

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 1 February 2010

Public Authority: Essex Police
Address: Essex Police Headquarters
PO Box 2
Chelmsford
Essex CM2 6DA

Summary

The complainant made a request for information about two police officers serving within Essex Police (the “public authority”). The information was withheld under the exemption in section 40(2) (personal information) of the Freedom of Information Act 2000 (the “Act”).

The Commissioner’s decision is that the exemption at section 40(2) is engaged but that disclosure would not breach any of the principles in the Data Protection Act 1998 (the “DPA”). The complaint is upheld.

The Commissioner further finds that the public authority breached sections 1(1)(b) and 10(1) in failing to disclose the withheld information.

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. On 30 June 2008 the complainant made the following request to the public authority:

“I am writing to ask for the following information; I would like to know the career path which the following two officers have led since 30th July 2006, up to the present time. The officers I refer to are PC [name removed] and Sergeant [name removed].”

3. On 29 July 2008 the public authority sent its response. It refused to provide the information stating that it believed it was exempt under section 40(2) of the DPA. It further clarified that it believed that to disclose the information would breach the first data protection principle as it would not be fair and lawful to disclose these officers' personal data.
4. On 13 August 2008 the complainant sought an internal review. He clarified that he only wished to establish the following points:
 - Which police division the two officers had served in since 30 July 2006; and,
 - Whether either had been promoted.
5. On 25 September 2008 the public authority sent out its internal review. It maintained its previous position and also added reliance on the second data protection principle to refuse disclosure.

The investigation

Scope of the case

6. On 20 October 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 whether or not the public authority was correct to withhold the information.
7. On 10 September 2009 the Commissioner wrote to the complainant to advise him that he was commencing his investigation. He sought confirmation regarding the amount of detail requested and also drew the complainant's attention to an article on the internet about one of the police officers. The article, which post-dated the request, mentioned one of the officers and showed that in June 2008, immediately prior to the request, he remained at the same rank. The Commissioner envisaged that this knowledge might therefore answer the part of the complainant's request concerning the promotion of that officer. However, the complainant advised that this was not the case.
8. The Commissioner has therefore based his investigation on the complainant's submission at the internal review stage. He will therefore consider whether or not the public authority was correct in withholding details of the division/s and rank/s of the two officers between the dates of 30 July 2006 and 30 June 2008 (when the request was made).

Chronology

9. On 23 September 2009 the Commissioner commenced his enquiries with the public authority. He clarified the scope and sought any further arguments.
10. On 19 October 2009 the public authority sent its response.

11. The public authority also responded to further queries raised by the Commissioner on 22 October 2009 and 28 October 2009.

Background information

12. The following link provides information about the police rank structure in the UK:
<http://www.police-information.co.uk/Docs/careerinformation/rankstructure.html>
13. This is a link to The Police (Promotion) Regulations 1996:
http://www.opsi.gov.uk/si/si1996/Uksi_19961685_en_1.htm
It provides information about how promotion is achieved within the police service.
14. This is a link to information about the High Potential Development Scheme (the "HPDS"). Although this publication postdates the request, the actual scheme predates it as it became effective in April 2008:
http://www.npia.police.uk/en/docs/HPDS_Manual_of_Guidance_FINAL_241108.pdf
15. The following newspaper article gives some more general background information about the HPDS:
<http://www.guardian.co.uk/education/2002/oct/12/students3>

Analysis

Exemption

Section 40(2) – personal information

16. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied. One of the conditions, listed in section 40(3)(a)(i), is where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act (the "DPA").
17. The public authority has stated that it believed disclosure of the requested information would breach the first and second data protection principles.
18. The first data protection principle requires that the processing of personal data is fair and lawful and,
 - at least one of the conditions in schedule 2 is met, and
 - in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.
19. The second data protection principle requires that 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.

Is the requested information personal data?

20. Section 1 of the DPA defines personal data as data which relates to a living individual who can be identified:
- from that data,
 - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
21. The information which the public authority has withheld on the basis of section 40(2) consists of the rank and division of two named police officers. The emphasis is clearly on these officers, whom the requester has identified by name and number, and the Commissioner therefore considers that the information requested is their personal data. However for the section 40(2) exemption to apply the public authority needs to show that disclosure would contravene one of the data protection principles as set out in the DPA.

The first data protection principle

22. The public authority has said that it believes that disclosure would contravene the first data protection principle. The first data protection principle provides 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 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.”

23. The Commissioner's guidance on section 40¹ suggests a number of issues that should be considered when assessing whether disclosure of information would be fair. These are as follows:
- the individual's reasonable expectations of what would happen to their personal data;
 - the seniority of any staff;
 - whether the individuals specifically refused to consent to the disclosure of their personal data;
 - whether disclosure would cause any unnecessary or unjustified distress and damage to the individuals;
 - the legitimate interests in the public knowing the requested information weighed against the effects of disclosure on the individuals.
24. Furthermore, the Commissioner's guidance suggests that, when assessing fairness, it is also relevant to consider whether the information relates to the public or private lives of the third party. His guidance states:

1

http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf

“Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned.”

25. The public authority gave the complainant the following reason for non-disclosure of rank and posting information in its refusal notice:

“... to provide information which constitutes an individual’s personal data ... would be in contravention of that individual’s rights under the Data Protection Act 1998 – Principle 1 in relation to Fair and Lawful processing of personal data is most pertinent in these circumstances. In this particular case you are seeking access to the personal data of specific Essex Police officers which is not already available in the public domain”.

26. At internal review stage it further added that the information would be:

“... likely to form part of the officers’ personnel record and would not be information that would necessarily be in the public domain; as may be the case with those who have achieved Chief Officer status (Chief Constable, Deputy Chief Constable and Assistant Chief Constable)”.

27. The public authority also stated that: *“If disclosed, the officers would have just cause to argue that Essex Police had breached their rights under the DPA”.*

28. The Commissioner notes that the police officers concerned had not achieved ‘Chief Officer’ status, because, according to the complainant’s request, they were a ‘police constable’ and ‘police sergeant’. Although they may obviously have been promoted in the meantime, if they had been promoted in the period specified by the complaint, then the highest rank that the police constable could have achieved is that of ‘sergeant’ and, for the police sergeant, the rank of ‘inspector’. (Further details about ranks and promotion can be found via the links in the ‘Background information’ section above).

29. However, whilst the officers may not have achieved the ‘senior rank’ referred to by the public authority, the Commissioner notes that they were, at the time of the request, serving police officers, and this fact has not been denied. He further notes the public authority’s statements to him that:

“If the original request had been for information relating to an officer’s current location and rank then there would not, in the majority of cases, be an issue in disclosing that. Indeed, information of this nature is readily available via the Essex Police website.”

“The exception to this may come when an officer is, for example, operating in a covert role and his or her location and rank etc would be harmful to the individual and the organisation if it were released into the public domain (welfare of the officer and prejudicial to the policing purpose).”

30. In view of the above statement, the Commissioner notes that it is likely that, were the complainant to have only requested the rank and divisional posting of the two officers at the actual time of his request, then the public authority would probably have complied with that request. It is also the Commissioner's view that, even were either officer engaged in 'covert' duties, it would have been possible to provide their divisional location as this would not give sufficient detail to reveal their exact section or responsibilities. There is no denial of them being serving police officers.

31. The public authority has submitted to the Commissioner that it would not comply with this specific request because:

"... in this case, the request has asked for historical information; 'the career path' of two officers i.e. more than just their current rank and location. This is information which (a) charts the career of the officer within Essex Police, (b) is information contained within the officer's personnel file and held on a HR database and (c) is not information that is known to be in the public domain."

32. Whilst the Commissioner accepts that disclosing the information would assist towards 'charting the career' of the two officers, he must consider whether disclosing the limited information sought would breach the first data protection principle. The career path of police officers is structured, as shown by the link in paragraph 13 above. It is not possible to attain a higher rank without serving in the previous rank. Whilst there are accelerated promotion prospects for officers on the HPDS (see paragraphs 14 and 15 above) this does not mean that an officer 'skips' any of the rank structure, only that he / she may progress more readily. Were either officer on such a scheme, the Commissioner does not believe that it would be possible for either officer to achieve more than one promotion within the period covered by the request. Therefore, an officer with the rank of 'constable' would necessarily still be a 'constable' unless he had been promoted to a 'sergeant', and an officer at the rank of 'sergeant' would necessarily still be a 'sergeant' unless he had been promoted to the rank of 'inspector'. The Commissioner does not therefore believe that releasing this information would be unfair.

33. The public authority also advised the Commissioner that:

"It is also fair to say that the officer's [sic] in question would not expect information from their personnel files to be disclosed in such a manner and made available to the public. This calls into question not only the fair processing of their personnel data by Essex Police but also using the personal data in a manner which it was not originally intended for ..."

34. The Commissioner again notes that the public authority advised him that it would have been likely to provide the information had the request only been for the 'current' data. For the same reasons given above, the Commissioner does not agree that to provide the rankings of the two officers for the time period requested would be unfair or unlawful. It is only feasible that each officer was either at the same rank or the next one up (the Commissioner notes that no argument

- regarding demotion was offered by the public authority so this has not been considered).
35. The public authority is made up of five territorial divisions and three centrally coordinated divisions². The Commissioner does not consider that disclosing which of these eight the officers were posted to could reveal whether they were on covert duties or otherwise. He is not convinced that to state at which of these eight possible locations either officer was posted would be either unfair or unlawful.
36. The Commissioner believes that police officers would have a reasonable expectation that details about their rank and divisional posting would be disclosed, as has already been indicated by the public authority. Depending on an officer's role, there may be considerably more detail already available on the public authority's website whatever their rank. No evidence has been provided by the public authority to suggest that either officer has refused consent to the disclosure and the information is clearly about the officers' public rather than private roles. The Commissioner does not accept the public authority's argument that to release this type of information would be beyond what a police officer would expect and he cannot see how disclosure would cause any unjustified distress or damage to either officer.
37. The Commissioner further understands that there is a legitimate interest in the public knowing the rank of a police officer and where they are stationed and he does not believe that there would be a negative effect caused by the disclosure of the information requested in this case. The public authority has stated that current information would usually be available and the Commissioner does not consider the information requested to have any different quality.

Schedule 2

38. However, as outlined above, for third party personal data to be disclosed under the Act, disclosure not only has to be fair and lawful but also has to meet one of the conditions for processing in schedule 2 of the DPA. In this case the Commissioner considers that the most relevant condition is Condition 6. This states that:

“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.”

39. In deciding whether condition 6 would be met in this case the Commissioner has considered the decision of the Information Tribunal in *House of Commons v Information Commissioner & Leapman, Brooke, Thomas* [EA/2007/0060]. In that

² http://www.essex.police.uk/about/a_di_01.php

case the Tribunal established the following three part test that must be satisfied before the sixth condition will be met:

- there must be legitimate interests in disclosing the information;
 - the disclosure must be necessary for a legitimate interest of the public;
 - even where disclosure is necessary it nevertheless must not cause unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the data subject.
40. The Commissioner notes that the complainant advised the public authority that he believed that disclosure of the requested information was in the public interest, in that it would promote public confidence in the police.
41. The Commissioner again notes that it is only the rank and divisional postings of two named officers that has been withheld. The public authority has further indicated that it would usually provide current information for these officers were it requested but that it would not provide what it described as a 'career path'.
42. The Commissioner cannot identify any specific harm in releasing the information in this case, and he considers that the release of the requested information would be fair. He considers that – given the benefits of transparency and accountability – a legitimate interest arises from the disclosure on request of information by public bodies. More specifically, there is legitimate interest in the public knowing and understanding the ranks and location of its officers providing that this does not affect its ability to comply with its policing purposes – for example, by revealing details of named officers on covert duties.
43. He also finds, in this case, that there would be no unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the officers concerned.

The second data protection principle

44. The public authority has also said that disclosure would contravene the second data protection principle. The second data protection principle provides that:
- “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.”*
45. The public authority has provided little evidence to show why it believes releasing the requested information would breach this principle. The only argument provided to the Commissioner is that by disclosing the information it would be: *“using the personal data in a manner which it was not originally intended for”*.
46. In order to comply with the second principle a data controller (i.e. the public authority in this case) must specify the purposes for which they are processing personal data. This can be achieved either through a fair processing notice provided directly to data subjects (i.e. the police officers in this case) or by

including the purpose in its entry on the Register of Data Controllers, a public register available for inspection on the ICO's website³.

47. Public authorities need to collect personal data in order to pursue their business objectives and it is only these purposes which the public authority has to specify in its entry on the Register of Data Controllers. Therefore, as it is not one of their business purposes, public authorities do not specifically obtain personal data so that they can then provide it in response to a request. It follows that there is no requirement to specify that disclosures may be made under the Act in either a fair processing notice or on the Register of Data Controllers.
48. Even though public authorities are not required to specify that they may disclose personal data under the Act, the second principle still prohibits them from further processing personal data (including in response to requests) in any manner that would be incompatible with the purposes it has specified, i.e. a disclosure in response to a request still needs to be compatible with the public authority's business purposes.
49. The Commissioner's view is that in order to consider this issue properly we have to take account of the ethos behind the Freedom of Information Act, which aims to promote the public's understanding of, and confidence in, the public authorities that serve them, which in turn will drive up standards within the public sector.
50. On this basis it is difficult to see how a disclosure of personal information which would not breach any of the remaining data protection principles, and would not involve the disclosure of information that is covered by another exemption, could possibly be incompatible with the public authority's business purposes. In fact, such a disclosure would actually support the purposes of the public authority by promoting openness.
51. Further support for this approach can be taken by consideration of the second principle in the broader context of the DPA, i.e. the protection of the privacy of individuals. There is an argument that the second principle should be interpreted in a way that focuses on whether any further processing would be incompatible with the privacy rights of the data subject rather than on the business purposes of the data controller, despite this approach straying away from a literal interpretation of the principle. Such an approach would mean that if, in all other respects, the disclosure is compatible with the remaining data protection principles, then it would not contravene the second principle.
52. It is the Commissioner's view that the aim of the DPA is to protect the privacy of individuals. It would therefore be a very odd result if, after satisfying himself that a disclosure complied with the first principle and that therefore no privacy rights would be prejudiced, a disclosure could be blocked by the second principle because such disclosures had not been specified by the public authority or because the disclosure would somehow interfere with the business purposes of the data controller. To allow these arguments would mean the second principle became an artificial barrier to disclosures that do not impact on the privacy of

³ <http://www.ico.gov.uk/ESDWebPages/DoSearch.asp?reg=4371131>

data subjects. It would allow public authorities to frustrate disclosures by omitting to specify such disclosures as a purpose for which information was obtained. Furthermore, where a public authority is concerned that a disclosure is incompatible with their business purposes then this may be addressed through the application of one of the other exemptions available under the Act rather than through the use of an exemption designed to protect individual privacy.

53. In the Information Tribunal case of *House of Commons v Information Commissioner* [EA/2006/0015 and 0016]⁴ the House of Commons appealed the Commissioner's decision that further details of the travel allowances claimed by MPs should be released - the overall amount claimed by each MP was already published. One of the reasons that the information had been withheld was on the basis that the disclosure would breach the second data protection principle.
54. The Tribunal found that, as the House of Commons was already publishing some information on expenses, publishing further details was not incompatible with that original purpose and was certainly not a new purpose.
55. In this case, the public authority has stated to the Commissioner that it would generally release the current rank and posting of its officers and that many were already identified on its website. The Commissioner has therefore assumed that officers are already aware that this type of information will be made available. The public authority is now arguing that to disclose additional details, i.e. the same information but for a longer time period, would be a widening of this purpose and could amount to a new purpose. However, in line with the Tribunal findings cited above, the Commissioner does not agree that providing the same information but for a longer time period would constitute a new purpose and he finds that by releasing the information requested the public authority would not be in breach of the second principle.

Procedural

Section 1

56. Section 1(1) of the Act 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”.*

57. The Commissioner considers that the information withheld from the complainant should be released to him. Therefore the public authority has breached section 1(1)(b) of the Act by failing to communicate this information to the complainant in response to his request.

4

http://www.informationtribunal.gov.uk/Documents/decisions/corpo officer_house_of_commons_v_infocomm.pdf

Section 10

58. Section 10(1) of the Act 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.”

59. As the public authority complied with section 1(1)(a) within 20 working days the Commissioner does not consider that it breached section 10(1) in relation to its compliance with section 1(1)(a).
60. The Commissioner finds that the public authority did not provide the requested information to the complainant within the statutory time for compliance because it incorrectly applied the exemption at section 40(2). He therefore considers that it breached section 10(1) in relation to its obligation under section 1(1)(b) of the Act.

The Decision

61. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act in that the information requested should have been disclosed.
62. He further finds that by failing to disclose the requested information within the statutory time for compliance the public authority breached sections 1(1)(b) and 10(1).

Steps required

63. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- The public authority should disclose the requested information.
64. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

65. 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.

Other matters

66. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. In correspondence with the Commissioner the public authority raised some issues which the Commissioner would like to clarify.

67. The public authority stated to him:

"... the primary issue of whether the requested information is or is not personal data has, I feel not yet been properly addressed. If the Commissioner agrees that it is, then would it not be a contravention of Principles 1 and 2 of the DPA by releasing it? Would it be fair and lawful to the officers concerned to disclose their personal data, bearing in mind that there was no prior notification from Essex Police that it would do so? Would it be a use of personal data for a purpose other than that which it was originally intended for? What would be the implication for all police officers if this information were to be released ..."

68. The Commissioner would like to stress that it was the public authority itself which sought to withhold the information on the grounds that it was the 'personal data' of the officers concerned. This exemption was not introduced by the Commissioner. However, as can be seen in the Notice above, it is his opinion that the information is indeed the officers' personal data. However, if it believed that it were not, then the Commissioner assumes that the public authority would have released it as it failed to cite any alternative exemptions.

69. During his investigation the Commissioner asked the public authority whether it would have treated the request any differently if it were made by a different member of the public. He iterated that requests should be both 'person' and 'purpose' blind and sought its views.

70. In response the public authority stated that:

"Although I appreciate that for the purpose of a request FOIA is both applicant and purpose blind, the circumstances behind why a particular request was made cannot be entirely ignored. The identity of an applicant can be important when trying to determine whether a particular request is vexatious, or to allow us to determine if there is another more appropriate access route to information of relevance to an enquiry, for example a FOIA request made by someone who is subject to a PSD complaint and wants information (personal data) from that file - subject access could then apply!"

71. The Commissioner fully accepts these comments. However, he would explain that in both circumstances mentioned by the public authority there are appropriate exemptions within the Act upon which it could rely. He notes that no other exemptions were cited in this case.

72. The public authority also alluded to there not being much 'public appetite' for this type of information and that the complainant would 'personally benefit' from any disclosure. The Commissioner would remind the public authority that the ethos behind the Act is to disclose information unless it is exempt. For the reasons given above, he has found that it is not exempt in this particular case.

Right of Appeal

73. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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

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

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

Dated the 1st day of February 2010

Signed

**David Smith
Deputy Commissioner and Director of Data Protection**

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

Legal Annex

Section 40 – personal information

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.'*

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.'