

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 19 December 2007

Public Authority: The Chief Officer of West Yorkshire Police
Address: PO Box 9
Laburnum Road
Wakefield
West Yorkshire
WF1 3QP

Summary

The complainant is seeking information that he asserts was provided to third parties in relation to cases that he was involved in during the 1970s and 1980s and which he believes is held by West Yorkshire Police. The Commissioner understands that these cases related to a number of employment issues and an allegation of theft. The public authority provided some information to the complainant and denied holding anything else of relevance. It explained to him that it was likely that any information held would have been destroyed. The complainant does not accept that the police destroyed the information and has corresponded with the police about this matter over a number of years. Contained in his correspondence are a number of subsequent requests which have been made to challenge the police's position. The Commissioner has determined that the public authority was not obliged to confirm or deny whether it held information by virtue of section 40(5). This is on the basis that, if held, the information would constitute the complainant's personal data and would be exempt under section 40(1). In failing to advise the complainant of this or to respond within the twenty working day timescale the public authority failed to comply with the requirements of section 17(1). The Commissioner considers that the public authority should have treated the request as a subject access request under section 7 of the Data Protection Act 1998. He will now go on to make a separate assessment under section 42 of that Act.

The Commissioner's Role

1. The Commissioner's role 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

2. On 4 January 2005 the complainant wrote to West Yorkshire Police ('the police') asking to be provided with:

'...the illegal and false record you allegedly possess, and which you have shown and told non-policemen about'.
3. The complainant wrote to the police again on 2 February 2005. In his letter he stated that he wanted 'the information you had given [a named individual] and [a second named individual], both non-police officers and my opponents in [party X vs party Y 1977].
4. On 14 February 2005, the police responded to the complainant's request and offered the following summary of what it considered the complainant was requesting:

'Any information or correspondence provided by West Yorkshire Police to [a named individual] and [a second named individual], in relation to cases held in Industrial Tribunals with yourself during May / June 1982 and 7 and 8 April 1994'
5. On 2 March 2005 the police wrote to the complainant informing him that, *'the information that we think you have asked for is attached. The fact is that the information you've requested does not exist, mainly due to the fact that a great deal of time has passed since you went to court'*. The police provided explanations regarding why it held no information relevant to the complainant's request. The attachments sent to the complainant consisted of an account of the actions taken by the police in searching for information and details of a brief email exchange (dated 9 February 2005). The email chain alerted the complainant to the fact that the police held *'... a 'thickish file (M/57/02) on him in the cellar...all about some form of Union involvement in the 70's'*.
6. The complainant wrote to the police on 4 March 2005 requesting the M 57/02 file. In his letter the complainant made the following requests:
 - ...to be provided with details of when a record of a telephone conversation was destroyed. This conversation allegedly concerned the complainant and a West Yorkshire Police Data Protection Officer. The conversation is alleged to have concerned a mistaken assumption that the complainant had been a serving police officer and was offered to the complainant as a reason for the failure of the police to respond to his subject access request of 9 April 2002;
 - ...for details of another telephone call. The complainant asserted that this is alleged to have taken place during November or December 1973 and was made by a named Detective Constable. There appears to be some uncertainty regarding this person's exact surname and/or its spelling. The complainant asserts that the alleged telephone call concerned an incident where the Detective Constable instructed the complainant to attend Stockport CID and report a confession made by a named third party;

- ...to be given assurances that Mr Cramphorn (formerly Chief Constable West Yorkshire Police) gave the Chairman of the police authority on not replying to, or giving him, in an understandable manner, a reply to his Subject Access request.
7. West Yorkshire Police carried out an internal review of the complainant's original request on 11 April 2005. The review panel concluded that the information held by the police had been identified and had been supplied to the complainant on 2 March. The police confirmed that it held no further information and stated 'maybe that the information never existed or the information was disposed of in line with the Force Policy for Retention of Documents'.
 8. The complainant wrote to the police on 14 April 2005. In his letter the complainant made the following comment in response to the police statement that the information he is seeking may never have existed:

'I have maintained it did not for 22 years. Considering this information was used by [a named individual] in the Court of Appeal and Court of Criminal Appeal, I contend that 'maybe' is not evidence. Any doubt over its credibility must be given to me as the accused'.

In the same letter the complainant asked to be given the date on which the police destroyed information relevant to his case.

The Investigation

Scope of the case

9. The complainant refuses to accept that West Yorkshire Police does not hold information relating to him and the events which took place in the 1970s and 1980s. The Commissioner's investigation covered the complainant's initial request and also his subsequent question which he put to the police in his 4 March 2005 letter.
10. During the course of the Commissioner's investigation the police sent the complainant a file referred to as M 57/02 which he had requested in his 4 March 2005 letter. This is a miscellaneous file held by the Police Professional Standards Department and contains correspondence to, from or about the complainant. Therefore the Commissioner has not made a decision in respect of the M 57/02 file on the basis that it is the complainant's personal data and the police have now provided it to him
11. The analysis in this Decision Notice is therefore restricted to the complainant's question of 4 January 2005 (clarified by the police 14 February 2005) and the three questions posed in the letter of 4 March (paragraph 6 above).

Chronology of the case

12. The Commissioner initially wrote to the police on 16 March 2007 detailing the requests made by the complainant in his letter of 4 March 2005 and his request concerning the date of destruction of the police files. West Yorkshire Police was asked to comment on the existence of the file, referenced M 57/02. The Police was asked to consider the disclosure of M 57/02 under the provisions of the Freedom of Information Act or if appropriate the Data Protection Act 1998.
13. The Commissioner continued to investigate the complaint between April 2007 and September 2007. The public authority was asked to provide additional information relevant to the material that it claimed it did not hold; to explain what searches had been carried out, and to supply a copy of its record retention policy. The caseworker also managed to agree the disclosure of further information to the complainant but under the Data Protection Act when attempting to informally resolve this complaint.
14. In August 2007 the Commissioner re-issued his guidance about the definition of personal data. This had been revisited in light of work carried out by the Article 29 Working Group. The Commissioner's new guidance is designed to assist organisations and individuals to determine whether information may be classified as personal data. In order to do this the guidance asks a series of questions. The Commissioner has considered the information being sought by the complainant along side these questions.
15. The Commissioner's Guidance can be viewed in full at the following link:

http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf

Analysis

Section 40 – Personal data

16. Section 40(1) states that :

“(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”.

Subsection (5) states that:
“The duty to confirm or deny:

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

17. West Yorkshire Police offered its interpretation of the complainant's request and informed him of this on 14 February 2005. As mentioned previously, the request was interpreted as being for the following:

“Any information or correspondence provided by West Yorkshire Police to [a named individual] and [a second named individual], in relation to cases held in Industrial Tribunals with yourself during May / June 1982 and 7 and 8 April 1994’.

18. The Commissioner notes that the complainant has not disputed the public authority's interpretation of his request and that he has pursued his complaint on this basis. The Commissioner has considered the request in the terms expressed above and also the three questions asked by the complainant in his letter of 4 March 2005. He is satisfied that if any information were held which was within the scope of the above request it would constitute the complainant's personal data and would therefore be exempt by virtue of section 40(1). This is on the basis that it would be information from which he could be identified and which relates to his professional life. It would be information about evidence used in employment tribunal and criminal cases in which the complainant was the claimant and the defendant and would have been used to influence decisions directly affecting him.
19. Further the Commissioner has also determined that, in view of the above, the public authority was not in fact obliged to confirm or deny whether any information was held by virtue of section 40(5). However, the request should have been treated as a request under section 7 of the Data Protection Act 1998. This is referred to further in the 'Other matters' section below.

The Decision

20. During the course of the investigation the Commissioner issued revised guidance concerning the definition of personal data. He has determined that, if the information was held, it would have engaged section 40(1) exemption within the Act and would therefore attract this exemption. The Commissioner has therefore concluded that West Yorkshire Police was not in fact obliged to comply with section 1(1)(a) in relation to this information by virtue of section 40(5).
21. In failing to advise the complainant of this fact, within the time for complying, the public authority breached section 17(1) of the Act. In light of the contents of this decision notice the Commissioner has not ordered any remedial steps in this regard. However, as mentioned in the 'other matters' section below, he does consider it appropriate for him to carry out an assessment of the public authority's compliance with the DPA under section 42 of that Act.

Other Matters

22. The Commissioner wishes to highlight the following matters of concern:
23. Section 7 of the DPA gives an individual the right to request copies of personal data held about them – this is referred to as a right of Subject Access. Therefore, the Commissioner will go on to make an assessment under section 42 of the DPA of West Yorkshire Police's compliance with that Act. However,

this assessment will be dealt with separately and will not form part of this Decision Notice. An assessment under section 42 of the DPA is a separate legal process from the consideration under section 50 of the FOI Act.

24. The Commissioner notes that this request should have been dealt with as a subject access request, under section 7 of the DPA from the outset, and he would encourage public authorities to consider requests under the correct access regime at the first instance.

Steps Required

25. The Commissioner requires no steps to be taken.

Right of Appeal

26. 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

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 19th day of December 2007

Signed

**Jane Durkin
Assistant Commissioner**

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

Legal Annex

Freedom of Information Act 2000

Section 1(1) provides that -

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

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

Section 10(1) provides that –

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

Section 17(1) provides that -

“A public authority which ... is to any extent relying:

- on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or
- on a claim that information is exempt information

must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 40(1) provides that –

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

Section 40(5) provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that
 - (i) he 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)."

Data Protection Act 1998

Section 7 Right of access to personal data

(1) Subject to the following provisions of this section and to sections 8 and 9, an individual is entitled—

(a) to be informed by any data controller whether personal data of which that individual is the data subject are being processed by or on behalf of that data controller,

(b) if that is the case, to be given by the data controller a description of—

(i) the personal data of which that individual is the data subject,

(ii) the purposes for which they are being or are to be processed, and

(iii) the recipients or classes of recipients to whom they are or may be disclosed,

(c) to have communicated to him in an intelligible form—

(i) the information constituting any personal data of which that individual is the data subject, and

(ii) any information available to the data controller as to the source of those data, and

(d) where the processing by automatic means of personal data of which that individual is the data subject for the purpose of evaluating matters relating to him such as, for example, his performance at work, his creditworthiness, his reliability or his conduct, has constituted or is likely to constitute the sole basis for any decision significantly affecting him, to be informed by the data controller of the logic involved in that decision-taking.