

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 24 June 2009**

**Public Authority:** The Metropolitan Police Service  
**Address:** Public Access Office  
Empress State Building  
Lillie Road  
London  
SW6 1TR

### Summary

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The complainant requested information regarding the arrest of a named individual including their suspected involvement in a mugging. The Metropolitan Police Service refused to confirm or deny that this information was held, citing the exemptions at sections 40(5) (Personal Information), 30(3) (Investigations and Proceedings), 31(3) (Law Enforcement) and 44(2) (Prohibitions on Disclosure).

While the Commissioner has found that the Metropolitan Police Service did not deal with the request for information in accordance with the procedural requirements in sections 10(1), 17(1) and 17(1)(b) of the Act, he finds that section 40(5)(b)(i) is engaged. He has not therefore gone on to consider the other exemptions cited.

The Commissioner does not require any steps to be taken.

### 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 requested information from the Metropolitan Police Service on 8 January 2007. His request was for:

*'information concerning the arrest of [named individual] leading to their caution for possessing cannabis on [date], including information about [named individual's] suspected involvement in the mugging of a woman'.*

3. The Metropolitan Police Service issued a refusal notice on 9 February 2007 neither confirming nor denying that it held the information requested, citing the exemptions at sections 40(5) (Personal Information), 30(3) (Investigations and Proceedings), 31(3) (Law Enforcement) and 44(2) (Prohibitions on Disclosure).
4. The complainant requested an internal review on 13 February 2007, arguing that the existence of the requested information has been widely reported in the media and is a matter of public knowledge.
5. On 29 June 2007, the Metropolitan Police Service wrote to the complainant, upholding its decision neither to confirm nor deny that it held the requested information.

## The Investigation

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### Scope of the case

6. The complainant contacted the Commissioner on 4 July 2007 to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - that the police refuses to consider the public interest in his request for the information because it refuses to acknowledge the information exists;
  - how it can be against the Data Protection Act to release information which is already in the public domain.

### Chronology

7. The Commissioner wrote to the Metropolitan Police Service on 26 January 2009 inviting it to make further submissions in support of its decision neither to confirm nor deny whether the information was held. In particular, the Commissioner asked the Metropolitan Police Service to explain why confirming or denying that it held the information would result in disclosure of exempt information. He also asked the Metropolitan Police Service to comment on the complainant's view that its refusal was not appropriate as the information was already in the public domain.
8. The Metropolitan Police Service responded on 5 March 2009, apologising for the delay and providing a full response to the Commissioner's questions.
9. Further clarification was sought during a telephone call to the Metropolitan Police Service on 14 April 2009 in relation to one aspect of the exemptions cited.

## Analysis

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### Procedural matters

#### Section 17 Refusal of request

10. 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.'*

11. 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.'*

12. In this case, the complainant's request was received by the Metropolitan Police Service on 8 January 2007 but the Metropolitan Police Service did not issue its refusal letter until 9 February 2007. It therefore took the Metropolitan Police Service 24 working days to respond to the information request. Accordingly the Commissioner finds that, in failing to confirm or deny within 20 working days whether it held the requested information, the Metropolitan Police Service breached the requirements of section 10(1) and that it also breached the requirements of section 17(1) by failing to provide the details required by that section within 20 working days.

13. Section 17(1)(b) places an obligation upon the public authority that its refusal notice *'specifies the exemption in question'*. The Commissioner's view is that the public authority is thereby required to refer to the specific part(s) of the relevant exemption(s).

14. In this case, when it responded to the complainant, the Metropolitan Police Service cited section 40(5) as one of the reasons for neither confirming nor denying that information within the scope of the request is held without specifying the paragraph and sub-paragraph it was applying.

15. The Commissioner would expect to see the full section details provided, namely section 40(5)(b)(i). In failing to specify the full details of the relevant subsection, the Commissioner finds the Metropolitan Police Service in breach of section

17(1)(b) in failing to supply a notice compliant with the requirements of that section within 20 working days.

16. Section 17 (3) provides that:

*'A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -*

*(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or*

*(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.'*

17. In *McIntyre v Information Commissioner & Ministry of Defence* (EA/2007/0068) the Information Tribunal commented that:

*'the Act encourages or rather requires that an internal review must be requested before the Commissioner investigates a complaint under s50. Parliament clearly intended that a public authority should have the opportunity to review its refusal notice and if it got it wrong to be able to correct that decision before a complaint is made'.*

18. In this case, the Metropolitan Police Service's refusal letter of 9 February 2007 did not include an assessment of the public interest test, where appropriate, for the exemptions it was citing. However, the Commissioner notes that this assessment was provided to the complainant in the Metropolitan Police Service's correspondence dated 29 June 2007. He is therefore satisfied that the Metropolitan Police Service corrected its error by the time of the completion of the internal review, thus meeting its obligations under the Act to provide this information.

## **Exemptions**

19. Where a public authority seeks to rely on several exemptions, the Commissioner considers that in many cases it will be appropriate to consider absolute exemptions first. If he decides that absolute exemptions have been incorrectly applied, he will then move on to consider qualified exemptions. In this case, the Commissioner has focussed his investigation on section 40.

## **Exemption – section 40 Personal Information and the exclusion from the duty to confirm or deny**

20. Generally, the provisions of section 40(1) to (4) exempt 'personal data' from disclosure under the Act if to do so would breach the data protection principles. In relation to a request which constitutes the personal data of individual(s) other than the applicant(s), as in this case, section 40(5)(b)(i) further excludes a public authority from complying with the duty imposed by section 1(1)(a) if complying with that duty would contravene any of the data protection principles, or section 10 of the Data Protection Act 1998 (the "DPA"), or would do so if the exemptions in section 33A(1) of that Act were disregarded.
21. A full text of section 40 can be found in the Legal Annex at the end of this Decision Notice.
22. Therefore, when determining in this case whether or not the Metropolitan Police Service was correct neither to confirm nor deny that information is held on the basis that section 40(5)(b)(i) applied, the Commissioner must consider the following questions:
  - Would confirming or denying whether information is held constitute a disclosure of personal data? If so, whose personal data?
  - If confirming or denying would involve the disclosure of personal data, would this contravene any of the data protection principles and, if so, which ones and why?

### **Would confirming or denying whether information is held constitute the disclosure of personal data? If so, whose personal data?**

23. Personal data is defined in section 1(1) of the Data Protection Act (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 intention of the data controller or any other person in respect of the individual'.*

24. Sensitive personal data is defined in section 2 of the DPA. It is personal data which falls into one of the categories set out in section 2 of the DPA, ie personal data consisting of information as to:

‘...’

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

25. The Commissioner notes that the request refers to a named individual. In this instance, there is no reason to believe that the named individual is deceased and therefore information, if held, would relate to a living individual.
26. The Commissioner also notes that the complainant requested information concerning the arrest of the named individual. Due to the nature of the information requested such information would, if held, reveal information about the commission or alleged commission by him of an offence.
27. The Commissioner is therefore satisfied that information within the scope of the request would, if held, fall within the definition of sensitive personal data as defined above.

**Would confirming or denying whether information is held contravene any of the data protection principles?**

28. The Commissioner has next considered whether or not confirming or denying information is held would contravene any of the data protection principles.

**The first data protection principle**

29. The Commissioner considers the first data protection principle to be the relevant one in this case. This states that:

*‘Personal data shall be processed fairly and lawfully and in particular shall not be processed unless*

- a) at least one of the conditions in DPA schedule 2 is met, and*
- b) in the case of in the case of sensitive personal data, at least one of the conditions in schedule 3 is also met’.*

30. As he is satisfied that information pertinent to the request would, if held, constitute sensitive personal data, the Commissioner must consider the criteria that have to be met in order for sensitive personal data to be disclosed under the Act.
31. The Commissioner's approach when considering whether sensitive personal data should be disclosed under the Act is to begin by considering whether any of the conditions in schedule 3 can be met. (The full text of the schedule can be found in the Legal Annex at the end of this Decision Notice).
32. Having considered the conditions listed in schedule 3, and in particular those in paragraphs 6 and 7, the Commissioner has formed the view that none of these conditions can be met.
33. Therefore, he is satisfied that the exemption in section 40(5)(b)(i) of the Act is engaged and provides an exemption from confirming or denying that information is held. This is because the effect of complying with section 1(1)(a), by either confirming or denying that information is held, would constitute the disclosure of the named individual's sensitive personal data. This would breach the first data protection principle because none of the conditions in Schedule 3 can be met.
34. As the Commissioner has decided that a schedule 3 condition for the disclosure of this information cannot be met, and that therefore disclosure would be in breach of the first principle of the DPA, he has not gone on to consider whether there is a schedule 2 condition or whether disclosure would be fair or lawful.
35. Since section 40(5)(b)(i) is an absolute exemption, no public interest test applies.

### **The public domain issue**

36. The complainant has argued that the requested information is already in the public domain, having been widely reported in the media, and therefore the Metropolitan Police Service's refusal to confirm or deny is not appropriate.
37. While the Commissioner takes the view that most exemptions under the Freedom of Information Act will not usually apply to information which is in the public domain, that general position does not apply to information which constitutes personal data (and is therefore subject to section 40). The reason is that personal data is subject to the separate legal regime of the Data Protection Act, which focuses on legitimate 'processing'.
38. The Commissioner is aware that there has been media coverage detailing the named individual whose information is the subject of the request. However, in relation to the information requested by the complainant, the Commissioner is not aware of any relevant information being attributed to the Metropolitan Police Service or of the Metropolitan Police Service having issued a press statement or public briefing in relation to this matter.

39. As the Commissioner has determined that a schedule 3 condition cannot be satisfied in this case, confirming or denying that this information exists would result in the Metropolitan Police Service being in breach of the DPA. This is because it would reveal sensitive personal data, namely whether or not the named individual has been dealt with by the police in respect of a caution and involvement in a mugging.

### **Other exemptions – sections 30, 31 and 44**

40. Since the Commissioner has concluded that the Metropolitan Police Service cited section 40(5)(b)(i) of the Act appropriately he does not propose to reach any conclusion in this Decision Notice regarding the Metropolitan Police Service's application of the exemptions in sections 30, 31 and 44.

### **The Decision**

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41. The Commissioner's decision is that the Metropolitan Police Service correctly relied on section 40(5)(b)(i) to refuse to confirm or deny whether it held the requested information.
42. However, the Commissioner has also found that the Metropolitan Police Service did not deal with the request for information in accordance with the procedural requirements of the Act. In failing to issue the complainant with a valid refusal notice within twenty working days, the Metropolitan Police Service breached sections 10(1) and 17(1). Additionally, this refusal notice did not meet the requirements of section 17(1)(b) as it did not refer to the sub sections of one of the exemptions claimed.

### **Steps Required**

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43. The Commissioner requires no steps to be taken.

### **Other matters**

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44. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
45. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner



has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 90 working days for an internal review to be completed. Whilst the Commissioner accepts that the complainant's request for review was submitted just prior to the publication of his guidance on the matter, he notes that the majority of the delay occurred after his guidance had been made public.

## Right of Appeal

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46. 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 24<sup>th</sup> day of June 2009**

**Signed .....**

**David Smith  
Deputy Commissioner**

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

## LEGAL ANNEX

### General Right of Access

**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 1(6)** provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

### Time for Compliance

**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.’*

### Refusal of Request

**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 17(2)** states –

“Where–

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-

(i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

**Section 17(3)** provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

**Section 17(4)** provides that -

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

**Section 17(5)** provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

**Section 17(6)** provides that –

“Subsection (5) does not apply where –

(a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

**Section 17(7)** provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

### **Personal Information**

**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 exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

**Section 40(4)** provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

**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) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
  - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”

**Section 40(6)** provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

**Section 40(7)** provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.

## The Data Protection Act

### 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 process 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.