

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 28 July 2009

**Public Authority:** Independent Police Complaints Commission  
**Address:** 90 Holborn  
London  
WC1 6BH

### Summary

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The complainant requested to know whether the IPCC had carried out an investigation into one officer and if so requested a copy of the IPCC investigation of the officer and another officer. The IPCC informed the complainant that it was not obliged to confirm or deny if the information is held by virtue of section 40(5) of the Act. Having investigated the case the Commissioner is satisfied that the IPCC correctly applied section 40(5) 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. On 13 June 2008 the complainant made the following request for information to the Independent Police Complaints Commissioner (IPCC):

"Under the Freedom of Information Act:

1. Please advice whether the IPCC carried out an investigation in police officer (a) and if the answer is yes:
2. Please may I have sight of the reports and recommendations of the IPCC into both police officer (b) and police officer (a)."

3. The IPCC responded on 11 July 2008 explaining that it was under no obligation to confirm or deny whether the IPCC holds the information requested by virtue of section 40(2) and 40(5) of the Act.
4. The complainant responded on 18 July 2008 requesting an internal review of the IPCC's decision.
5. The IPCC carried out an internal review and communicated the findings to the complainant on 17 September 2008. The internal review upheld the application of section 40(2) and 40(5) to neither confirm nor deny if the requested information is held.

## The Investigation

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### Scope of the case

6. On 13 November 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the information in the public domain regarding both named officers.

### Chronology

7. The Commissioner began his investigation by writing to the IPCC on 24 November 2008. In his letter the Commissioner informed the IPCC that he was in receipt of a complaint and asked the IPCC for any further representations it wished to make.
8. The IPCC responded on 13 January 2009 providing further arguments to support its reliance on section 40(2) and 40(5) to neither confirm nor deny if the requested information is held.

### Findings of fact

9. The IPCC issued a press statement on 23 April 2008 stating that an MPS Officer was required to resign following an IPCC investigation. However, the IPCC do not name the office in question:  
[http://www.ipcc.gov.uk/news/pr230408\\_mpsresign.htm](http://www.ipcc.gov.uk/news/pr230408_mpsresign.htm)

### Analysis

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#### **Exemption: Section 40(5)(b)(i)** (Exclusion from the duty to confirm or deny)

10. The information was requested by the complainant in the belief (and it is irrelevant whether this is right or wrong) that there may have been an IPCC investigation into the conduct of police officer (a) and that there was an IPCC

investigation into police officer (b) This therefore prompted the Commissioner to initially consider whether the public authority would have been automatically excluded from the duty imposed on it by the provisions of section 1(1)(a) (confirming or denying) by virtue of the provisions of section 40(5)(b)(i).

11. From the outset, it is important to point out that the Act except in very few scenarios (none of which are applicable in this case) is applicant blind. In other words, a disclosure made under the Act is in effect to the world at large, as every other applicant would be entitled to that information upon request.
12. Generally, the provisions of section 40 subsections 1 to 4 exempt 'personal data' from disclosure under the Act. In relation to a request which constitutes the personal data of individual(s) other than the applicant(s), 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 DPA or would do so if the exemptions in section 33A(1) of that Act were disregarded.
13. A full text of section 40 is available in the Legal Annex at the end of this Notice.
14. Section 40(5)(b) (i) states:
  - “The duty to confirm or deny –
  - (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 would have to be given to comply with 1(1) (a) would (apart from this Act) contravene any of the data protection principles”
15. In order for section 40(5) (b) (i) to be correctly applied the public authority must establish the following two elements:
  - (1) That to confirm whether or not the information is held by the public authority would reveal the personal data of a data subject as defined by section 1(1) of the DPA
  - (2) That to confirm whether or not information is held would contravene one of the data protection principles.

**Would confirming or denying whether information is held reveal personal data of the data subject?**

16. Personal data is defined by section 1(1) of the DPA. This states that –
  - “personal data means data which relate to a living individual who can be identified -
  - (a) from those data,

(b) from those data and other information which is in the possession of the, 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”

17. The public authority informed the Commissioner that through confirming or denying that the information requested is or is not held it would expose to the public whether the named officers were or were not subject to an IPCC investigation. This would be the personal data of the officers. The Commissioner agrees with the public authority that whether or not someone was subject to an IPCC investigation would fall under the definition of personal data in the DPA.

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

18. The first data protection principle states in part; *‘Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met...’*

19. The Commissioner considers the most applicable condition for processing in this case is likely to be Schedule 2 (6)(1) which states;

*‘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.’*

20. The public authority argued that disclosure as to whether or not the officers had been subject to an IPCC investigation would be unfair. The IPCC stated that there has been no official confirmation with regard to either officer as to whether or not an investigation has taken place.

21. The Commissioner finds this argument persuasive. He believes that generally an officer would expect that any investigations would remain private between them and the IPCC. In addition he notes that the officers in question were not of a very senior grade. Therefore he believes that the individuals would be less likely than a more senior officer to have any expectation that the public would be told whether or not they had been the subject of an investigation.

22. The Commissioner has also taken into account the Police Reform Act 2002 as connected to the Police (Complaint and Misconduct) Regulations 2004. Section 11(7) of the Regulations states:

“As soon as is practicable after any misconduct hearing or other action that is taken in respect of the matters dealt with in any report submitted under paragraph 22 of Schedule 3 of the 2002 Act, the Independent Police Complaints Commission or, as the case may be, an appropriate authority shall notify any complainant and interested person of the outcome of that

hearing or action, including the fact and outcome of any appeal against the findings or sanctions imposed by such a hearing.”

23. In view of the above, the Commissioner has considered whether police officers, should irrespective of seniority, reasonably expect that information about IPCC investigations will be made readily available to others. However, any disclosure under the above Regulations is likely to be to parties who are already aware that an investigation is under way and he does not consider that the possibility of disclosure to certain limited parties in that context means that officers should reasonably expect that the public will be informed about whether or not they have been subject to an investigation.
24. The Commissioner has also considered the information in the public domain (two articles on the BBC news website) which were referred to by the complainant. One article makes no reference to an IPCC investigation and whilst the other article is linked to a press statement made by the IPCC there has been no confirmation by the IPCC of the individual who was investigated. The Commissioner therefore does not believe that the information publicly available either confirms or denies if there has been an IPCC investigation into the individuals named. Although the Commissioner accepts that it is possible for the articles in the press to be linked to the press statement by the IPCC this does not amount to a public statement, any linking of the two would be speculation. The Commissioner does not consider that a press article, containing speculation –is the same as a formal confirmation or denial by the IPCC. Further although both press articles names the officers, in one there is no reference to the IPCC and in the other the reference to the IPCC contains no confirmation or denial from them of the officer discussed.
25. While the Commissioner accepts that there may be a legitimate interest in the general public knowing whether officers, where appropriate, were investigated by the IPCC he feels that disclosure under the Act is not appropriate in this case as disclosure under the Act is not limited to interested parties but would be to the public at large.
26. The Commissioner has also considered whether to confirm that a particular officer was not the subject of an investigation would also be unfair. In this case the Commissioner believes that the approach needs to be uniform for any other approach would indirectly expose those that had been subject to an investigation. The Commissioner therefore feels that to confirm or deny whether there was not a disciplinary hearing would also be unfair.
27. Therefore the Commissioner finds that confirming or denying whether the requested information was, or was not held would be unfair and in breach of the first data protection principle. Therefore he is of the view that the public authority is exempt from the duty to confirm or deny whether it holds the requested information by virtue of section 40(5)(b)(i).
28. As the Commissioner has concluded that confirming or denying the existence of the information would breach the first data protection principle because it would

be unfair, he has not deemed it necessary to consider whether complying with 1(1) (a) would be lawful or meet any of the conditions in Schedule 2 of the DPA.

## **The Decision**

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29. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

The public authority correctly relied on section 40(5)(b)(i) to refuse to confirm or deny whether it held the requested information.

30. However, the Commissioner finds that in failing to cite the above exemption to the subsection, the IPCC breached the requirements of section 17(1)(b)

## **Steps Required**

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31. The Commissioner requires no steps to be taken.

## Right of Appeal

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32. 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 July 2009**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

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

## Legal Annex

### 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) 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)."

**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.