

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 10 November 2008**

**Public Authority:** Rochdale Metropolitan Borough Council  
**Address:** Municipal Offices  
Smith Street  
Rochdale  
Lancashire  
OL16 1LQ

### Summary

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The complainant requested a copy of a report detailing the findings of an audit carried out by the council on the Rochdale Centre of Diversity (the 'RCD'), a charitable organisation based in Rochdale. The council carried out the audit due to allegations it received that funds were being mismanaged at the RCD. The council refused the complainant's request on the basis that the exemptions in sections 30 (investigations and proceedings conducted by public authorities) and 36 (prejudice to the effective conduct of public affairs) applied.

The Commissioner's decision is that sections 30 and 36 of the Act do not apply. However he has decided that section 40 (personal data) does apply to the personal information of junior employees of the charity. The personal data of senior employees of the RCD is not exempt under section 40 other than a few sections which impact directly upon the private (as opposed to the public) lives of those individuals.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

## The Request

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2. On 20 April 2006 the complainant wrote to the council stating:

"I would like you to provide me with the outcome of the investigations carried out specifically into the issues I raised as listed in my letter dated 16 September 2005. Please provide me with the full details of the method of investigations that were carried out, what evidence were found/used and the final outcome/conclusion in relation to each point.

Please also provide me with the copies of any documents used during the investigations into the above matters as well as any subsequent reports and conclusions/recommendations made".

3. On 16 May 2006 the council responded stating that:

- a) The outcome of the investigations carried out had already been reported to him.
- b) In respect of the method of investigations that were carried out, including the evidence found/used and the final outcome/conclusions in relation to each point, copies of any documents used during the investigations as well as any subsequent reports and conclusions/recommendations, these were exempt under section 30 of the Act.

4. On 24 July 2006 the complainant wrote back to the council requesting that it reviewed its decision. In that letter he clarified that in his view the report should definitely not be exempt from disclosure and that in his view, the public interest rested in disclosing it. He therefore requested a review of the initial refusal of the request. He sent a further letter to the council dated 5 October 2006 chasing the decision of the council asking whether the review had been completed.

5. The council responded on 2 November 2006. In that response it stated that the method of investigation should have been provided to him, and enclosed copies of the relevant documentation. However as regards copies of any documents used in the investigation and any subsequent reports, conclusions and/or recommendations it maintained its view that the information was exempt under section 30 of the Act. It also informed the complainant that the qualified person had decided that sections 36(2)(b) & (c) of the Act were also applicable.

## The Investigation

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### Scope of the case

6. On 11 December 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider whether the council had failed to:
  - a) provide the requested information;
  - b) respond to the request and the subsequent complaint within a reasonable time;
  - c) provide proper advice and assistance;
  - d) provide information in the form requested;
  - e) properly explain any reasons for refusing the request; and
  - f) properly apply exemptions under the Act.

### Chronology

7. The Commissioner wrote to the council on 10 January 2007 informing it that an eligible complaint had been received which would be investigated in due course.
8. On 26 July 2007 the Commissioner wrote to the council informing it that the case had now been allocated and requesting a copy of the information which had been withheld together with any further arguments the council wished to submit in support of its position.
9. The council responded on 1 August 2007, providing a copy of the withheld information together with further arguments.
10. On 30 November the Commissioner emailed the council asking it to clarify whether the qualified person had decided that section 36 was applicable, and asking it to clarify which specific subsection of the exemption in section 30 the council felt was applicable.
11. The council responded on 17 December 2007 providing a copy of the report which the council's internal audit team had produced. It also confirmed that it was the qualified person who had considered whether the exemption in section 36 was applicable and clarified that it was relying upon section 30(1)(b).
12. The Commissioner responded on the same day asking the council to clarify what powers it had to initiate or conduct legal proceedings, a criterion for the application of section 30(1)(b). He emailed again on 4 January 2008 reminding the council that he required an answer to this question.

13. The council responded on the same day, clarifying the powers it had to prosecute or defend legal proceedings.

## Analysis

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### Procedural matters

14. The Commissioner notes that the complainant made his initial request on 20 April 2006, and that the council responded on the 20 May 2006. This period falls within the 20 working day time period which is required under section 10 of the Act. The council therefore complied with its obligations as regards this period. This partially responds to the complainant's request noted in (b) above.
15. The complainant requested that the council review its decision on 24 July 2006. The response to that request was not received by the complainant until 2 November 2006.
16. The Commissioner has dealt with the timing of the internal review in the other matters section of this Decision Notice.
17. The Commissioner has considered points c) to f) above. The complainant asked for copies of documents to be provided to him but did not stipulate a format in which to receive those documents. There is therefore no issue regarding the format in which the information was disclosed to the complainant. Additionally, the Commissioner does not recognise any issues of help or assistance relevant to this matter.
18. The Commissioner is not satisfied that the refusal notice provided to the complainant sufficiently explained why the council considered that the information was exempt under section 30 of the Act. The council merely reiterated the exemption and stated that in its view the balance of the public interest lay maintaining the exemption. The Commissioner considers that in not specifying which subsection of section 30 it was relying upon in its refusal notice amounts to a breach of section 17(1)(b) of the Act. He has also decided that the failure to specify the reasons for the council relying on this exemption in the refusal notice amounts to a breach of section 17(1)(c) of the Act. This relates to the complainant's request to the Commissioner at point (e) above.
19. At review stage some information was reconsidered and subsequently provided to the complainant. In not providing this information within the original time limit for a response to a request to the complainant the Commissioner's decision is that the council breached section 10 (1) of the Act (Time for compliance).
20. The Commissioner also notes that the council did not claim section 36 in its initial refusal notice to the complainant. He therefore considers that this failure to specify that it was also relying on this exemption amounts to a breach of section 17(1)(b) of the Act.

## **Exemptions**

### **Section 30**

21. The council exempted the information under section 30 of the Act (investigations). Section 30 (1)(b) allows information which is the subject of a request to be exempted from disclosure if, at any time it has been held by the authority for the purposes of any investigation which is conducted by the authority and in the circumstances may lead to a decision by it to institute criminal proceedings which the authority has the power to conduct. The full text of section 30 is provided in the legal annex to this Decision Notice.

22. The criteria for this exemption are therefore:

- a. Was the information held as part of an investigation which might have led them to institute such criminal proceedings?
- b. Does the council have the power to institute and conduct relevant criminal proceedings?

#### **a) Was the information held as part of an 'investigation'?**

23. In a letter dated 28 November 2005 between the council and the Executive Director of the RCD which was disclosed to the complainant in response to his request, the council clearly states to the Executive Director that allegations had been made against individuals at the RCD and that it was the council's intention to investigate those allegations.

24. The Commissioner is satisfied that the information was held as part of an investigation by the council into allegations of improper conduct made against the RCD. Although the investigation took the form of an audit, the Commissioner is satisfied that the intention and focus of the audit was to investigate the allegations made against the RCD, and that the result of that investigation may have led to the council considering its options as regards prosecution had evidence of a criminal offence been found.

25. The exemption in section 30 applies to information held "at any time" for the purposes of an investigation. The Commissioner therefore notes that it does not therefore matter whether the investigation is complete or not, merely whether it was held *at some point in time* for the purposes of an investigation. It also does not matter how or why that information was obtained in the first instance providing it was held for the purposes of an investigation at some point.

26. However whether an investigation is complete or not, is a factor which can taken into account in any public interest test which is required should the exemption be engaged.

b) Does the council have the ability to institute criminal proceedings?

27. The Commissioner questioned the council as to its ability to institute criminal proceedings in such cases. In response it stated that it is able to institute proceedings in its own right under the Local Government Act 1972 (c.70) section 222. This allows for an authority to institute or defend legal proceedings in certain circumstances. The relevant provision states:

(1) Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area -

(a) they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name, and

(b) they may, in their own name, make representations in the interests of the inhabitants at any public inquiry held by or on behalf of any Minister or public body under any enactment.

28. As a result of the above, the council argues that it does have the powers to institute and conduct criminal proceedings in its own right in situations where it believes that this is warranted.

29. The Commissioner therefore recognises that the council has the power to institute criminal proceedings in some circumstances. However he questions whether this power could in fact have been used in circumstances such as in this case. The council provided a copy of its guidance document entitled 'Rochdale Metropolitan Borough Council anti fraud and corruptions strategy' dated May 2007. In that document, at paragraph 4.7 the council states:

*"Where there is prima facie evidence that a criminal offence has been committed it is the policy of the Council to refer the case to the Police for prosecution."*

30. The Commissioner therefore recognises that although the council may have the legal power to institute and conduct proceedings in its own right, in actuality if its investigation uncovers evidence of a criminal offence, the council would refer the matter to the police for prosecution, following its own policy document.

31. The Commissioner also notes that section 222 provides the power to prosecute only in cases where it is 'expedient' to do so. The Commissioner considers that in general it would not be considered expedient to prosecute where the police or the Crown Prosecution Service (CPS) would be better placed to decide if a criminal prosecution was viable or warranted.

32. The Commissioner has also considered case law on this subject and has found no examples of cases where local authorities have sought to use this section to prosecute in cases of potential fraud. In general such powers are used to implement trading standards legislation, to address anti social behaviour or in other circumstances where the prosecution relates to a local authority's specific functions, not the general criminal law.

33. The Commissioner also considers that in order for section 222 to apply the authority would need to show good reason, by reference to the interests of the promotion or protection of the inhabitants of their area, why it would initiate such action itself. Otherwise the Police and the CPS will generally be the proper authorities to take forward any prosecution. Indeed, the council's own guidance, quoted in paragraph 29 above, indicates that evidence of criminal activity would be referred to the Police for prosecution. The Commissioner therefore considers that the council would be highly unlikely to institute criminal proceedings pursuant to its investigation in this case.
34. The Commissioner's view is therefore that section 222 is not applicable. Hence the Commissioner's decision in this case is that section 30 of the Act is not engaged. Therefore it is unnecessary for him consider the public interest test in relation to the maintenance of this exemption.

### Section 40 – Personal Data

35. The Commissioner has considered the application of the exemption in section 40 of the Act to the information. Although the council did not specifically claim that section 40 was applicable, in this instance the Commissioner considers it necessary to consider the application of this exemption due to the nature of the information held in the report and due to his role as the regulator of the Data Protection Act 1998. As a public authority the Commissioner must also ensure that his decisions are not incompatible with rights accorded to individuals under the Human Rights Act. Section 40 is provided in the legal annex to this Decision Notice.
36. Section 40 of the Act exempts the personal data of individuals (as defined in the Data Protection Act 1998 (the 'DPA') from disclosure where, in the case of third parties, that disclosure would breach one of the Data Protection Principles.
37. Section 1 of the DPA defines personal data as data which relate to a living individual who can be identified:
  - from those data, or
  - from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
38. The Commissioner has considered the nature of the report and of the allegations made against the charity. The allegations refer to the improper, inefficient or excessive and unnecessary use of charitable funds and equipment.
39. The audit report addresses those allegations, and includes descriptions of the actions taken by specific individuals in the course of their duties at the charity. The report includes the personal data of individuals working at the charity, including a description of specific allegations made against individuals. It also includes a general assessment of senior employees' actions at the charity concerning the management of its funds. The report also contains some personal data of junior employees where those employees have been affected by the actions of more senior staff at the charity.

40. The First Data Protection Principle requires that personal information is processed “fairly”. This generally (but not always) requires that individuals would have an expectation that their information would be disclosed, either because it would be reasonably obvious to that individual that that would be the case, or because the public authority told them it would be processed in that way at the time the information was obtained.
41. In this case the RCD is not a public authority within the definition on section 3 of the Freedom of Information Act. It is not therefore under a duty to respond to freedom of information requests directly. The Commissioner understands that there may not therefore be an expectation by senior employees at the charity that their personal data might be disclosed in response to a freedom of information request, even where they are acting in their official capacity.
42. However the RCD is a registered charity which receives public money from the council to support it in its functions. It may also receive private donations from the general public. The Commissioner’s view is that registered charities should expect to be subject to a greater degree of public scrutiny than a completely private concern. Clearly senior figures in charities must be open and accountable for their activities, and their actions should withstand appropriate scrutiny. The Charity Commission states in the opening pages of its website:

“Reporting and Accountability

Charities have a duty to be transparent and accountable to donors, beneficiaries and the public, and are required by law to provide certain documents to the Commission and to keep their information on the public register up to date.”

The disclosures made in line with these requirements will inevitably reflect the actions of senior charity employees to some extent.

43. In his guidance on the section 40 exemption the Commissioner has also stated that the seniority of the individual acting in a public or official capacity should be taken into account when personal data about that person is being considered for disclosure under the Act: “It may also be relevant to think about the seniority of staff: the more senior a person is the less likely it will be that to disclose information about him or her acting in an official capacity would be unfair.” In previous decision notices the Commissioner has stated that he considers that occupants of senior public posts are more likely to be exposed to greater levels of scrutiny and accountability.
44. In light of the above, the Commissioner is satisfied that due to the charitable status of the RCD, it is reasonable to conclude that the disclosure of some personal data concerning an individual’s actions taken as a senior employee at that organisation could reasonably be expected. The Commissioner therefore considers this situation to be comparable to that of a senior public servant.



45. Secondly the Commissioner has considered whether the information itself relates to the individual's work or to their private life. The Commissioner's guidance on section 40 differentiates between information which relates to an individual's private life and their public life, stating,

“...information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned.

While it is right to take into account any damage or distress that may be caused to a third party by the disclosure of personal information, the focus should be on the damage or distress to an individual acting in a personal or private capacity. The exemption should not be used, for instance, as a means of sparing officials embarrassment over poor administrative decisions.”

46. The scope of this exemption was also clarified by the Information Tribunal in *House of Commons v ICO & Norman Baker MP* (EA/2006/0015 and 0016). The Information Tribunal found that where information is about officials acting in their public capacity then there should be a clearer expectation by those individuals that their actions will be subject to a greater level of scrutiny than would otherwise be the case.
47. The Commissioner considered whether the requested information includes the personal data of the individuals acting in their official ('public') capacity and whether the disclosure of information about the investigation and the allegations would in fact impact upon their private lives.
48. He considers that some of the information refers to the officials acting in their capacity as senior employees of the charity. However, the nature of some of the allegations which were investigated means that any disclosure could affect the private lives of some of those individuals to an extent. Clearly allegations of improper conduct laid against individuals could have some effect on the way those individuals are subsequently viewed by others, even if the investigation found that no improper conduct had in fact occurred.
49. In the Information Tribunal decision highlighted above, the House of Commons argued that travel arrangements would inevitably reflect personal and family circumstances to some degree. The Tribunal found this to be correct, but found that the above principle “...still applies even where a few aspects of their private lives are intertwined with their public lives but where the vast majority of processing of personal data relates to a data subject's public life.” (at para 78).
50. The Commissioner has balanced these two competing factors together, and his view is that although disclosure could have a degree of effect on the private lives of some of the senior employees of the charity, the report generally concentrates on their actions as senior employees, and the effect on their private lives would in fact be minimal.

51. However there are a few sections of the report where the Commissioner considers that the nature of the information would impact upon the private aspects of the individuals identified. These sections concern the pension rights and liabilities or the remuneration packages of named individuals. The Commissioner considers that this information impinges to a much greater degree on the private lives of the individuals named. His decision is therefore that paragraphs 3.2 and 3.3 and paragraphs 8 to 8.4 (including the allegation itself) should be excluded from disclosure under section 40(2) of the Act on the basis that disclosure would be unfair.
52. The Commissioner has also decided that the names of any junior employees named in the report should be redacted from the information to be disclosed. The Commissioner's decision is therefore that the exemption in section 40(2) applies to the personal data of junior employees at the council who would not have the expectation that their personal data would be disclosed in this manner. However he does not consider that it would necessarily be unfair to disclose information about the actions of senior employees of the RCD other than those paragraphs relating to remuneration and pension rights mentioned above in paragraph 51.
53. He has therefore considered the other requirements for fair and lawful processing in accordance with the First Data Protection Principle; that a condition in schedule 2 of the DPA, and, in addition, in the case of sensitive personal data, a condition in schedule 3 of the DPA is met in order for processing to be considered lawful.

#### Schedule 2 condition

54. The Commissioner considers that the most applicable condition in this case is likely to be schedule 2 (6)(1) of the DPA which allows processing personal data where,

“The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”
55. The full text of schedule 2 of the DPA can be found in the Legal Annex at the end of this Notice.
56. In considering the application of this schedule 2 condition the Commissioner has adopted the approach of the Information Tribunal in *The Corporate Officer of the House of Commons v the Information Commissioner* (EA/2007/0060, 0061, 0062, 0063, 0122, 0123, 0131.) The Tribunal noted that this condition involved a balance of interests broadly comparable with the public interest test for qualified exemptions under the Act, but found that in order for this condition to be satisfied, the legitimate interests of those to whom the data would be disclosed (i.e. the general public) had to outweigh the rights, freedoms and legitimate interests of the data subject.

57. As the council did not argue that the information in the Audit Report was the personal data of the senior figures as the RCD, it did not provide the Commissioner with any specific arguments as to how the release of the information would prejudice the legitimate interests of those senior figures.
58. However the Commissioner considers that the nature of the allegations made against the RCD would by necessity involve some degree of fault or flaw being insinuated against particular individuals at the RCD. Information which has been held for the purposes of an investigation into such allegations may also be intrusive, might be misleading (for instance where the investigation was based on false allegations or merely suspicions), and may potentially include sensitive personal information relating to identifiable individuals. Such allegations could have a negative impact on the individuals involved should they be disclosed to the public. The Commissioner acknowledges that this is likely to impact upon the legitimate personal interests of those individuals involved to a limited degree.
59. The Commissioner has gone on to consider the legitimate interests of those to whom the data would be disclosed. The Commissioner believes that the general public has a strong legitimate interest in access to information about the efficient and proper use of public money received by a charity from a local authority.
60. The Commissioner also considers that the general public has a legitimate interest in the accountability of those acting in senior roles in charities and in the spending of public money and donations made for the purposes of a particular charity. This follows the principles of transparency and openness laid down by the Charity Commission.
61. In the particular circumstances of this case, there is a strong public interest in the general public being able to obtain an understanding of the results of a review of spending of public money by senior members of a charitable company whose role it is to promote equality and diversity in the community in Rochdale. This is so especially because of the nature of the allegations laid against the RCD – that public money was being spent unwisely and hence the role of the charity adversely affected.
62. After considering the above points, and bearing in mind the approach described in paragraph 56 above, it is the Commissioner's view that the legitimate interests of those to whom the information would be disclosed (i.e. the general public) outweigh those of the data subjects. Therefore he believes that, in this case, condition 6(1) of schedule 2 of the DPA is satisfied.
63. Therefore the Commissioner believes that, in relation to the personal data of senior employees of the charity, the disclosure of the Audit Report would not be in breach of the first principle of the DPA.
64. The Commissioner notes that allegation 10 in the report could be construed as an allegation against one individual that he or she committed a criminal offence. An allegation of a criminal offence laid against an individual would amount to sensitive personal data of the data subject. Under the DPA the disclosure of sensitive personal data requires that in addition to a condition in schedule 2, a

condition of schedule 3 must also be satisfied in order for a disclosure to be made. The Commissioner has considered the conditions in schedule 3 and is satisfied that none of the conditions apply in this instance. His decision is therefore that allegation 10 should be redacted from the report. He notes however that the report's finding as regards allegation 10 does not contain personal data, and therefore this information (the finding) should be disclosed.

### Section 36 – Prejudice to The Effective Conduct of Public Affairs

65. Section 36 states that information is exempt from disclosure where, in the reasonable opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs. Section 36 is set out in full in the legal annex to this Decision Notice.
66. At the review stage of the complaint the qualified person made a decision that the council could rely on the exemption in sections 36(2)(b) and (c) of the Act. The council notified the complainant that its view was that section 36 of the Act also applied to the information. It did not however state to the complainant that this was a decision of the qualified person, nor did it provide a specific subsection which it felt applied, nor further reasoning why it believed that section 36 applied.
67. In an email to the council dated 30 November 2007 the Commissioner questioned the council as to whether the qualified person had made the decision that section 36 applied, and asked it to provide the arguments the qualified person had considered when making this decision. The council replied providing the information required by email dated 17 December 2007. The qualified person at the council is the monitoring officer, who is the borough solicitor.
68. When considering the application of this exemption the Commissioner is mindful of the Information Tribunal's decision in EA/2006/0011 and EA/2006/0013 of *Guardian/Brooke v The Information Commissioner* issued on 8 January 2007. In its decision, the Tribunal concluded that in order to satisfy the statutory wording in s36 - '*in the reasonable opinion of a qualified person*' - the opinion must be both reasonable in substance and reasonably arrived at. If the qualified person's opinion meets these criteria then the exemption in section 36 of the Act is engaged.
69. The council's arguments for the applications of section 36 basically centre around its ability to conduct a proper audit. It argues that this ability would be prejudiced because,
  - a) if audit reports are disclosed individuals will be less likely to talk freely and frankly with audit investigators, thereby diminishing the investigators ability to carry out a proper audit, and
  - b) if the audit report is disclosed the relationship the council has with those organisations it audits could be damaged. Organisations may refuse to allow the council to audit them, may seek to stultify audits where they do allow them, or may be less inclined to agree actions based upon the

recommendations provided in the audit. Essentially the “working together” approach taken by the parties would be damaged by the disclosure.

c) if the reports are disclosed other voluntary bodies may choose not to work in partnership with the council, thereby reducing the effectiveness of the council. That directly or indirectly, disclosure could lead to a reduction in the number of organisations keen to assist the council in delivering improvements to the citizens of Rochdale Borough, improvements that the council does not have the capacity to deliver alone.

#### The impact on the ability to discuss matters freely with individuals

70. The council's argument is that the investigation required the cooperation of staff at the RCD, and that a subsequent disclosure of such information may create a “chilling effect” as mentioned above. In other words, individuals may not be so full and frank with council investigators if they are aware that what they say may subsequently be disclosed in response to a request under the Act.
71. Colleagues of those alleged to have acted inappropriately will have been questioned during the course of the audit investigation, and may have provided full and frank details of what they have seen to the investigators. The subsequent disclosure of the information individuals have provided may dissuade employees generally from being so frank in the future. This could hamper investigations into such cases.
72. The Commissioner recognises that in areas where individuals or organisations may be seen to be at fault they may take action to minimise their degree of culpability, or become reticent when investigations are carried out to establish culpability. This is particularly so where it is evident that a report is to be produced and provided to senior management within the council or to senior management at the organisation concerned.
73. The Commissioner has taken into account that as employees of the charity, staff will be under a duty to provide auditors with a full account of their actions in spite of any reservations they may have. Nevertheless in situations where employees fear that being fully open with auditors may result in some criticism to themselves, their organisation or their colleagues, it is possible that there will be an impact on their conduct in the audit process. The Commissioner therefore recognises and accepts that a degree of inhibition may already exist where audits are being carried out.
74. In this case the audit report found some reasons for concern with the charity's performance in some aspects of its financial management. Some of the problems identified are also associated with the actions of particular individuals at the charity.
75. Although the Commissioner places weight on the fact that employees of charities must abide by their duty to be honest and open in investigations, he recognises that in reality a degree of inhibition may in fact occur, and that it is therefore reasonable for the qualified person to recognise this and apply section 36 to such

information where the situation merits it. In this case, because specific individuals are identified as being more at fault than others, the Commissioner recognises the possibility that a disclosure of a critical report may have an effect on future investigations to some extent.

#### The relationship between the RCD and other audited bodies and the council.

76. The council's other arguments relate to its ability to continue to audit the RCD and other bodies should this information be disclosed. Essentially it argues that the disclosure of the report would make the RCD or other bodies reticent when being audited as they will be aware that a critical audit report may subsequently be disclosed in response to a request. Ultimately they may refuse to allow the council to audit them for fear of that criticism, or for fear that the organisation itself may be damaged by a disclosure affecting the public's view of the organisation. In addition it argues that disclosure may prevent the council from agreeing constructive remedial action with an organisation it has audited if the information is disclosed.
77. The council was able to audit the RCD under the terms of a funding agreement which exists between the two organisations. The council notes however that the RCD is an independent body which has its own governance and management arrangements. The council therefore argues that it is not in a position where it can compel compliance from the RCD and require it to either submit to an audit in the first instance, or to recognise and take remedial action in response to an audit investigation's findings. The council does however recognise that there is a strong incentive for the RCD to do so as a refusal may ultimately lead the council to withdraw from the funding agreement.
78. The Commissioner has considered this argument. If the RCD (or another similar organisation) chooses not to comply with the council's wish to audit it then the risk is that its ability to monitor key systems and processes and to safeguard public money would be prejudiced. The qualified person has assessed the likelihood that this might occur should this report be disclosed and decided that the risk was such that the exemption is applicable. The Commissioner does not dispute the reasonableness of that opinion, and so is therefore satisfied that Section 36 is engaged in this case.
79. Section 36 is however a qualified exemption. Where the exemption is engaged the Act requires the qualified person to carry out a public interest test to ascertain whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Commissioner has therefore considered the application of this test further.

#### Public interest arguments

80. In *Guardian & Heather Brooke v The Information Commissioner*, the Information Tribunal considered and refined an earlier judgement where they provided some principles about the application of the public interest test in section 36 cases. The Tribunal provided the following factors for consideration:

- a) The lower the likelihood is shown to be that the free and frank exchange of views would be inhibited, the lower the chance that the balance of the public interest will favour maintaining the exemption.
  - b) 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.
  - c) The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a general rule, the public interest in maintaining the exemption will diminish over time.
  - d) 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 effective conduct of public affairs through the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.
  - e) 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.
81. The Tribunal qualified the first of these tests, (a), 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 which was likely.
82. The Commissioner has considered these principles against the information in this case. He has addressed these in the order provided above.
- a) The severity, frequency or extent of the prejudice that is foreseen
83. There are two separate lines of argument to be considered, one relating to the prejudice which is likely as regards individuals feeling inhibited when being interviewed under audit, the other relating to the effect disclosure might have to the relationship between the council and audited bodies.
84. As regards the arguments about an individual's reactions to the disclosure of the information, the Commissioner accepts that in reality there is always a possibility that employees will feel inhibited when providing information to audit investigators

if they are aware that this may lead to direct criticism of themselves, their colleagues or their department. There will already be a degree of inhibition due to the very nature of audit investigations. It is a human attribute not to want to be criticised and to be seen to be doing a good job. The question which the Commissioner has considered however is whether a disclosure under the Act would in itself create or add to any inhibition that already exists.

85. The council is in effect arguing that the obligations under the Act add to the insecurity of those providing information to an audit investigator. If an audit report is subsequently disclosed in response to a request under the Act, it could then go on to be published and commented upon by the media or potentially the political opponents of the council. In the course of so doing this may highlight the actions of the charity to some extent. The argument must be that 'additional' concerns from the disclosure of the audit report may be strong enough to inhibit some employees at the charity from being fully open with auditors where otherwise they would have been. There is also then a question as to how great an extent any additional pressure might result in prejudice to the council's audit functions in any event.
86. The main concern staff will have is whether the report shows them in a good light. The Commissioner accepts that in circumstances where press coverage would be likely, there may be an additional pressure to accentuate the positive and/or minimise any negative aspects to investigators. He considers however that the main pressure on interviewees will be to ensure that the report provides their employers with a good reflection of their individual work.
87. However, the Commissioner considers that the vast majority of employees would act professionally and would be as full and frank as possible with investigators. If any individual employees were inhibited when being interviewed by auditors it would therefore be less likely to have an effect on the final outcome of the audit as auditors would receive the full, frank and truthful version from other employees.
88. Additionally, the Commissioner recognises that there is an additional counter pressure on staff to be full and frank with audit investigators. The result of not being full and frank would be potential disciplinary action being taken against them and/or the potential of an attempted 'cover up' by particular employees being reported in the press. This counter pressure would to a great extent, balance the reluctance felt by any individuals as they would be aware that other employees will be full and frank and any attempt to hide information or to deceive the investigators would be likely to fail in any event.
89. The Commissioner also considers that the possibility of a few employees being inhibited or even seeking to deceive audit investigators would be unlikely to sidetrack audit investigations in the vast majority of occasions. Such investigations will be carried out under a robust auditory regime and would take into account the occasional individual's reluctance to be fully honest and open. It is likely that the audit investigators will have corroboratory methods or systems in place to ensure that they are not being deceived. The council's own guidance on its audit process (which was disclosed to the requestor) states at paragraph 3 that



its methods include a testing programme; "The testing programme may be discussed with the Executive Director/Head of Service and may include the accessing of all relevant records, members of staff and other relevant individuals." The audit report shows that some records were accessed and considered by the council during the course of their investigation into the RCD.

90. The Commissioner therefore considers that although there is a possibility that a disclosure of this information could cause a degree of additional inhibition by some employees in audit investigations, the overall result would be unlikely to be severe or frequent, and it would not be likely to disrupt audit investigations to any great extent.
91. In conclusion, the pressure on employees to be open and honest is inherent in any event, given that they will be aware that other employees will be open and honest and that audit investigations are likely to be robust enough to take into account individuals being inhibited in their responses to questions. The fear of being 'found out', together with the fear of disciplinary action or publicity if any deception was uncovered will, in the vast majority of cases ensure that any individual inhibition will be negated to a great extent. The Commissioner therefore considers that the likely prejudice would not be severe and would not affect the council's audit processes to any great extent.
92. The Commissioner has also considered the arguments relating to the council's relationship with charities should this report be disclosed. The arguments put forward in paragraph 69 state that a breakdown in the relationship between the parties could lead an organisation to refuse the council access to audit, refuse to be full and frank or make it difficult for the council when auditing, or may ultimately refuse to consider or take into account any recommendations made in a resultant audit report.
93. If a charity chose to undermine the ability of the council to audit it there may be serious repercussions to it, both from the point of view of the council withdrawing from the funding agreement, and also because of the potential press stories which could follow such an action. In addition, charities are subject to the normal rules and legislation for charitable bodies. The Charities Commission may investigate the circumstances surrounding the refusal to work with the council, particularly if questions are raised about the financial management of the organisation or if funds are withdrawn on the basis that the ability to scrutinise the organisation has been withdrawn.
94. The Commissioner also considers that the council can include a contractual stipulation requiring a charity to allow it to be audited by the council if required. To refuse access or to withhold relevant information would therefore be likely to amount to a breach of contract which would be legally actionable. Any damages suffered as a result of such a breach would be retrievable through the courts in such circumstances. This would be likely to include donations provided under the funding agreement.
95. The council has also suggested that once the audit process has been completed, organisations may be less willing to engage with the council to discuss the

actions which it has recommended in the report. The Commissioner places little weight on such arguments. The disclosure and subsequent publication of a highly critical report would highlight the recommendations to a wider audience, including the benefactors, trustees and beneficiaries of the charity. The charity could then be held accountable for its refusal to take measures to achieve the recommendations by interested parties and would potentially need to explain why it has refused to implement a measure recommended by the council. In fact, the impetus to act in accordance with the recommended actions may be stronger if such reports are disclosed because of this pressure. Ultimately, if the recommendations address serious faults, the council could withdraw from the funding agreement if the charity refused to engage in discussion regarding remedial measures. Again such actions are likely to incur further interest from the Charity Commission if they occurred because of the obligation on trustees to act in the best interests of the intended beneficiaries.

96. The qualified person also argued that disclosure could ultimately lead to a reduction in the number of organisations keen to assist the council in delivering improvements to the citizens of Rochdale Borough, improvements that the council does not have the capacity to deliver alone. The Commissioner has considered this argument. In his view charitable organisations are created in order to aid particular sectors of the community, and will not turn down the offer of funding from the council purely on the basis that doing so would allow the council to audit it and potentially disclose the resultant reviews. Charities have a duty to be transparent and also to act in the best interests of their beneficiaries. Hence turning down an offer of funding from the council could amount to a breach of that duty.
97. The Commissioner therefore considers that whilst the qualified person's arguments in this respect do engage the exemption, the actual prejudice which might be caused would not be severe.
- b) Was a blanket exemption applied by the qualified person?
98. The Commissioner has considered the arguments of the council and whether they are a result of the specific circumstances of the case or whether the qualified person has sought to apply a blanket exemption to this type of information. He is satisfied that the qualified person's arguments do take into account the information to hand in that there may be additional criticism of the RCD if this information were disclosed, and hence additional pressures on employees to show their actions in a good light.
- c) Has the sensitivity of the information waned over time?
99. The Commissioner notes that the audit report was published on 3 March 2006. It was requested by the complainant on 20 April 2006. Therefore, at the time of the request the issues raised in the report were still relevant and that suggested actions to rectify the problems the report highlighted may not have been taken by the council by that time. The Commissioner therefore considers that the passage of time had not substantially reduced the public interest in maintaining the exemption at the time of the time of the request.

d) Specific public interest factors in favour of maintaining the exemption

100. The council stated that there is a strong public interest in the exemption being maintained based on the impact that disclosure could have on the council's relationship with the RCD, together with the future willingness of staff to be open and to cooperate fully and frankly with its audit arrangements.
101. If staff were inhibited and audits were affected then the efficiency and effectiveness of the council's management could be prejudiced. Any disruption to the ability of the council to properly scrutinise the actions of organisations it provides funds to leaves open the possibility that problems remain unidentified and ongoing, with the potential for greater losses or ongoing inefficiency draining public resources.
102. If the council does not receive full information from audits it may be deceived into thinking that the organisation is running an efficient service, when the service to the community could in fact be better. The council must therefore be able to obtain honest and open facts and figures about the organisation's performance in order to best manage its funding in an effective way. If a particular charity is not acting efficiently or in the best interests of its beneficiaries then the council must be able to ascertain that this is the case. Any disruption to that ability could prejudice its ability to manage its funding effectively. A failure to receive information of this sort could ultimately waste council resources which could be diverted to other funds or other charities benefiting the community.
103. However the Commissioner has already stated in paragraph 97 that in his view the likely prejudice would not be severe and would not affect the audit process to any great extent.

e) Public interest factors in favour of disclosing the information.

104. The Commissioner considers that there is a strong public interest in the disclosure of this information. There is a strong public interest in transparent and open government, and in allowing taxpayers and interested parties to scrutinise the decisions and actions of local authorities in their management of their funds. There is also a strong public interest in charities being open with the work they carry out with the funds that they receive, both from general donations, but particularly where that money is provided by public bodies using tax payers money. The RCD is a charity set up to promote equality and diversity in the community in Rochdale and provides an important service in an ethnically diverse area.
105. At the time of the request, the council provided substantial funding to the RCD, and there is therefore a strong public interest in allowing the general public access to information on how that funding has been spent, particularly as the allegations laid against the RCD involved issues surrounding the use of those funds.
106. If the charity was using its funds inappropriately there is a great deal of public interest in the public being made aware of this, and in knowing the actions that

have been recommended to alleviate any problems which were uncovered. There is also a strong public interest in tax payers being able to scrutinise the spending of public money and the effectiveness with which the council is managing its funding to the RCD to ensure that it is being spent in the best interests of the community.

107. If problems in the report were highlighted which are still ongoing, or the actions the council has recommended as a result of the audit are inadequate then it is important that the council can be held to account for this. It is only by being able to obtain information of this sort that the public can understand whether there is a need to further question the actions and decisions taken by the council in providing public funds to the RCD on a continuing basis.
108. In order for tax payers to be assured that the council's funding of the RCD is appropriate then the council must be open and transparent in its management of those funds, unless in doing so it damages its, or the charity's ability to act effectively, or damages its ability to maintain good services and provide good value for money.
109. The Commissioner must also consider the effect the disclosure of the document may have on the RCD. His view is that allowing an audit to take place provides a degree of assurance that the RCD is in fact performing well. Members of the community will be able to consider the content of the report, note areas where the audit report highlights concerns, but note the actions taken in response to that report. Audit reports will, by their very nature consider negative aspects of an organisation's spending and efficiency, and will therefore nearly always concentrate on the negative aspects of what they have found. In this case there is a difference given the fact that the report was initiated due to allegations of misspending.
110. The Commissioner has considered all of the above arguments in making his decision.

#### Conclusion on the public interest test

111. Although he recognises the importance of the council's ability to be able to obtain accurate and full information from RCD staff during an audit, the Commissioner has considered the extent to which the effective conduct of public affairs would be prejudiced and weighted this concern against the public interest in disclosing the information. He has not been convinced that a disclosure of this information in this instance would cause prejudice to the extent that it outweighs the public interest in the information being disclosed. A robust audit system would negate the majority of the damage foreseen by the qualified person, and the Commissioner is not satisfied that any pressure employees may feel when being interviewed would be significantly greater simply because of the potential of a wider disclosure of the information.
112. The Commissioner has further considered the argument that a disclosure of the report would undermine the council's ability to act effectively. He believes that the prejudice foreseen by the qualified person will not be frequent or severe given

that the council can take action to ensure its ability to audit such bodies. He has also taken into account the fact that charities are accountable to the charity commission and must ultimately act in the best interests of their beneficiaries.

113. Further, he has considered the public interest in this information being disclosed, and is satisfied that in circumstances of this case, the public interest in maintaining the exemption does not outweigh the public interest in the disclosure of the information.

## The Decision

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114. The Commissioner's decision is that the public authority did not deal with the following elements of the request in accordance with the Act:

It did not provide the complainant with an adequate refusal notice as required by section 17(1)(b) and (c) of the Act.

It incorrectly withheld the requested information under the exemptions in sections 30 and 36 of the Act. The Commissioner's decision is that neither of these exemptions is applicable to the information.

## Steps Required

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115. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

The council should redact the names of junior employees of the charity from the documents concerned.

The council should redact the sections of the report highlighted in paragraphs 51 and 52 and in paragraph 64.

The council should disclose the remaining sections of the report to the complainant.

116. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## Other matters

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117. As stated, the complainant requested that the council review its decision not to supply him with a copy of the information on 24 July 2006. The response to that request was not received by the complainant until 2 November 2006.

118. This means that a gap of over three months occurred between the request for the decision to be reviewed and the receipt of the outcome of that review by the complainant.
119. Although the council responded to the complainant's initial request for information within the 20 working day period defined in the Act, the Commissioner therefore considers that it did not carry out and communicate the results of the review of its decision within a reasonable time.
120. In his Freedom of Information Good Practice Guidance No. 5 (published in February 2007), the Commissioner provides reasons why he believes that a reasonable time for completing an internal review should be 20 working days from the date of the request for review. He considers that there may however be a small number of cases which involve exceptional circumstances where it may be reasonable for a public authority to take longer than this period. In those circumstances, the Commissioner considers that the public authority should, as a matter of good practice, notify the requester and explain why more time is needed. In his view, in no case should the total time taken exceed 40 working days. He would also expect a public authority to be able to demonstrate that it had commenced the review procedure promptly following receipt of the request for review and had actively worked on the review throughout that period.
121. The Commissioner notes that in this case, the review took substantially longer than the maximum he advises, and that the complainant needed to contact the council on more than one occasion before the review was in fact carried out and the response provided to him.
122. The Commissioner therefore considers that the council did not comply with the requirements of Part IV the section 45 code of practice when dealing with the request for internal review.
123. In light of concerns relating to the handling of the review process by the council this case will be referred to the Commissioner's Good Practice and Enforcement Team which will consider whether any further action is appropriate in the context of the ICO's FOI Enforcement Strategy.

## **Failure to comply**

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124. 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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125. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

126. 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.
127. Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 10<sup>th</sup> day of November 2008**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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

## Legal Annex

### The Freedom of Information Act 2000

#### Investigations and proceedings conducted by public authorities.

30. - (1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-
- (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-
    - (i) whether a person should be charged with an offence, or
    - (ii) whether a person charged with an offence is guilty of it,
  - (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or
  - (c) any criminal proceedings which the authority has power to conduct.
- (2) Information held by a public authority is exempt information if-
- (a) it was obtained or recorded by the authority for the purposes of its functions relating to-
    - (i) investigations falling within subsection (1)(a) or (b),
    - (ii) criminal proceedings which the authority has power to conduct,
    - (iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or
    - (iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and
  - (b) it relates to the obtaining of information from confidential sources.
- (3) The duty to confirm or deny 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) or (2).
- (4) In relation to the institution or conduct of criminal proceedings or the power to conduct them, references in subsection (1)(b) or (c) and subsection (2)(a) to the public authority include references-
- (a) to any officer of the authority,
  - (b) in the case of a government department other than a Northern Ireland department, to the Minister of the Crown in charge of the department, and
  - (c) in the case of a Northern Ireland department, to the Northern Ireland Minister in charge of the department.



(5) In this section-

"criminal proceedings" includes-

- (a) proceedings before a court-martial constituted under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 or a disciplinary court constituted under section 52G of the Act of 1957,
- (b) proceedings on dealing summarily with a charge under the Army Act 1955 or the Air Force Act 1955 or on summary trial under the Naval Discipline Act 1957,
- (c) proceedings before a court established by section 83ZA of the Army Act 1955, section 83ZA of the Air Force Act 1955 or section 52FF of the Naval Discipline Act 1957 (summary appeal courts),
- (d) proceedings before the Courts-Martial Appeal Court, and
- (e) proceedings before a Standing Civilian Court;

"offence" includes any offence under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957.

(6) In the application of this section to Scotland-

- (a) in subsection (1)(b), for the words from "a decision" to the end there is substituted "a decision by the authority to make a report to the procurator fiscal for the purpose of enabling him to determine whether criminal proceedings should be instituted",
- (b) in subsections (1)(c) and (2)(a)(ii) for "which the authority has power to conduct" there is substituted "which have been instituted in consequence of a report made by the authority to the procurator fiscal", and
- (c) for any reference to a person being charged with an offence there is substituted a reference to the person being prosecuted for the offence.

### **Personal information.**

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 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).
- (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.

## Effective conduct of public affairs.

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.

## **The Data Protection Act 1998**

### **Sensitive personal data**

In this Act “sensitive personal data” means personal data consisting of information as to—

- (a) the racial or ethnic origin of the data subject,
- (b) his political opinions,
- (c) his religious beliefs or other beliefs of a similar nature,
- (d) whether he is a member of a trade union (within the meaning of the [1992 c. 52.] Trade Union and Labour Relations (Consolidation) Act 1992),
- (e) his physical or mental health or condition,
- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence, or
- (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

## **SCHEDULE 1**

### **The Data Protection Principles**

#### Part I The principles

1 Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

2 Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

3 Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.

4 Personal data shall be accurate and, where necessary, kept up to date.

5 Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.

6 Personal data shall be processed in accordance with the rights of data subjects under this Act.

7 Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

8 Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

## **SCHEDULE 2**

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

- 1 The data subject has given his consent to the processing.
- 2 The processing is necessary—
  - (a) for the performance of a contract to which the data subject is a party, or
  - (b) for the taking of steps at the request of the data subject with a view to entering into a contract.
- 3 The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.
- 4 The processing is necessary in order to protect the vital interests of the data subject.
- 5 The processing is necessary—
  - (a) for the administration of justice,
  - (b) for the exercise of any functions conferred on any person by or under any enactment,
  - (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or
  - (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.
- 6 (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.  
  
(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied

## SCHEDULE 3

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

1. The data subject has given his explicit consent to the processing of the personal data.
- 2 (1) The processing is necessary for the purposes of exercising or performing any right or obligation which is conferred or imposed by law on the data controller in connection with employment.  
  
(2) The Secretary of State may by order—
  - (a) exclude the application of sub-paragraph (1) in such cases as may be specified, or
  - (b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.
- 3 The processing is necessary—
  - (a) in order to protect the vital interests of the data subject or another person, in a case where—
    - (i) consent cannot be given by or on behalf of the data subject, or
    - (ii) the data controller cannot reasonably be expected to obtain the consent of the data subject, or
  - (b) in order to protect the vital interests of another person, in a case where consent by or on behalf of the data subject has been unreasonably withheld.
- 4 The processing—
  - (a) is carried out in the course of its legitimate activities by any body or association which—
    - (i) is not established or conducted for profit, and
    - (ii) exists for political, philosophical, religious or trade-union purposes,
  - (b) is carried out with appropriate safeguards for the rights and freedoms of data subjects,
  - (c) relates only to individuals who either are members of the body or association or have regular contact with it in connection with its purposes, and
  - (d) does not involve disclosure of the personal data to a third party without the consent of the data subject.
- 5 The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.
- 6 The processing—
  - (a) is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings),
  - (b) is necessary for the purpose of obtaining legal advice, or

(c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights.

7 (1) The processing is necessary—

(a) for the administration of justice,

(b) for the exercise of any functions conferred on any person by or under an enactment, or

(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department.

(2) The Secretary of State may by order—

(a) exclude the application of sub-paragraph (1) in such cases as may be specified, or

(b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.

8 (1) The processing is necessary for medical purposes and is undertaken by—

(a) a health professional, or

(b) a person who in the circumstances owes a duty of confidentiality which is equivalent to that which would arise if that person were a health professional.

(2) In this paragraph “medical purposes” includes the purposes of preventative medicine, medical diagnosis, medical research, the provision of care and treatment and the management of healthcare services.

9 (1) The processing—

(a) is of sensitive personal data consisting of information as to racial or ethnic origin,

(b) is necessary for the purpose of identifying or keeping under review the existence or absence of equality of opportunity or treatment between persons of different racial or ethnic origins, with a view to enabling such equality to be promoted or maintained, and

(c) is carried out with appropriate safeguards for the rights and freedoms of data subjects.

(2) The Secretary of State may by order specify circumstances in which processing falling within sub-paragraph (1)(a) and (b) is, or is not, to be taken for the purposes of sub-paragraph (1)(c) to be carried out with appropriate safeguards for the rights and freedoms of data subjects.

10 The personal data are processed in circumstances specified in an order made by the Secretary of State for the purposes of this paragraph.