

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 28 February 2008**

**Public Authority:** Chief Officer of Hertfordshire Constabulary  
**Address:** Police Constabulary Headquarters  
Stanborough Road  
Welwyn Garden City  
Hertfordshire  
AL8 6XF

### Summary

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The complainant's son died in a traffic incident which occurred on the A1(M) in Hertfordshire in July 2003. Since then he has been in correspondence with the public authority seeking access to information relating to its investigation of this incident. Partial disclosure had been made to him as the father of the deceased (not as a member of the public) but he was dissatisfied with the extent of this disclosure. In July 2006, he requested all information, documentation and reports relating to the circumstances of his son's death. The public authority refused to provide this information citing Section 40(2) (Unfair Disclosure of Personal Data) and Section 30(1) (Investigations Information) as its basis for doing so. It further argued that the public interest in maintaining the exemption at Section 30(1) outweighed the public interest in disclosure. It upheld this position on review in relation to most of the information but did disclose some information with third party names redacted. The Commissioner has decided that most of the remaining information is exempt by virtue of Section 30(1) and the public interest in maintaining this exemption in relation to that information outweighs the public interest in disclosure. However, the Commissioner has identified some information which should have been disclosed under the Act because the public interest in disclosure in relation to this piece of information outweighs the public interest in maintaining the exemption. In failing to provide this information, the public authority contravened the requirements of Section 1(1)(b) of the Act. The Commissioner requires the public authority to disclose it with certain personal details redacted in order to satisfy the requirements of the first data protection principle of the Data Protection Act 1998. The public authority also failed to issue a refusal notice within 20 working days. In failing to do so, it contravened the requirements of Section 17(1) of the Act.

### 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. The complainant's son was killed when he was hit by an articulated lorry while crossing the A1(M) in Hertfordshire on foot in the early hours of 26 July 2003. The driver of the lorry was an Irish national and the lorry was owned by a road haulage company based in the Republic of Ireland. This incident was investigated by the public authority.
3. It is the complainant's contention that his son was in some way forced onto or chased onto the A1(M) following an altercation with a former associate or associates. It is further alleged that one of these former associates made a threat of violence against the complainant's son shortly before the young man's death. There was an earlier alleged falling out between the complainant's son and the former associate following an incident involving a company car used by the complainant's son. The car was allegedly taken without the son's permission. This earlier incident took place in Bedfordshire. There has been some co-operation between the public authority and Bedfordshire Police in investigating matters related to the young man's death. That public authority's response to a separate request made by the complainant is the subject of another decision notice (ICO Reference: FS50107084).
4. The complainant had been in contact the public authority raising concerns about its investigation. He sought access to information it held to learn all he could about what had happened to his son and to take forward private legal action. He also wished to find out the identity of officers of the public authority who should, in his view, be subject to disciplinary action.
5. The public authority disclosed some information to him as the father of the deceased (not as a member of the public) in a letter from the public authority dated 27 June 2006.
6. On 12 July 2006, he wrote a letter to the public authority criticising the extent of their disclosure to him. At the end of that letter he wrote,  
  
*"I would again ask that you provide all information documentation and reports relating to the circumstances of my son's death and not just the parts you choose."*
7. The complainant had already been in contact with the Commissioner about other complaints he had made about other public authorities and reference had been made to the correspondence he had been having with this public authority. The Commissioner contacted the public authority on 30 August 2006 to advise it that the letter of 12 July 2006 should be construed as a request for information under the Act.

8. The public authority replied to the complainant on 6 September 2006 and sent him a refusal notice. Specifically, it refused to provide the following information under the Act:
  - Documentation relating to the case against the lorry driver
  - A witness list
  - Details from the deceased's mobile phone.
9. It cited the exemptions at Section 40(2) (Unfair Disclosure of Personal Data) and Section 30(1)(a)(i) & (ii) (Investigations Information) as its legal basis for doing so. Full details of these exemptions are provided in a Legal Annex to this Notice. More details of the public authority's arguments in relation to these exemptions are provided later in this Notice.
10. The complainant requested an internal review of this refusal in a letter dated 11 September 2006. He said that the information caught by the scope of his request should include an unedited version of the *"limited sanitized documentation provided recently...along with all information and documentation related to the killing of my son and the police conduct and behaviour in this case and the associated cases and not just the three parts you carefully identified in your letter. This will include details of the police investigations, all communications with the Bedfordshire Police and others, a list of all those interviewed and the report recently sent by the Hertfordshire Police to the CICA [Criminal Injuries Compensation Authority] that remains concealed and was no doubt intended to damage my interests."*
11. In support of disclosure he outlined his private interest and wider public interest. He said that officers and other individuals should not be protected from legitimate criticism and should be accountable for their actions. He said that there was a serious issue of jurisdiction that had been raised in Parliament by his MP. This related to the apparent inability of the UK Health and Safety Executive to take action against a firm based in another EU member state for breaching EU-wide driving regulations. This also related to the fact that UK driving penalties imposed on the lorry driver for those breaches did not apply in his home country. He added that failure to disclose denied him the right to consider a personal injury claim and to properly consider private prosecutions.
12. The public authority's Review Panel conducted an internal review. The public authority informed the complainant of the outcome of that review in a letter dated 20 October 2006. The letter explained that the panel had met on 10 October 2006 and had reconvened on 23 October 2006. This letter also specified the information it had considered, namely the three items listed above at paragraph 8.
13. It upheld the original decision and reiterated its arguments for citing Section 40(2) and Section 30(1)(a)(i) & (ii). These arguments are set out later in this Notice. It also made some additional comments in relation to the mobile phone details and the documentation relating to the criminal case against the lorry driver.
14. In relation to the mobile phone details, it said that the Panel had read the content of the messages found on the mobile phone. It said that the Panel wanted to

reassure him that there were “*no threats or abusive messages contained within the records*”.

15. In relation to the criminal case against the lorry driver it provided a list of the documents it had withheld:
  - Correspondence between the public authority and GARDA [this is a reference to Garda Síochána na hÉireann, the police service of the Republic of Ireland].
  - Court process documents regarding the lorry driver
  - Internal memo regarding occupational directions
  - Correspondence between the public authority and the insurance company representing the lorry driver's employer
16. It also applied Section 40(2) to this documentation.

## The Investigation

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### Scope of the case

17. The complainant wrote to the Commissioner on 28 October 2006. He restated many of the concerns that he had raised in other earlier correspondence with the Commissioner and outlined the private actions he wished to pursue. He also explained that he wished to have the inquest into his son's death reopened because he was dissatisfied with the narrative verdict that had been issued by the Coroner. He believed that certain information had been deliberately withheld from the Coroner by the Police though his reasons for this belief were somewhat unclear.
18. The Commissioner's decision in this case addresses whether or not the public authority handled the complainant's request in accordance with the requirements of Part 1 of the Act. His decision will focus on that information which remains withheld from the complainant.
19. This is as follows:
  - The witness list – exempted by virtue of Section 40(2) (Unfair disclosure of Personal data)
  - Details from the deceased's mobile phone - exempted by virtue of Section 40(2) (Unfair disclosure of Personal data)
  - Documentation relating to the criminal case against the lorry driver exempted by virtue of Section 30(1)(a)(i) and (ii) (Investigations Information) and Section 40(2) (Unfair disclosure of Personal data)
  - Other information which had been redacted as being exempt by virtue of Section 40(2) (Unfair disclosure of Personal data) in a disclosure made to the complainant outside the scope of the Act.

20. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

## Chronology

21. The Commissioner wrote to the public authority on 2 December 2006. He asked for the following information:
- A list of all information that the public authority holds about the circumstances of the complainant's son's death.
  - An indication as to which information had already been supplied to the complainant outside the Act
  - Confirmation whether complete copies were disclosed to him.
  - Copies of withheld information as itemised in the public authority's refusal notice of 6 September 2006
  - Copies of any additional information relevant to the request but which had not been disclosed already to the complainant outside the Act
22. The complainant wrote to the Commissioner on 1 December 2006 to outline the efforts he was making to bring his concerns to the attention of appropriate bodies in the Republic of Ireland (the home country of the lorry driver and his employer). He commented that he had received a prompt response from the Irish Taoiseach, Bertie Ahern T.D., and contrasted this promptness unfavourably with delays at the Commissioner's office. He also commented that there was considerable public interest in increasing understanding of the jurisdictional difficulties that can occur when a citizen of one EU state commits a crime in another EU state. He said that he had received conflicting information as to whether any action was going to be taken in the Republic of Ireland and commented that there had been difficulties in serving a summons on the lorry driver because he was not a UK citizen.
23. He stated "*I believe that proceedings should have been brought against the employer in this country as a test case to establish Case Law and if not proceedings should have been brought against the employer in Ireland particularly as there is good evidence that serious offences were committed on a regular basis for up to five years by [the employer's drivers] and it is clearly very important to know what advice was given by [an officer of the public authority] and his colleagues to the Irish Garda and Transport Authorities to understand why they did not enforce the law*".
24. The public authority responded to the Commissioner on 14 December 2006.
25. It provided a list of all the information it held in relation to the circumstances of the young man's death divided into two parts. The first part was a full list of information held and the second part was a schedule of documents already sent to the complainant. It advised that some of these documents were redacted and that personal information concerning witnesses or officers was withheld.
26. It also provided copies of information withheld under the Act in September 2006.

27. Towards the end of his investigation on 14 November 2007, the Commissioner called the public authority to confirm a definitive list of that information which had been withheld by the public authority. The public authority assured the Commissioner that it had not withheld the names of any police officers contained in the information disclosed to the complainant.

### **Findings of fact**

28. The complainant's son was killed when he was hit by an articulated lorry while crossing the A1(M) in Hertfordshire on 26 July 2003.
29. In December 2005, the driver of the articulated lorry was found guilty of falsifying his tachograph records in relation to a journey which took place on one of the days prior to this incident. The falsification was discovered during the investigation of the accident. The driver was fined £750 with £750 costs and banned from driving for a year although the ban would not be effective in his home country, the Republic of Ireland.
30. The driver had argued in mitigation that he was under pressure from his employer to complete that earlier journey without the requisite rest stops. Attempts were made to take action in the UK against the road haulage company for putting pressure on its employee to contravene safe driving regulations but these failed because the company did not fall within UK jurisdiction. It was not suggested in that court case that the driver had exceeded his hours on the night of the traffic incident.

### **Analysis**

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#### **Procedural Issue**

31. In failing to issue a refusal notice in response to the request dated 12 July 2006 within twenty working days the public authority breached section 17(1) of the Act. Full details of the requirements of Section 17 are provided in a legal annex to this Notice.

#### **Exemptions**

32. The public authority has set out three main exemptions as its basis for withholding the information in question, Section 40(2) (Unfair disclosure of personal data), Section 30(1)(a)(i) (Investigations Information re: whether a person should be charged with an offence) and Section 30(1)(a)(ii) (Investigations Information re: whether a person charged with an offence is guilty).
33. The Commissioner notes that the public authority did not seek to apply one or more of the exemptions at Section 30 to all information when, arguably, it could have done. This exemption applies (subject to a public interest test) to the class of information involved here, namely information that is held for the purposes of an investigation into whether a person should be charged with an offence or

whether a person is guilty of an offence they have been charged with. In this case, as outlined in paragraph 2 above, the public authority investigated the young man's death to determine whether it was the result of criminal action and, during that investigation, it discovered evidence to suggest that the lorry driver had, some days before, committed an offence in relation to his tachograph records. This second investigation led to a criminal prosecution where the driver was found guilty, fined and banned from driving in the UK for a year.

34. The Commissioner assumes that the public authority focussed on the application of Section 40(2) because this is an absolute exemption not subject to a public interest test. This contrasts with Section 30 which applies to a broad class of information but which is subject to a public interest test. If Section 40(2) applies then the balance of public interest regarding the application of Section 30 is not relevant.
35. Where Section 40(2) is deemed to be applicable, the Commissioner encourages public authorities to consider redacting information which identifies individuals and to disclose the remainder unless it is exempt for another reason. In this case, the public authority made efforts to do so in order to facilitate, as far as possible, the private disclosure of information to the complainant as he is the father of the deceased. However, the public authority has argued that the information which it redacted from private disclosure is exempt by virtue of Section 40(2). Other information which it did not disclose is also exempt by virtue of Section 40(2) or by virtue of Section 30(1).

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

36. Full details of this exemption are given in a Legal Annex to this Notice but, in brief, this exemption applies absolutely where disclosure would contravene one of the data protection principles under the Data Protection Act 1998 ("DPA98"). There are eight data protection principles to ensure appropriate handling of information relating to identifiable living individuals. The Commissioner believes that the most appropriate data protection principle to consider is the first principle.

### **First data protection principle**

37. The first principle has two main components and, in cases involving sensitive personal data (e.g., information about a person's health or about criminal offences they have committed or are alleged to have committed), there is an additional component. These are as follows:
  - Requirement to process all personal data fairly and lawfully
  - Requirement to satisfy a DPA98 Schedule 2 condition for processing of all personal data
  - Additional requirement to satisfy a DPA98 Schedule 3 condition for processing sensitive personal data (if applicable)
38. Both (or, where applicable, all three) requirements must be satisfied to ensure compliance with the first data protection principle. If even one requirement

cannot be satisfied, processing will not be in accordance with the first data principle.

### **Fairness and lawfulness**

39. In considering fairness, the following are significant factors:
- What are the reasonable expectations of the individual in relation to the handling of their personal data?
  - What was that person told about what would happen to their personal data?
  - Is any duty of confidentiality owed to that person?
40. Disclosure is unlawful where, for example, a statutory prohibition applies, such as the statutory prohibition on making public the name of a person who has alleged that a sexual offence has been committed against them. The Commissioner has not identified any statutory prohibition that would apply in this case.

### **DPA98 Schedule 2 and 3 conditions**

41. In identifying a DPA98 Schedule 2 condition for processing the Commissioner considers that the most appropriate condition is at paragraph 6(1) which is listed in a Legal Annex to this Notice. This condition sets out a balance of interests which should be considered.
42. This balance of interests test has been described as an “inverse public interest test”. This refers to and contrasts with the balance of public interest test which applies to those exemptions under the Act which are not absolute, such as the exemption at Section 30. Under the Act, the public interest is presumed to favour disclosure unless outweighed by the public interest in maintaining the exemption, i.e., in avoiding the harm identified in that exemption.
43. The so-called “inverse public interest test” treats the question of disclosure in reverse. Here, the public interest favours protecting a person’s privacy unless the public’s legitimate interest in accessing that information via the Act carries greater weight. Factors which might lend weight to the disclosure of personal data are:
- the degree of sensitivity of the information in question
  - the need for transparency regarding actions taken and decisions made by individuals
  - the seniority of the individual where he or she is a public official
44. The effect of DPA98 Schedule 3 is to impose a higher threshold for disclosure of more sensitive information. The conditions are listed in a legal annex to this notice.

### **Whose personal data is it?**

45. The Commissioner has identified personal data relating to a number of identifiable living individuals. These can be identified singly or collectively as follows:



- Witnesses who are members of the public including members of the public acting in their professional capacity
- Witnesses who are officers of the public authority
- Individuals who called the complainant's son on his mobile phone
- Individuals who sent text messages to the complainant's son on his mobile phone
- Individuals who were called by the complainant's son from his mobile phone
- Individuals to whom the complainant's son sent text messages
- The lorry driver

### **The witnesses (members of the public)**

46. The personal data of various witnesses is found in a specific witness list which is referred to in correspondence between the complainant and the public authority. Witnesses are also referred to by name in other parts of the information.
47. The information redacted in the disclosures already made to the complainant constitutes personal data relating to identifiable individuals. The public authority determined that such a disclosure would be unfair and therefore in contravention of the requirements of the first data protection principle.
48. In the Commissioner's view, the witnesses who are members of the public can be subdivided into two groups. The first sub-group is comprised of individuals whose connection with events is either accidental or through acquaintance with the young man who died. The second sub-group is comprised of individuals who are not police officers but whose connection with the events of July 2003 is nonetheless of a professional nature.

### **Members of the public - first sub-group**

49. The Commissioner is satisfied that disclosure of the personal data contained in the requested information which relates to these individuals would be unfair. It includes, for example, personal contact details. In the Commissioner's view, it would be wholly outside the reasonable expectations of these individuals to make public any of their personal data that is contained in the requested information. The Commissioner therefore agrees that this information is exempt from disclosure under the Act by virtue of Section 40(2).

### **Members of the public - second sub-group**

50. The Commissioner is satisfied that the disclosure of this information, even though it relates to individuals acting in their professional capacity, would also be unfair. It also includes contact details, the disclosure of which would be outside the reasonable expectation of those individuals.

### **Police Officers**

51. As described in paragraph 27 above, the public authority has assured the Commissioner that it has not withheld the name of any police officer who had any dealings with this case in any of the information that it has disclosed to the

complainant. The Commissioner would support this approach because he does not consider that disclosure of police officers' names in this case would contravene the requirements of DPA98. Where personal data relating to police officers is included in information which remains withheld, the inclusion of this personal data would not be sufficient reason to withhold the information. There may be other reasons for withholding this information, e.g., because it forms part of information which is exempt by virtue of Section 30. This is discussed in more detail later in this notice.

### **Those who sent or received calls and text messages**

52. As part of its investigation, the public authority compiled information about calls and text messages to and from the complainant's son's mobile phone. The Commissioner is satisfied that this information constitutes the personal data of the individuals who sent or received the calls and text messages.
53. While there may be powerful arguments as to why a father might have access to his deceased son's mobile phone information, these cannot form part of the Commissioner's decision regarding fairness. Telephone calls and text messages exchanged between friends and acquaintances are, in the Commissioner's view, wholly private matters and there must be very compelling reasons to override that expectation of privacy. The complainant contends that the records must show evidence of criminality e.g., threats against his son's life. He would argue that this provides a compelling reason for disclosure in the public interest where disclosure demonstrates that the public authority has been remiss in its duties to investigate the circumstances surrounding his son's death. The public authority sought to reassure the complainant there was nothing of a threatening or abusive nature in the records. The complainant is not convinced.
54. Having examined the information, the Commissioner did not see anything of a threatening or abusive nature. He does not consider the public interest is served in this case by proving a negative, i.e., by proving that there is nothing of an abusive or threatening nature in the records by disclosing them to the public at large. This would, in the Commissioner's view, constitute an unnecessary and wholly unwarranted intrusion into the privacy of those who sent calls and messages to or received calls and messages from the complainant's son's phone.

### **The lorry driver's personal data**

55. The information in question refers to the fact that the lorry driver was charged, prosecuted and convicted of a criminal offence. As such it constitutes his sensitive personal data. Considering the three elements referred to in paragraph 37 the Commissioner is unable to identify a condition for processing in Schedule 3 of DPA98 which could be satisfied to allow disclosure of this sensitive personal data under the Act.
56. The Commissioner recognizes that certain parts of this personal data were put into the public domain by virtue of contemporaneous media reports. However, the Commissioner does not believe that this means that such information should

necessarily be made available under the Act upon request. In a recent Decision Notice (ICO ref: FS50075171, the Commissioner noted:

*“5.3.4 The Commissioner recognises that at the time a case is heard in court, personal data is inevitably disclosed to those attending court, and in the absence of restriction on reporting, could be made known to the wider world. However the Commissioner believes that in practice public knowledge of the issues is only short lived and may be limited to only a small number of people. Even where cases are reported in newspapers this does not lead to the establishment of a comprehensive, searchable database of offenders.*

*5.3.5 To create such a data base would prejudice the principle of the rehabilitation of offenders. There is established public policy on controlling access to the records of those who have been involved with the criminal justice system as demonstrated by the creation of the Criminal Records Bureau. It is clearly not desirable for the Freedom of Information Act to undermine these principles.”*

57. This decision notice can be accessed in full via the Commissioner's website. [http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50075171.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50075171.pdf)

## **Anonymisation**

58. Taking the above into account, the Commissioner has considered whether any of the information which is exempt by virtue of Section 40(2) could be anonymised, i.e., where the names and other information identifying living individuals are redacted. Where an individual cannot be identified from information it is not that individual's personal data and the requirements of DPA98 do not apply to it.
59. Having considered the information, the Commissioner has identified one section which could be anonymised. This relates to correspondence between the public authority and the Garda Síochána na hÉireann (the “Garda”). In unredacted form, it includes the lorry driver's sensitive personal data. By removing certain details, the Commissioner believes it would be possible to disclose the information without disclosing personal data.
60. The public authority has argued that this information is also exempt by virtue of Section 30(1).

## **Section 30(1) – Investigations Information**

61. This exemption applies where information has been held at any time by a public authority for the purposes of any investigation which it has a duty to conduct with a view to ascertaining whether a person should be charged with an offence or whether a person charged with an offence is guilty. This is a class-based qualified exemption, i.e., if the information in question is of the class of information described, it is exempt from disclosure subject to a balance of public interest test.

62. The investigation to which this information relates is the investigation into the lorry driver's falsification of driving records. The Commissioner is satisfied that the correspondence falls within the definition of the class of information described in Section 30(1).
63. Having determined that the information is exempt information by virtue of Section 30(1), the Commissioner went on to consider whether the public interest in maintaining that exemption outweighs the public interest in disclosure. When doing so, the Commissioner considered the arguments for and against disclosure of the anonymised information, not the information which identifies the lorry driver and his employer.

### **The balance of public interest**

64. In previous decisions of the Commissioner and in previous judgments of the Information Tribunal, it has been found that the balance of public interest in Section 30 cases is generally likely to favour maintaining the exemption.
65. The Commissioner has identified four key factors to examine in relation to the balance of public interest as follows:
- the stage or stages reached in any particular investigation or criminal proceedings;
  - the significance or sensitivity of the information;
  - the age of the information; and
  - whether and to what extent the information has already been released into the public domain

The complainant has also made arguments as to why he, as the father of the deceased, should have access to the information in question. In the Commissioner's view it is wholly understandable that a person in such a position would wish to access as much information as possible in order to learn as much as he could about his son's death. However, disclosure under the Act is disclosure to the public at large rather than to particular individuals with a private interest in the information. The Commissioner's decision cannot, therefore, assign any particular weight to the complainant's private reasons for accessing the information unless they reflect a wider public interest.

### **What stage has an investigation or any criminal proceedings reached?**

66. The Commissioner would argue that, save in the most unique circumstances, the public interest would not favour disclosing investigations information where that investigation is ongoing. There is, in the Commissioner's view, a strong public interest in protecting police forces' control over the flow of information they hold in relation to an active investigation. Where the matter has gone to court, the Commissioner believes there is a similarly strong public interest in supporting the presiding judge or magistrate's authority regarding the flow of information to both parties and to the public at large. This also ensures that principles surrounding the administration of justice are protected.

67. In this case, the investigation into the lorry driver's falsification of tachograph records and the criminal proceedings related to that investigation have both concluded resulting in his prosecution. The Commissioner is not aware of any appeal that was submitted in relation to the prosecution. In other words, disclosure would not necessarily have a prejudicial effect in relation to this particular investigation or prosecution. That does not mean that disclosure might not have wider prejudicial consequences in relation to the way investigations might be conducted in the future.

#### **How significant or sensitive is the information?**

68. As far as the investigation into the driver's falsification of his records is concerned, this information is not particularly significant. It was created after the successful prosecution of the driver and therefore had no bearing on the outcome of that investigation or that prosecution. However, it is somewhat sensitive insofar as it is copy correspondence between the public authority and a foreign police force about a particular case. As such, the Commissioner acknowledges the public authority's reluctance to disclose such information as a matter of course. It was not clear at that point that no action would be taken against the driver or his employer in the Republic of Ireland and, arguably, information which sets out the investigation or the prosecution in the UK could have a prejudicial outcome on any legal proceedings or investigation activities in the Republic of Ireland. However, the public authority did not provide any arguments on this point and, therefore, the Commissioner is unable to determine with any certainty whether disclosure of this particular information would, of itself, have a negative impact on proceedings in that country that might have arisen.

#### **How old is the information?**

69. The information was created relatively recently and relates to events which occurred in the last five years. The Commissioner recognises that disclosure of relatively recent investigations information is more likely to have a negative impact on police investigations. For example, there may well be ongoing or related matters arising from or connected to an earlier investigation which may be affected by disclosure in a manner which is against the public interest. The public authority did not draw the Commissioner's attention to any ongoing or related matters which might be affected in such a way and so the Commissioner is unable to determine with any certainty whether this is applicable in this case.
70. He would note as a general principle that investigations information which is created relatively recently is more likely to include information which reveals current techniques or procedures, the disclosure of which could have a negative impact on other investigations. The public authority did not, however, provide any arguments on this point in relation to the correspondence between itself and the Garda.

#### **Has the information been put into the public domain?**

71. There has been contemporaneous reporting of this prosecution in both the UK and the Republic of Ireland (the home country of the lorry driver). Concerns

about the nature of criminal proceedings taken against the driver and his employer have also been put into the public domain by the complainant himself and by his MP, with whom he has raised the matter. These concerns focus not only on this particular incident, the driver and his employer, but also on the wider question of jurisdiction. The complainant has repeatedly raised this point with the Commissioner as part of his submissions in favour of disclosure.

72. The Commissioner believes that there is particular merit to this point. A citizen of an EU country (Republic of Ireland) was convicted of contravening UK legislation which is derived from EU regulation. As far as the Commissioner can gather, legislation of a similar nature exists in the Republic of Ireland. This legislation sets out the hours a driver can spend at the wheel for work and the hours he or she must rest. In this case, the driver argued in mitigation that he had been put under pressure by his employer to disregard the applicable regulations. By the time the matter had been brought to the attention of the Irish authorities, it transpired that the offences in question were statute barred in that country.
73. In the complainant's view, either the relevant legislation or the organisations enforcing it have fallen short in some way. In the complainant's view, the driver and/or his employer should have received a harsher penalty in the UK and sanction in their home country for contravening legislation that should apply in some form across the EU. Arguably, there is a public interest in disclosing the correspondence between the public authority and the Garda to illustrate how the law was applied in this case and to inform public debate as to whether the law was sufficient in this regard. The Commissioner believes this argument carries significant weight.
74. The Commissioner has also learned that since the events described above there has been considerable discussion between British and Irish authorities on the matter of applying driver disqualifications from one country to the other. According to the website of the British-Irish Council which was set up as part of the Good Friday Agreement, a communiqué was issued on 9 February 2006 reflecting discussions between UK and Irish Ministers on a proposed bilateral agreement on the mutual recognition of driving disqualifications.  
<http://www.british-irishcouncil.org/documents/transport2.asp>
75. In the Commissioner's view, this demonstrates that there has been a lengthy debate and discussion between the UK and Irish governments on this subject which is likely to have been ongoing at the time of the traffic incident in 2003 and the prosecution of the driver in 2004. It is clear that the impetus for the debate has been the practicalities of driver disqualification north and south of the border between the UK and the Irish Republic. However, the British-Irish Council's communiqué does not seem to suggest that mutual recognition of driving disqualifications should be restricted to drivers from Northern Ireland and the Irish Republic. In other words, under a mutual recognition scheme, the lorry driver's disqualification in the UK in this case would probably have been applicable in his home country. He would have been unable to work in either national or international haulage for a year and his employer would have suffered a labour resource shortage as a result of his disqualification in his home country.

76. The Commissioner notes that the question of penalties for foreign drivers who commit offences in the UK is not restricted to penalties for drivers from the Irish Republic. On 17 January 2007, a parliamentary question was tabled to ask the Secretary of State for Transport what timetable he has set for the enforcement of traffic penalties on foreign drivers who have left the UK. The response refers to consultation at European Commission level with legislative developments proposed in the UK and reflects the fact that this matter has been the subject of widespread debate across the EU.
77. In the Commissioner's view, there were compelling arguments for the release of this correspondence in anonymised form at the time of the request for the following reasons:
- to illustrate how legislation derived from EU regulations applied in practice at the time in relation to an offence committed by an EU driver in the UK
  - to inform debate about proposed changes to cross-border enforcement of such matters
  - to understand whether the matter could have been brought to the attention of the Irish authorities within the time limits applicable in that country had the public authority (or any other person) acted differently
  - to illustrate the wider significance of the British-Irish Council discussions on mutual recognition of driving disqualifications
78. The Commissioner believes that these arguments remain persuasive at the time of this Notice.

### **The Balance of Public Interest Test – Conclusion**

79. The Commissioner recognises that a significant proportion of police investigation information is inherently sensitive. He also recognises that its disclosure requires careful management to avoid undermining the very purpose for which it was collected, namely investigations to determine whether an offence has been committed and, where it has, to determine who is guilty of that offence. Section 30 seeks to protect the proper course of such investigations and any resulting proceedings that arise from those investigations. Even when a case is closed, there is a risk that the disclosure of investigations information will undermine subsequent or related investigations, particularly where, for example, techniques of investigation are disclosed.
80. However, the Commissioner believes that, in this case, there are compelling arguments for disclosing an anonymised version of the information contained in the correspondence sent to the Garda which are not outweighed by the public interest in maintaining the Section 30 exemption which applies to that information.
81. In relation to any other information which is not exempt by virtue of Section 40(2) but which is nonetheless exempt by virtue of Section 30(1), the Commissioner believes that the public interest in maintaining the exemption in relation to that information outweighs the public interest in disclosure for the reasons outlined in paragraph 79 above.

## The Decision

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82. The Commissioner's decision is that the public authority partly dealt with the request for information in accordance with the Act.
83. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- It properly applied either Section 40(2) or Section 30 in relation to most of the requested information.
84. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- It did not respond to the complainant's request for information of 12 July 2006 within the 20 working days specified in Section 10 of the Act. As such it contravened the requirements of Section 17(1).
  - It withheld from disclosure certain information under Section 30 in contravention of Section 1(1)(b) of the Act. Although the exemption applied, the public interest in maintaining the exemption did not outweigh the public interest arguments in favour of disclosure.

## Steps Required

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85. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- It must disclose the information in the correspondence between itself and the Garda in an anonymised form to avoid disclosure to the public of information which identifies the lorry driver.
86. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## Failure to comply

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87. 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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88. 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)

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 28<sup>th</sup> day of February 2008**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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

## Legal Annex

### Extracts from the Freedom of Information Act 2000

#### Section 1 - General right of access to information held by public authorities

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

...

#### Section 10 – Time for compliance with request

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

(2) Where the authority has given a fees notice to the applicant and the fee is paid in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

(3) If, and to the extent that—

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
  - (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,
- the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

...

#### Section 17 - Refusal of request

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

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

...

### **Section 30 - Investigations and proceedings conducted by public authorities**

(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

...

### **Section 40 - Personal information**

(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 [1998 c. 29.] 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 [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

### **Extracts from The Data Protection Act 1998**

#### **SCHEDULE 1 The Data Protection 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.