

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 12 March 2008

Public Authority: Devon & Cornwall Constabulary
Address: Middlemoor
Exeter
Devon
EX2 7HQ

Summary

The complainant requested copies of the police statements and pocket books of three officers involved in an incident and also a copy of the statement made by a third party involved in the same incident.

The public authority refused to release the information on the basis it was exempt under sections 30(1)(b), 40(1), 40(2) and 41 of the Act.

The Commissioner has determined that the public authority was not obliged to confirm or deny whether it held the requested information by virtue of section 40(5) of the Act. This is on the basis that, if the information was held, it would constitute the complainant's personal data and would be exempt under section 40(1)... He has therefore not considered the remaining exemptions. The complaint is not upheld.

The Commissioner's Role

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

2. The complainant and his brother attended a Council meeting on 4 March 2004. The complainant's brother was ejected from the Council chamber and the complainant left shortly afterwards. A situation was developing between the brothers and both parties were arrested. The complainant subsequently made a complaint against the police for the use of excessive force when he was arrested.

This complaint was investigated by the force's Professional Standards and Performance Department and, later, by the Independent Police Complaints Commission.

3. On 12 April 2005 the complainant requested "*copies of statements and pocket books of the three officers involved in the incident at [location removed] on 4th March 2004 which was dealt with by the Professional Standard Dept*" and a copy of the "*statement from [his brother] who was also involved in the incident.*"
4. On 31 May 2005, outside of the 20 day statutory time for compliance, the public authority wrote to the complainant claiming the information was exempt from disclosure under sections 30(1) - information held for the purposes of a criminal investigation, 40(2) - personal information relating to a third party and 41 - information provided in confidence. Its complaints procedure was included.
5. The public authority further explained that: "*You may be entitled to some of this information under the Data Protection Act 1998. The Subject Access provisions of the Data Protection Act allow individuals to request access to any information that the force may hold about them. I have therefore forwarded your details onto our Data Protection Unit who will be contacting you in due course.*" It did not cite section 40(1) as an exemption as part of its Refusal Notice.
6. On 6 June 2006 the complainant made a subject access request to the public authority. The public authority responded to the complainant and he then made a complaint to the Commissioner, under the Data Protection Act (DPA), about the reply that he had received. This complaint is mentioned further in the 'Other Matters' section of this notice below.
7. On 6 February 2006 the complainant contacted the Commissioner's office to complain about the non-disclosure of information under the Act. The Commissioner advised him that he had not requested an Internal Review by the public authority, which he subsequently did on 20 February 2006. This was acknowledged by the public authority on 3 March 2006 and it advised that a review would be completed before 23 May 2006.
8. On the 23 March 2006 the public authority wrote to the complainant upholding its original decision.

The Investigation

Scope of the case

9. On 4 April 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular he was dissatisfied that he had been denied access to the information that he had requested. He stated the following:

“This seems to have been a long drawn out procedure to try and get the truth. It seems which ever way I turn I am up against a brick wall. How can I take it to judicial review when I cannot get the information I require. My barrister says I need to exhaust all attempts to get the information before I can take it further.”

10. The Commissioner has investigated whether or not the public authority appropriately refused access to the following information relating to the incident on 4th March 2004:
- The statements of three named officers
 - The pocket note book entries of the three named officers
 - The brother's witness statement

Chronology

11. On 2 March 2007 the Commissioner commenced investigation of the complaint. The public authority was asked to expand on its use of the exemptions and also to provide copies of the withheld data within the next 20 working days.

12. On 7 March 2007 the public authority advised that there would be a delay in its response due to annual leave and that a response would be sent shortly after 26 March 2007. On 29 March 2007 a response was chased, and again on 4 April 2007.

13. On 5 April 2007 a reply was emailed by the public authority. The exemption at section 40(1), personal information of the complainant, was introduced. It further stated the following:

“This [witness statement] information is the sensitive personal data of [the complainant] and [the complainant's brother] as all the details in statements concern the incident involving [the complainant] and [the complainant's brother] to which the police were called and following which the brothers were subsequently arrested.”

14. The public authority also advised that although statements from three named police officers were originally requested it had no record of a statement having been taken from one of these officers. As such, it advised that it should have told the complainant that one statement was 'not held'. It further explained that the other two statements had only been produced as a result of an investigation into the conduct of one of the officers – the investigation having been instigated at the behest of the complainant in this case.

15. In relation to the witness statements the public authority stated the following:

“The witness statements in their entirety are exempt from disclosure under section 41 (information provided in confidence by the two police officers – neither police officer has given their consent to disclose this information), section 40(1) (personal information of [the complainant]), section 40(2) (personal information relating to third parties namely [complainant's brother], and section 30(1)(b) (disciplinary proceedings which this Force has the power to conduct).”

16. In respect of the pocket note book entries the public authority clarified its position as follows:

“The information relating to [the complainant] is exempt under section 40(1). Section 40(1) is an absolute, class-based exemption and there is no requirement to consider the public interest.”

“The information relating to [the complainant’s brother] is exempt under section 40(2) by virtue of the condition in subsection 40(3)(b) being satisfied (Data Protection Principle 1 - data shall be processed fairly and lawfully).”

17. The position of the public authority in relation to the complainant’s brother’s statement was as follows:

“The witness statement of [the complainant’s brother] is exempt from disclosure in its entirety under section 41 (information provided in confidence by [the complainant’s brother]), section 40(2) (personal information relating to third parties namely [the complainant’s brother]), section 40(1) (personal information of [the complainant]) and section 30(1)(b) (disciplinary proceedings which this Force has the power to conduct).”

18. The public authority also provided further harm and public interest considerations to the Commissioner in respect of section 30(1).

Analysis

Procedural matters

19. Section 17(1) requires that a public authority which is seeking to rely on an exemption in Part II of the Act must give the applicant a notice which states that fact, specifies the exemption in question and states why the exemption applies. This must be within 20 working days of the receipt of a request. The request was acknowledged as being received on 13 April 2005 however a response was not sent to the complainant until 31 May 2005. Although the complainant did not raise the issue, the Commissioner finds that the public authority has not dealt with the Complainant’s request in accordance with Section 17(1) of the Act in that it exceeded the statutory time limit for responding to a request.
20. The Commissioner also notes that the refusal notice only referred to the complainant’s brother’s statement and the pocket note books. The officers’ statements were not mentioned in the original refusal notice. However the statements were refused at the internal review stage. In failing to issue a refusal notice in respect of the officers’ statements within twenty working days of receiving the request the public authority breached section 17(1).
21. In addition, although the public authority advised the complainant that he may be entitled to some of the requested information under the DPA, it did not cite sections 40(1) or (5)(a) which technically is also a breach of section 17(1). In the

Commissioner's view these sections should have been cited in relation to all of the requested information. The public authority therefore breached section 17(1)(b) in that it failed to specify the exemption in question and section 17(1)(c) in that it failed state why the exemption applied.

Exemption

22. Personal data is defined in section 1(1) of the DPA as:

"... data which relate to a living individual who can be identified -

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual"

23. The Commissioner has reviewed the pocket note books, officer statements and the complainant's brother's statement held by the public authority, all of which are relevant to his request. He is satisfied that all of this information constitutes the complainant's personal data and that therefore it is all exempt under section 40(1) of the Act.

24. The Commissioner is satisfied that the information is the complainant's personal data because he can be identified from the information and it details his involvement in the incident in question. Further it indicates the police's intentions in respect of him. At least some of the information was also used by the police to make decisions affecting the complainant, specifically about his complaint regarding the way the police handled the incident.

25. In the refusal notice dated 31 May 2005, the public authority advised the complainant that he may be entitled to some of the information he had requested under the DPA. However, the public authority made no reference to section 40(1). The Commissioner has made further comments about the DPA and the referral of the complainant's details to the Data Protection Officer within the public authority in the other matters section below.

26. As section 40(1) applies to all of the requested information, the public authority was not in fact obliged to comply with 1(1)(a) by virtue of section 40(5)(a) of the Act. This states that 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)".

27. The Commissioner has determined that the public authority was not obliged to confirm or deny whether it held the requested information by virtue of section 40(5) of the Act. This is on the basis that, if the information was held, it would constitute the complainant's personal data and would be exempt under section 40(1). As this applies to all of the information requested by the complainant he has not gone on to consider the other exemptions cited by the public authority.

The Decision

28. The Commissioner's decision is that the public authority partly dealt with the request for information in accordance with the Act.
29. He is satisfied that all of the information requested by the complainant is his personal data and therefore the exemption in section 40(1) was appropriately cited and applied to all of information, not just some. He has further concluded that in fact the public authority was not obliged to comply with section 1(1)(a) of the Act by virtue of section 40(5)(a).
30. The public authority did not comply with the requirements of section 17(1) of the Act. The Commissioner has not ordered any remedial steps in this regard.

Other matters

31. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters:
32. As mentioned above, the public authority advised the complainant that he may be entitled to some of the requested information under the DPA in its refusal notice, though it did not refer specifically to the exemption in section 40(1).
33. Where public authorities identify that information being requested under the Act is in fact the applicant's personal data, they should advise them of this fact and process the request under the DPA. The Commissioner does not consider it necessary for the requester to submit a further application. However, before responding public authorities are obviously entitled, if they so wish, to request the applicable fee and any necessary identification from the applicant.
34. In this case the Commissioner is aware that, on the advice of the public authority, the complainant made a subject access request under the DPA on 6 June 2005. He specified that he required access to statements made by three named officers and his brother but he did not ask for the pocket note books mentioned in his FOI request. The public authority responded to the complainant's subject access request disclosing some information. The complainant was dissatisfied that he did not receive copies of statements and complained to the Commissioner under section 42 of the DPA. The Commissioner carried out an assessment and communicated the outcome to the complainant in a letter dated 19 June 2006.
35. As the Commissioner has already considered the public authority's compliance with the DPA in relation to statements he does not intend to take any further action in this regard.
36. The note books which were the subject of the original FOI request were not specified on the complainant's subsequent subject access request. However, as mentioned above, the Commissioner considers that the public authority should

have automatically considered the whole of the request made on 12 April 2005 under the DPA subject to receipt of the necessary fee and identification without requiring the complainant to restate his request. The Commissioner has approached the public authority regarding the pocket note books and it has agreed to consider whether this information can be disclosed to the complainant under the DPA. It will communicate its decision to the complainant in due course. If the complainant is unhappy with the response he receives in this respect he then has the right to request a further assessment from the Commissioner under the DPA.

Right of Appeal

37. 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.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

Dated the 12th day of March 2008

Signed

**Steve Wood
Assistant Commissioner**

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

Legal Annex

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

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

Section 40(1) provides that –

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

Section 40(2) provides that –

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

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

Section 40(3) provides that –

“The first condition is-

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

Section 40(5) provides that –

“The duty to confirm or deny-

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