhibited in undertaking their functions and reaching a robust conclusion; and*
    - (c) lead to incomplete (and therefore possibly inaccurate) information being publicised in the wider arena."*
37. Having considered these factors the Commissioner does not consider that all of them are relevant factors in considering the possible engagement of section 36(2)(b)(ii). However, he is satisfied that the first two factors (when read together), and the factor listed as 5(b) are relevant.
38. The central tenet of these relevant factors is that, at the time of the requests, the University had not made the final decision as to the potential restructuring of the departments or any associated redundancies. The complainant has argued that this is not true, and that at the time of the requests such decisions had been made. In particular, the complainant has argued that some of the University's employees and/or their representatives had already been notified that certain posts were to be made redundant. During the investigation of the cases the



University repudiated these statements, and argued that although at the time of the requests certain posts had been identified for possible redundancy, no final decision had been made. Instead, at that time, it was consulting with the employees potentially affected and their representatives.

39. The Commissioner does not consider that he is in any position to judge the quality of those consultations, and nor does he consider that it is within his remit to do so. He has noted that the University has repeatedly stated that final decisions had not been made, and nor has he been provided with any evidence to suggest otherwise. Indeed, some of the initially withheld information (now disclosed to the complainant) supports the University's statements.
40. Bearing this in mind, the Commissioner is satisfied that at the time of the requests the University had not made the final decision as to the potential restructuring of the departments referred to in the requests – or any associated redundancies. Therefore, he is satisfied that the first two factors (when read together) and the factor listed as 5(b), referred to at paragraph 36, were relevant factors for the qualified person to take into account when reaching their opinion.
41. Furthermore the Commissioner is satisfied that the substance of the withheld information is not such that the qualified person could not reach a reasonable opinion that the exemption was engaged. Whilst he has identified a flaw in the application of section 36, the Commissioner notes that this was remedied prior to completion of the internal review. Therefore in view of all of the above he is satisfied that the qualified person's opinion was reasonably arrived at.
42. The Commissioner has gone on to consider whether the qualified person's opinion was reasonable in substance. In order to do this, he has considered whether the opinion was objectively reasonable.
43. The basis of the qualified person's opinion in relation to section 36(2)(b)(ii) is that disclosure would, or would be likely to, have an inhibitory effect on its employees who were involved in the decision making process for the possible restructuring and associated redundancies. As noted above, the qualified person noted that final decisions in relation to restructuring and potential redundancies had not been made, and that therefore, "*...it remained necessary for senior colleagues within Cranfield to consult on a strictly confidential and internal basis...*" These internal consultations and deliberations necessitated free and frank exchange of views, which would be inhibited, were the information to be disclosed.

44. In reaching a view on whether this opinion was objectively reasonable, the Commissioner has taken into account the circumstances that lie behind these requests. The University is the academic provider for the Ministry of Defence (the "MoD"), and provides academic support to MoD staff, as well as members of the Armed Forces. In 2005 it was announced that the University had signed a new contract with the MoD for the provision of academic services.<sup>1</sup> This Academic Provider contract (the "AP contract") would start in August 2006 and run for 22 years. In 2009 the MoD had informed the University that it had to reduce the cost of the AP contract by a substantial amount. Therefore the University had to absorb this cut in its funding, leading to it having to consider the restructuring of certain departments and potential cuts in staffing levels. Bearing this in mind, the Commissioner considers that it is not unreasonable to conclude that employees involved in the deliberation and decision making process relating to these events would have to discuss these issues at length, and explore various options in a robust manner. This would include debating issues which might have had a significant personal bearing for any employees who were ultimately affected, as has been argued by the University. Given the nature of matters that were under debate, it is likely that all options (including extreme ones) would have to be considered. These debates, and the associated decision making process, would require the free and frank exchange of views.
45. Bearing these points in mind, the Commissioner considers it is reasonable to conclude that disclosure of the information would be likely to have some inhibitive effect on the free and frank exchange of views for the purposes of deliberation. Therefore he is satisfied the qualified person's opinion in applying this exemption was reasonable in substance.
46. The Commissioner has gone on to consider whether the public interest in favour of maintaining section 36(2)(b)(ii) outweighs the public interest in disclosure.
47. In reaching a view on the public interest the Commissioner has noted the comments of the Tribunal in *Guardian & Brooke v the ICO & the BBC* [EA/2006/0011 and EA2006/0013]. This held that the application of the public interest test in section 36 cases entails a consideration of the following factors:
- The lower the likelihood is shown to be that the free and frank exchange of views would be inhibited, the lower the chance that

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<sup>1</sup> [http://www.da.mod.uk/colleges/cmt/news/contract\\_signature/news\\_item.2005-11-25.6816184956](http://www.da.mod.uk/colleges/cmt/news/contract_signature/news_item.2005-11-25.6816184956)

the balance of the public interest will favour maintaining the exemption.

- Since the public interest in maintaining the exemption must be assessed in all the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought. The authority may have a general policy that the public interest is likely to be in favour of maintaining the exemption in respect of a specific type of information, but any such policy must be flexibly applied, with genuine consideration being given to the circumstances of the particular request.
  - The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a rule, the public interest in maintaining the exemption will diminish over time.
  - In considering factors that militate against disclosure, the focus should be on the particular interest that the exemption is designed to protect, in this case the free and frank exchange of views for the purposes of deliberation.
  - While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad ranging and operate at different levels of abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process.<sup>2</sup>
48. However, the Tribunal qualified the first of these bullet points by stating that it was for the qualified person to decide whether prejudice was likely, and thereby whether the exemption was engaged. However, in making a decision on the balance of the public interest, the Tribunal (and therefore the Commissioner) would need to make a decision as to the severity, frequency, or extent of any prejudice that would or might occur.

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

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<sup>2</sup> EA/2006/0011 & EA/2006/0013, para 87.

49. The University has recognised that there is a public interest in openness and accountability, and increasing the transparency of its decisions.
50. The complainant has argued that the proposed restructuring and potential redundancies may have an impact on the public purse through severance costs. She has argued that it is in the public interest to establish whether the University's statements in relation to these costs are legitimate.
51. The Commissioner notes that the withheld information relates to circumstances where the University had to consider the restructuring of its courses / departments. It was highly likely that these decisions (once they were made) would have a significant impact on some of its employees, as well as (potentially) students. The Commissioner recognises that there is a public interest in ensuring that these decisions would be made in a fair manner, and in increasing accountability of these decisions. The disclosure of the withheld information would help satisfy these public interest factors.

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

52. The University has argued that it is in the public interest for relevant staff to be able to express themselves openly in providing internal advice, or exploring extreme options. It has also stated that it is in the public interest for it to have, *"...the space to discuss sensitive issues openly without fear of disclosure so that proper discussions can be made."* It has again pointed out that no final decisions on restructuring or possible redundancies had been made at the time of the requests, and that disclosure, *"...would be likely to inhibit the imparting or commissioning of advice, or the offering or requesting of options or considerations."* This would not be in the public interest.
53. The Commissioner considers that there is a public interest in public authorities being able to make fully informed decisions, especially in relation to difficult matters such as those that lie at the heart of these cases. He considers that in order for a fully informed decision to be made, relevant personnel at a public authority should be able to discuss matters in a free and frank manner, exchanging views and exploring all options. Given the fundamental impact that a large cut in the income from the AP contract would have on its courses, its employees and its students, the Commissioner is satisfied that it is in the public interest for the University to preserve its ability to make fully informed decisions in relation to these matters.

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

54. In reaching a decision as to the balance of public interest arguments, the Commissioner has been particularly mindful of the particular circumstances of these cases.
55. The Commissioner considers that the public interest factors in favour of disclosure are strong. The withheld information relates to a period when the University was considering the potential restructuring of some of its departments and courses. These decisions would inevitably have a significant impact on some of its employees, together with (potentially) some of its students. The Commissioner considers that there is a strong public interest in increasing the accountability of the decisions taken by the University in relation to these events (although he acknowledges the University's argument that no final decisions had been made when the requests were made).
56. However he considers that there is also a strong counter argument to this. As above, the withheld information in these cases relates to a period in which the University was in the process of making difficult decisions which were highly likely to have a significant effect on some of its employees. The Commissioner considers that there is a strong public interest in the University being able to make these decisions on a fully informed process. In order to do so, he considers that relevant staff would have to be able to discuss matters, and consider options, in a free and frank manner.
57. The Commissioner has already accepted that inhibition to the free and frank exchange of views is likely to occur. However (as noted at paragraphs 47 and 48), in considering the balance of the public interest, the Commissioner will take into account the severity, frequency, or extent of any prejudice that would or might occur. In order to determine this, the Commissioner has considered both the nature of the withheld information and the timing of the requests.
58. In relation to the nature of the withheld information, he notes that it shows a full and frank exchange of views by relevant personnel in relation to the issues that lie behind the requests in these two cases. These individuals were deliberating on major issues affecting the University's structure, together with potential major impacts on University employees and students. In relation to the timing of the request, the Commissioner is satisfied that at the time of the requests the University had not made the final decision as to the potential restructuring of the departments, together with any associated redundancies (see paragraphs 39 and 40 above). Given the sensitive nature of the issues that were being discussed; the fact that these individuals were having to discuss all available options in a free and

frank manner; and that no final decision had been made at the time of the request; the Commissioner considers that were the information to have been disclosed the prejudice argued by the University would have been severe and frequent (at least until such time as final decisions on the restructuring/redundancies had been made). Bearing this in mind the Commissioner finds the public interest in maintaining the exemption particularly weighty.

59. Therefore, after balancing the public interest factors, the Commissioner considers that the public interest in maintaining section 36(2)(b)(ii) outweighs the public interest in disclosing the withheld information that this exemption has been applied to. Therefore all the withheld information that this exemption has been applied to should be withheld under this exemption.
60. As he has come to the conclusion that all of the withheld information that this exemption has been applied to should be withheld under section 36(2)(b)(ii), the Commissioner has not gone on to consider the application of sections 36(2)(b)(i) and 36(2)(c).

#### **Section 40**

61. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in sections 40(3) or 40(4) is satisfied.
62. In these cases the condition in question is contained in section 40(3)(a)(i), which applies where the disclosure of the information to any member of the public would contravene any of the data protection principles. This is an absolute exemption, and is therefore not subject to a public interest test.
63. The full text of section 40 can be found in the legal annex attached to the end of this notice.
64. In these cases the University has applied this exemption to the following types of information:
  - information about some staff members who would be potentially affected by the restructuring and potential redundancies (including details of workload and courses taught);
  - the names of some non-senior employees (i.e. those below Level 6);
  - the names of some employees acting in their capacity as trade union representatives;



- a limited amount of other information relating to a single communication between two individuals.
65. The University has argued that the disclosure of this information under the Act would be unfair and would therefore be in breach of the first principle of the DPA.
66. In order to establish whether this exemption has been correctly applied the Commissioner has first looked at whether the withheld information constitutes the personal data of a third party.
67. Section 1 of the DPA defines personal data as data which relate to a living individual, who can be identified:
- from that data, or
  - from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
68. The complainant has suggested that the information she has requested is not personal data as it is information relating to the restructuring of departments and academic programmes, and/or the selection of posts for redundancy. She has argued that the requests make no reference to personal data.
69. After considering the withheld information in question, the Commissioner considers that individuals are clearly identifiable in three of the categories listed above, namely the information that relates to:
- the roles of some non-senior employees in the events that lie behind the requests in question;
  - discussions regarding potential redundancies of some staff; and
  - the identities of the names of some employees acting in their capacities as trade union representatives.
70. Bearing these points in mind, the Commissioner is satisfied that these three categories of information are the personal data of the individuals concerned.
71. However, in relation to the information described in the fourth bullet point listed at paragraph 64 above, the Commissioner considers that other than the name and contact details of a non-member of staff, the remainder of the information (if the name and contact details were removed) would have no individual identifiable from it. Therefore other than the name and contact details of the non-member of staff, the Commissioner does not consider that this information is personal data of



a third party, and as such section 40(2) is not engaged. This information is identified in the confidential annex attached to the end of this notice.

72. The Commissioner has gone on to consider whether the disclosure of the information that he considers to be the personal data of third parties would be in breach of the first principle of the DPA.
73. The first principle requires that personal data is:
- processed fairly and lawfully, and
  - one of the conditions in schedule 2 is met.
74. The Commissioner has first considered whether the disclosure of the withheld information would be fair.
75. As noted above, and taking into account his findings at paragraph 71, the withheld information consists of the names and contact details of:
- [information about some staff members who would be potentially affected by the restructuring and potential redundancies \(including details of workload and courses taught\);](#)
  - [the names of some non-senior employees;](#)
  - [the names of some employees acting in their capacity as trade union representatives; and](#)
  - the name and contact details of a non-member of staff found in a single communication between two individuals.
76. In considering whether disclosure of this information would be fair the Commissioner has taken the following factors into account:
- whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned;
  - the individual's reasonable expectations of what would happen to their information; and
  - are the legitimate interests of the public sufficient to justify any negative impact to the rights and freedoms of the data subject.
77. The Commissioner has considered each of these factors, in relation to each type of information withheld under this exemption in turn.

Potentially affected staff members

78. In relation to the information about some staff members who would be potentially affected by the restructuring and potential redundancies the Commissioner notes that this information will, in all likelihood, be very sensitive to the individuals concerned. Whilst he accepts that these individuals may wish to have access to this information themselves – or may want this information to be made available to their representatives – he does not consider that they would wish to have this information made available to the world at large through disclosure under the Act. Given that this information directly relates to considerations for potential redundancies, the Commissioner is satisfied that disclosure under the Act would be likely to cause unjustified damage or distress to the individuals concerned.
79. In addition to this, given the sensitivities around this subject the Commissioner is satisfied that it would not be within the reasonable expectations of the individuals concerned for this information to be disclosed under the Act.
80. In relation to the third factor, the Commissioner considers that there is a legitimate interest in the general principles of accountability and transparency, especially in ensuring that decisions about restructuring and any associated redundancies would be made in a fair manner, and in increasing accountability of these decisions. However, given the sensitivity of this information to the individuals concerned, he is not persuaded that this legitimate interest would justify the likely negative impact that disclosure into the public domain would cause.
81. Bearing these points in mind, the Commissioner considers that given the sensitivity of the information, and the reasonable expectations of the individuals concerned, disclosure of information about staff members who would be potentially affected by the restructuring and potential redundancies would be unfair. Therefore this information should be withheld under sections 40(2) and 40(3)(a)(i).

Non-senior employees

82. In relation to information about non-senior employees the Commissioner is mindful that he has issued guidance which gives advice to public authorities on when the names of staff, officials, elected representatives or third parties acting in a professional capacity should be released in response to an information request. The key point to consider when disclosing names is to consider whether it would be fair in all the circumstances to identify an individual. The presumption is in favour of protecting privacy, so the release of personal information will in most cases only be fair if there is a genuine reason to disclose that

information. The Commissioner is of the view that public authorities should consider the following:

- The public authority should identify the legitimate interests which a member of the public might have in the information. These may not be the same as, or limited to, any interest expressed by the particular requester, although any arguments they put forward should be considered.
- The public authority should consider whether the names add to the value of the information, or whether the interests would be fully met by providing information with the names redacted.
- The public authority should decide whether the benefits of disclosure are proportionate to any potential harm, distress or intrusion to the individuals named.

83. In these cases the University has confirmed that this information relates to non-senior employees. The Commissioner is satisfied that more junior employees would be unlikely to expect that their names would be disclosed into the public domain through disclosure of this information under the Act. Given that junior employees are less likely to be accountable for decisions taken by a public authority, the Commissioner considers that the benefit to the public of disclosing this information is minimal. Rather, the Commissioner is of the view that disclosure of the names of junior staff would be likely to draw undue attention to these individuals. Therefore the Commissioner concludes that disclosure of the information about non-senior employees would be unfair and would breach the first data protection principle. Therefore this information should also be withheld under sections 40(2) and 40(3)(a)(i).

#### Trade union representatives

84. In relation to the information showing the names of some employees acting in their capacity as trade union representatives, the Commissioner has – before considering the above factors for establishing whether disclosure would be fair – first considered whether this information is the sensitive personal data of the individuals concerned.
85. Section 2 of the DPA defines sensitive personal data as personal data relating to, amongst other things, whether the individual concerned is a member of a trade union, within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992.
86. In this instance the University has explained that this information relates to certain individuals acting as representatives of other trade union

members. As such, the Commissioner considers that this information relates to the trade union membership of the individuals concerned.

87. Bearing this in mind, and after considering the withheld information, the Commissioner is satisfied that the withheld information constitutes the sensitive personal data of the named individuals.
88. Where information constitutes sensitive personal data the Commissioner's approach is that disclosure of that information will in most circumstances be unfair. By its very nature, sensitive personal data has been deemed to be information that individuals regard as the most private information about themselves. It is highly unlikely that the individuals concerned would have a reasonable expectation that this information would be disclosed under the Act. Further, the Commissioner considers that disclosure of this type of information would potentially have a detrimental effect on the subjects of this information (i.e. the named individuals).
89. The Commissioner has taken into account the particular circumstances of these cases and in doing so has considered the expectations of the individuals concerned. The public authority has argued that this information relates to individuals acting as representatives of other trade union members. As such, the Commissioner considers that there is little legitimate interest in having these names placed into the public domain in this context through disclosure under the Act.
90. Bearing these points in mind, the Commissioner considers that given the sensitivity of the information, and the reasonable expectations of the individuals concerned, disclosure of information showing the names of some employees acting in their capacities as trade union representatives would be unfair. Therefore this information should be withheld under sections 40(2) and 40(3)(a)(i).

#### Non-member of staff

91. Finally, in relation to the name and contact details of the non-member of staff, this information is part of an enquiry that was made to the University by a member of the public. Bearing this in mind, the Commissioner does not consider that that individual would have any reasonable expectation that their details would be disclosed under the Act. After taking this into account, the Commissioner considers that the disclosure of this information would be unfair. Therefore, this information should be withheld under sections 40(2) and 40(3)(a)(i).

### **Section 43**

92. Section 43(2) states that information is exempt if its disclosure under the Act would, or would be likely to, prejudice the commercial interests

of any person (including the public authority holding it). This is a qualified exemption, and is therefore subject to the public interest test.

93. The full text of section 43 can be found in the legal annex at the end of this notice.
94. The University has argued that the disclosure of the information that it believes falls under this exemption would be likely to prejudice its own commercial interests.
95. The Commissioner has first considered whether the withheld information in question, and the potential prejudicial effects described by the University, would relate to its commercial interests.
96. The withheld information can be split into three categories, namely:
  - Information relating to the pricing of the AP contract with the MoD; including costs and pricing of courses, elements of those courses, and some of the services provided under the contract.
  - Information relating to 'exceptional costs', i.e. severance costs.
  - A limited amount of other information relating to a single communication between two individuals.
97. The University has argued that the disclosure of commercially sensitive information relating to the AP contract would be likely to prejudice its commercial interests, by allowing its competitors to gain a detailed insight into the way in which it prices its services and products under this contract. Disclosure would therefore put it at a competitive disadvantage.
98. The Commissioner considers that the withheld information that falls under the first category is clearly commercial information, as it shows details of the way in which the costs and prices of services and courses provided by the University under the AP contract. Bearing this in mind, and after considering the University's central argument (as outlined above), the Commissioner is satisfied that this information relates to commercial interests, and that the potential prejudicial effects would relate to the commercial interests of the University. Therefore he is satisfied that the first category of information falls within the scope of the exemption.
99. The second category of information refers to the potential 'exceptional costs', i.e. severance costs, which might have arisen as a result of the proposed restructuring of the University, and any associated redundancies. Although the Commissioner accepts that this is financial information, he does not consider this information actually relates to the

cost and pricing of services and courses provided by the University under the AP contract. He also notes that the University has not provided any specific arguments in relation to this type of information, and has instead focused its arguments on the disclosure of information withheld under section 43(2) revealing details of the AP contract and the manner in which it prices its services. Bearing this in mind, the Commissioner does not consider that the information that falls under the second category listed above falls within the scope of the exemption.

100. Therefore, this exemption is not engaged in relation to the second category of withheld information.

101. The third category of information discusses, briefly, proposed organisational changes. This discussion took place at a very high level, and the Commissioner does not consider that it reveals any commercially sensitive information. Bearing this in mind, the Commissioner does not consider that the information that falls under the third category listed above falls within the scope of the exemption.

102. In relation to the first category of information set out above, the Commissioner has gone on to consider whether the disclosure of this information would be likely to prejudice the commercial interests of the University.

103. In reaching a decision on the question of the likelihood of prejudice the Commissioner considers that the expression 'likely to prejudice' means that, "*the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.*"<sup>3</sup>

104. In reaching a decision on the likelihood of prejudice the Commissioner also believes that the public authority should be able show some causal link between the potential disclosure of the withheld information and the prejudice it has argued is likely to occur.

105. In the internal review and its initial submissions to the Commissioner the University argued that the withheld information was commercially sensitive, and related to a competitively let contract between the University and the MoD. It argued that if this information was disclosed it would:

- compromise the University's commercial and bargaining position with actual or prospective contracting parties;

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<sup>3</sup> *John Connor Press Associates Limited v ICO* [EA/2005/0005], para 15.



- damage relations between the University and actual or potential third party contractors;
- harm the University's reputation amongst actual / prospective students;
- allow for the aggregation of data, which would provide a real and valuable insight into the University's future plans, budget and areas of research; and
- allow competitors to gain a clearer insight into how University operates, and how it prices its services, placing it at a disadvantage when competing against private bodies that are not subject to the Act.

106. During the investigation of these cases the Commissioner wrote to the University and set out his initial view in relation to the application of this exemption and the arguments it had made to support it. In his opinion the withheld information related to discussions between the University and the MoD about the modification of an existing contract for a specific service. Whilst he accepted that the withheld information showed financial information, this appeared to relate to the specific circumstances of these cases. The University had not argued that the MoD was, at that time, seeking to obtain academic provider services from a different academic institution, nor that the withheld information related to a potential bid for another academic provider contract by the University. Bearing this in mind, he was not convinced that the disclosure of the withheld information would be likely to have the prejudicial effects argued by the University. He asked the University to provide further arguments.

107. The University provided further arguments in its letter dated 24 February 2011. It pointed out that the AP contract was awarded in 2006 for 22 years, but that notwithstanding the term of the contract, it was subject to "...an annually agreed programme for the delivery of courses and services..." with the MoD. It argued that the commercial basis on which it had won AP contract was highly sensitive, as it was subject to benchmarking and subsequent market testing, as well as break or termination clauses. It pointed out that when the AP contract had been awarded in 2006 there had been four established higher education institutions bidding for it. It also argued that future competition for activities such as the AP contract would be fiercer given the current funding position in higher education, and that it had direct competitors for the provision to supply academic services like the ones detailed in the AP contract. Finally it stated that the unique pricing and key delivery factors of the AP contract were commercially sensitive. Were the basis on which the University had priced its bid in 2006 to be disclosed there



was a very real and significant risk that substantial prejudice to its commercial interests would, or would be likely to, occur.

108. The Commissioner acknowledges that the withheld information has the potential to be commercially sensitive. It shows the costing of certain courses, modules and services that were being provided under the AP contract. He also acknowledges that the University faces many competitors in this area. However, he again notes that this information relates to the modification of an existing contract, which was agreed in 2006 for a 22 year term. Whilst he notes the University's comments that the AP contract was subject to benchmarking, and break and termination clauses, he has not been provided with any evidence that these were likely to be triggered at the time of the requests. Whilst he accepts that, were the MoD to have been seeking to retender for the AP contract at the time of the requests, this information would be highly likely to have been of great use to the University's competitors, he again notes that the University had not argued that the MoD was seeking to do this. Nor has it argued that the withheld information related to a potential bid for another academic provider contract by the University. He also notes that the University has not provided any detailed arguments as to how this information would be of use to its competitors (in such a way as to be likely to prejudice its commercial interests) outside of the provision of the AP contract. Even if the University were to do so, he notes that it has not provided any evidence that this information does not relate specifically to the unique circumstances of the provision of academic services with the MoD.
109. Bearing in mind the test of prejudice as outlined at paragraphs 103 and 104 above, and taking into account all the above factors, the Commissioner is not satisfied that the disclosure of the withheld information would be likely to prejudice the commercial interests of the University.
110. Therefore the Commissioner finds that section 43(2) is not engaged in relation to the first category of withheld information.
111. As such, all of the withheld information that the University has only relied upon section 43(2) to withhold should be disclosed.
112. As the Commissioner has found that this exemption is not engaged he has not gone on to consider the public interest test in relation to this exemption.

### **Procedural Requirements**

113. Section 1(1) states 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."*

114. Section 10(1) states 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."*

115. As the Commissioner has decided that some of the withheld information is not exempt from disclosure under the exemptions cited by the University, he considers that this information should have been provided to the complainant in line with the duty at section 1(1)(b). The University's failure to do so therefore constitutes a breach of section 1(1)(b). Furthermore, by failing to provide this information within 20 working days of the requests the University also breached section 10(1).

116. Section 17(1) requires a public authority, which is relying upon an exemption in order to withhold requested information, to issue a refusal notice within twenty working days 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.

117. Although the University informed the complainant that it was seeking to rely upon sections 36, 40(2), 40(3) and 43, the Commissioner notes that it did not fully specify, in either the refusal notices or the internal reviews, which parts of sections 36 and 43, nor which of the conditions of section 40(3) it believed applied. In failing to do this, the University did not comply with the requirements of section 17(1)(b).

118. The full text of sections 1, 10 and 17 can be found in the legal annex attached to the end of this notice.

## The Decision

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119. The Commissioner's decision is that the University dealt with the following elements of the requests in accordance with the requirements of the Act:

- It correctly relied upon section 36(2)(b)(ii) to withhold the requested information to which this exemption was applied.
- It correctly relied upon section 40(2), in conjunction with section 40(3)(a)(i), to withhold some of the requested information.

120. However, the Commissioner has also decided that the University did not deal with the requests for information in accordance with the Act in that:

- It did not deal with the request in accordance with section 1(1)(b) in so far as it inappropriately relied upon section 40(2), in conjunction with section 40(3)(a)(i), and section 43(2) to withhold some of the requested information.
- In failing to comply with section 1(1)(b) within 20 working days, it also breached section 10(1).
- It also failed to meet the requirements of section 17(1) in that it failed to fully cite the exemptions that it was seeking to rely upon.

## Steps Required

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121. The Commissioner requires the University to take the following steps to ensure compliance with the Act:

- It should disclose the information listed in the confidential annex.

122. The University 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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123. 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.

## Right of Appeal

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124. 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: 0300 1234504

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)

125. 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.

126. 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 16<sup>th</sup> day of June 2011**

**Signed .....**

**Lisa Adshead  
FOI Policy Delivery Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

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### Section 1

- (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) Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
- (3) Where a public authority –
  - (a) reasonably requires further information in order to identify and locate the information requested, and
  - (b) has informed the applicant of that requirement,the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.
- (4) The information –
  - (a) in respect of which the applicant is to be informed under subsection (1)(a), or
  - (b) which is to be communicated under subsection (1)(b),is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.
- (5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).
- (6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

## Section 10

- (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.
- (2) Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.
- (3) If, and to the extent that –
  - (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
  - (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.
- (4) The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.
- (5) Regulations under subsection (4) may –
  - (a) prescribe different days in relation to different cases, and
  - (b) confer a discretion on the Commissioner.
- (6) In this section –

“the date of receipt” means –

  - (a) the day on which the public authority receives the request for information, or
  - (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

## Section 17

- (1) A public authority which, in relation to any request for information, 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.
- (2) Where—
  - (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—
    - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
    - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
  - (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,  
  
the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.
- (3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -



- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
  - (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- (4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.
- (5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
- (6) Subsection (5) does not apply where –
- (a) the public authority is relying on a claim that section 14 applies,
  - (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
  - (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
- (7) A notice under section (1), (3) or (5) must –
- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
  - (b) contain particulars of the right conferred by section 50.

### **Section 36**

- (1) 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.

- (2) 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.
- (3) 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).
- (4) 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".
- (5) 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.
- (6) 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.
- (7) 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.

## **Section 40**

- (1) 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.
- (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).
- (5) 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 the 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)."
- (6) 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.
- (7) 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."

### **Section 43**

- (1) Information is exempt information if it constitutes a trade secret.
- (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
- (3) 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, prejudice the interests mentioned in subsection (2).