

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 27 October 2009

Public Authority: Chief Constable of West Mercia Police
Address: PO Box 55
Hindlip Hall
Worcester
WR3 8SP

Summary

The complainant requested a report commissioned by the police as part of an investigation into a perjury allegation made by him. The public authority refused to either confirm or deny whether it held information falling within the scope of the request and cited the exemptions provided by sections 30(3) (information relating to investigations), 38(2) (endangerment to health and safety) and 40(5)(b)(i) (personal information relating to third parties). The Commissioner finds that any information falling within the scope of the request would be the personal data of the complainant and so the request should have more properly been handled as a subject access request made under section 7 of the Data Protection Act 1998. The Commissioner also finds that the public authority breached section 17(1)(c) by failing to explain adequately why section 38(2) was believed to be engaged; and section 17(3)(a) by failing to explain the public interest test adequately in relation to sections 30(3) and 38(2).

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant made the following information request on 9 January 2009:

"I would be grateful for a copy of a Report made by Mr Edward Allen (Snr). This was a technical report commissioned by Telford Police in connection with an allegation of perjury."

3. The public authority responded to this on 22 January 2009. The public authority refused to confirm or deny whether it held the information requested and cited the exemptions provided by sections 30(3) (information relating to investigations), 38(2) (health and safety) and 40(5) (personal information). This refusal notice included a generalised harm test. The balance of the public interest in relation to sections 30(3) and 38(2) was also addressed in a generalised fashion.
4. The complainant responded on 31 January 2009 and requested that the public authority carry out an internal review of its handling of the request. The public authority responded to this on 5 March 2009. The refusal to confirm or deny was upheld.

The Investigation

Scope of the case

5. The complainant first contacted the Commissioner on 6 March 2009. The complainant specified that he did not agree that any of the exemptions cited by the public authority were engaged and asked that the Commissioner procure the disclosure of the information requested.

Chronology

6. The Commissioner contacted the public authority initially on 3 June 2009. The public authority was asked to respond with reasoning for the exemptions cited.
7. The public authority responded on 23 June 2009 and set out the background to the information request, stating that the complainant had taken court action. An expert witness participated in the court action. The court did not find in favour of the complainant.
8. Following this court action, the complainant made an allegation of perjury against the expert witness. The report that the complainant refers to in his request was, he believes, commissioned by the public authority as part of the investigation into his perjury allegation. The public authority also confirmed that it maintained that the exemptions previously cited were engaged.

Analysis

Exemptions

Section 40

9. The public authority cited the exemption provided by section 40(5) on the basis that to confirm or deny whether it held information falling within the scope of the request would constitute the disclosure of personal data relating to individuals

aside from the complainant. Section 40(5)(b)(i) was, therefore, the relevant subsection. This section is set out in full in the attached legal annex, as are all other legislative provisions referred to in this Notice.

10. Given the context of the information that the complainant has requested, the Commissioner considers it appropriate to consider whether the information is the complainant's personal data. This would mean that the relevant subsection would be 40(5)(a). This provides that the duty to confirm or deny does not arise in relation to information that does, or would if it were held, fall within the scope of section 40(1). Section 40(1) provides that information which is the personal data of the requester is exempt. The task for the Commissioner is, therefore, to consider whether, if any information was held by the public authority that fell within the scope of the request, this information would constitute the personal data of the complainant.
11. The Commissioner would stress that any conclusion that the exemption provided by section 40(5)(a) is engaged should not be taken as an endorsement of the handling of this request by the public authority. Instead, this should be taken as an indication that the view of the Commissioner is that the public authority should have recognised that this request was for the complainant's personal data and treated it as a subject access request made under section 7 of the Data Protection Act 1998 (the "DPA").
12. The Commissioner has considered two main factors here. First, in order to assess whether information falling within the scope of the request would constitute personal data, it has been necessary for the Commissioner to reach a view on what it is reasonable to anticipate would be within the content of the information requested. Secondly, the Commissioner has considered whether it is reasonable to conclude that this content would constitute the complainant's personal data.
13. The context of the information requested is described above at paragraphs 7 and 8. If the report does exist, it was commissioned in response to a perjury allegation made by the complainant. The purpose of this report would be to provide an expert opinion on the allegation. The Commissioner would anticipate that the content of this would include references to both the complainant, when addressing his allegation, and to the expert witness in the court action, when assessing the evidence this individual provided. The Commissioner would also anticipate that the form that this report would take would be an assessment of each of the grounds given by the complainant in support of his allegation by comparing these with the evidence given by the expert witness during the court action.
14. As to whether this content would constitute the personal data of the complainant, as noted above, it is likely that the content of this report would also include information relating to the expert witness. It would also be likely to include information relating to the author of the report. That this information may also include information that constitutes the personal data of individuals other than the complainant does not, however, preclude the possibility that this information is also the personal data of the complainant. That information can constitute the

personal data of more than one individual was recognised by the Information Tribunal in the case *Fenney v the Information Commissioner* (EA/2008/0001) where it stated:

“... There is no basis for arguing that the DPA intended that the only data subject to be considered when assessing a document incorporating data on more than one individual is the one whose data is more extensive or more significant. If information incorporates the personal data of more than one person the data controller is not required to attempt an assessment as to which of them is the more significant and to then recognise the rights to protection of that individual and ignore any others. Its obligations are set out in sections 7(4) to 7(6) DPA, which require it to consider whether the information requested includes information relating to a third party and, if it does, to disclose only if that third party consents or it is reasonable in all the circumstances (by reference to the particular matters identified in subsection (6)) to comply with the request without his or her consent.”
(paragraph 13)

15. Section 1(1) of the DPA provides the following definition of personal data:

“‘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, or is likely to come into the possession of, the data controller”

16. In order to reach a conclusion as to whether the anticipated content of the report would constitute the personal data of the complainant, the Commissioner has referred to his published guidance note “Determining what is personal data”. The following questions are given in this guidance note as an aid to determining what is personal data.

- i. Can a living individual be identified from the data, or from the data and other information in the possession of, or likely to come into the possession of, the data controller?

The question in this case is whether the complainant could be identified from any information held by the public authority that falls within the scope of the request. As previously noted, the Commissioner anticipates that any information held by the public authority that falls within the scope of the request would consider the merits of an allegation made by the complainant, including the specific detail of this allegation. The Commissioner would consider it highly likely that, in assessing an allegation made by the complainant, the complainant would be identified within this information.

- ii. Does the data ‘relate to’ the identifiable living individual, whether in personal or family life, business or profession?

The relevance of this question here is whether the information in question relates to the complainant. The view of the Commissioner is that this information would relate to the complainant in that any information held by the public authority that falls within the scope of the request would relate to the allegation made by the complainant.

17. The Commissioner considers it reasonable to conclude that the report requested by the complainant would, if it were held, relate to the complainant and that the complainant would be identifiable from this. This information would, therefore, constitute the personal data of the complainant and so would be subject to the exemption provided by section 40(1). As a result, the overall conclusion of the Commissioner is that the exemption provided by section 40(5)(a) is engaged.

Section 30(3) and 38(2)

18. As the Commissioner has reached the above conclusion on section 40(5)(a), it has not been necessary to go on to consider the other exemptions cited by the public authority.

Procedural Requirements

Section 17

19. As noted above at paragraph 3, the public authority included within the refusal notice a generalised 'harm test' rather than explaining clearly how endangerment relevant to section 38(2) would, or would be likely to, occur through confirmation or denial. The public interest was also addressed in a generalised fashion, rather than individually in relation to sections 30(3) and 38(2).
20. In failing to adequately explain why section 38(2) was believed to be engaged, the public authority did not comply with the requirement of section 17(1)(c). In failing to provide an adequate explanation as to why it believed that the public interest favoured the maintenance of the exemption in relation to both section 30(3) and section 38(2), the public authority did not comply with the requirement of section 17(3)(a).

The Decision

21. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act in that it breached section 17(1)(c) by failing to explain adequately why section 38(2) was believed to be engaged; and section 17(3)(a) by failing to explain the public interest test adequately in relation to sections 30(3) and 38(2). However, the Commissioner, in concluding that any information held by the public authority that falls within the scope of the request would constitute the personal data of the complainant and, therefore, that the exemption from the duty to confirm or deny provided by section 40(5)(a) was engaged, also concludes that the public authority was correct and in

compliance with section 1(1)(a) in neither confirming nor denying whether it held information falling within the scope of the request.

Other matters

22. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

The Commissioner would stress that the implication of this Notice is not that it is appropriate for a public authority to respond under the Freedom of Information Act to requests that are for the personal data of the requester. Instead, the Commissioner expects public authorities to recognise where a request is for the personal data of the requester and to treat it as a subject access request made under section 7 of the DPA, including in circumstances where the requester has specified the Freedom of Information Act when making their request.

23. In this case, the public authority should now treat the complainant's request as a subject access request and respond accordingly. The Commissioner would suggest that it will be appropriate for the public authority to do this as a matter of priority.
24. If, having received the response to this request, the complainant is not satisfied with this, he may contact this office and request for an assessment under section 42 of the DPA to be carried out. If the conclusion of this assessment is that the public authority has not complied with the DPA in responding to his request, the Commissioner will set out those steps that the public authority should take in order to ensure compliance with the DPA.
25. On a separate issue, the public authority's refusal notice of the 22 January 2009 explains that it aims to respond to complaints about the way in which requests are handled within two months. Such an approach does not accord with the Commissioner's published guidance on internal reviews, which explains that a review should be conducted within 20 working days. If exceptional circumstances apply, the review period may be extended to a maximum of 40 working days. In view of this the Commissioner advises that the authority amend its existing procedure to bring the timescales for completing reviews in line with his published guidance.
26. In this specific case, the Commissioner notes that the review slightly exceeded 20 working days, and is of the opinion that there were no exceptional circumstances to justify the additional time.

Right of Appeal

29. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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

30. 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 27th day of October 2009

Signed

**Lisa Adshead
Senior FOI Policy Manager**

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

Legal Annex

Freedom of Information Act 2000

Section 1

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 17

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(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 30

Section 30(1) provides that –

“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,
- (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or
- (c) any criminal proceedings which the authority has power to conduct.”

Section 30(2) provides that –

“Information held by a public authority is exempt information if-

- (a) it was obtained or recorded by the authority for the purposes of its functions relating to-
 - (i) investigations falling within subsection (1)(a) or (b),
 - (ii) criminal proceedings which the authority has power to conduct,
 - (iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or
 - (iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and
- (b) it relates to the obtaining of information from confidential sources.”

Section 30(3) provides that –

“The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2).”

Section 38

Section 38(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to-

- (a) endanger the physical or mental health of any individual, or
- (b) endanger the safety of any individual.”

Section 38(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, have either of the effects mentioned in subsection (1).”

Section 40

Section 40(1) provides that –

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

Section 40(5) provides that –

“The duty to confirm or deny-

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

Data Protection Act 1998

Section 7

Section 7(1) provides that –

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

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

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

(i) the personal data of which that individual is the data subject,
(ii) the purposes for which they are being or are to be processed, and
(iii) the recipients or classes of recipients to whom they are or may be disclosed,

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

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

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

Section 42

Section 42 provides that –

“(1) A request may be made to the Commissioner by or on behalf of any person who is, or believes himself to be, directly affected by any processing of personal data for an assessment as to whether it is likely or unlikely that the processing has been or is being carried out in compliance with the provisions of this Act.

(2) On receiving a request under this section, the Commissioner shall make an assessment in such manner as appears to him to be appropriate, unless he has not been supplied with such information as he may reasonably require in order to—

(a) satisfy himself as to the identity of the person making the request, and
(b) enable him to identify the processing in question.

(3) The matters to which the Commissioner may have regard in determining in what manner it is appropriate to make an assessment include—

(a) the extent to which the request appears to him to raise a matter of substance,
(b) any undue delay in making the request, and
(c) whether or not the person making the request is entitled to make an application under section 7 in respect of the personal data in question.

(4) Where the Commissioner has received a request under this section he shall notify the person who made the request—

- (a) whether he has made an assessment as a result of the request, and
- (b) to the extent that he considers appropriate, having regard in particular to any exemption from section 7 applying in relation to the personal data concerned, of any view formed or action taken as a result of the request.”