

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 15 February 2010

Public Authority: Commissioner of the Metropolitan Police Service
Address: New Scotland Yard
Broadway
London
SW1H 0BG

Summary

The complainant requested a copy of the report submitted by the public authority to the Crown Prosecution Service in connection with the “*cash for honours*” investigation. The public authority refused to disclose the information requested and cited the exemptions provided by sections 30(1)(a) (information relating to investigations) and 40(2) (personal information). The Commissioner finds that the exemption provided by section 40(2) is engaged and the public authority is not required to take any steps. However, the Commissioner also finds that the public authority failed to comply with the procedural requirements of sections 17(1) and 17(3)(b) in its handling of the request.

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 22 October 2008:
“A copy of the report submitted by the Metropolitan Police to the Crown Prosecution Service relating to the so-called ‘Cash for Honours’ investigation.”
3. The public authority responded to this on 20 November 2008 and confirmed that the information requested was held. The public authority refused to disclose this information, citing sections 30(1)(a), 30(1)(b), 30(1)(c) and 30(2)(a) (information

relating to investigations), 31(1)(a), 31(1)(b) and 31(1)(c) (prejudice to law enforcement), 41(1) (information provided in confidence) and 42(1) (legal professional privilege). The refusal notice included no explanation as to why sections 30, 41 and 42 were believed to be engaged. A generalised 'harm test' was set out, presumably in connection with section 31. The public interest was also addressed in a general fashion, rather than separately in connection with each of the qualified exemptions cited.

4. The complainant responded on 3 December 2008 and asked the public authority to carry out an internal review. The public authority responded with the outcome of the review on 17 February 2009. The public authority upheld its decision to refuse the request and confirmed that it believed that the exemptions provided by sections 30(1)(a), 30(1)(b), 30(1)(c), 31(1)(a), 31(1)(b), 31(1)(c), 41(1) and 42(1) were engaged. The public authority also now cited the exemption provided by section 40(2) (personal information). The public authority provided no explanation as to why sections 30(1)(a), 30(1)(b), 30(1)(c), 31(1)(a), 41(1) and 42(1) were believed to be engaged. In connection with sections 31(1)(a), (b) and (c) the public authority gave a generalised harm test. The public interest was again addressed only in a generalised fashion. In connection with section 40(2), the public authority provided an explanation as to why it was believed that the first data protection principle would be breached through disclosure, but did not explain how the information requested would constitute personal data.

The Investigation

Scope of the case

5. The complainant contacted the Commissioner initially on 24 March 2009. The complainant stated that he believed that the "*exceptional public interest*" in the information requested meant it should be disclosed.

Chronology

6. The Commissioner contacted the public authority initially on 21 September 2009. In connection with the citing of both sections 30 and 31, the public authority was reminded that these exemptions cannot both be cited in relation to the same information and, if these exemptions had been cited in relation to the same information, the public authority was asked to now clarify which of these exemptions it believed to be engaged. The Commissioner anticipated that section 30 was most likely to be relevant.
7. The Commissioner also commented specifically on the citing of sections 30(1)(b), 30(1)(c) and 30(2). Sections 30(1)(b) and (c) provide exemptions relating to criminal proceedings that the public authority has the power to conduct. The public authority was asked to confirm why it believed that sections 30(1)(b) and (c) were engaged when the prosecuting authority in relation to the report requested would be the Crown Prosecution Service. In connection with section 30(2), the public authority was asked to explain how the information related to the

obtaining of information from confidential sources. The public authority was also asked to confirm its reasoning for the other exemptions cited and to confirm, where relevant, why the public interest favoured maintenance of those exemptions.

8. The public authority responded on 6 November 2009 and confirmed that it no longer believed that sections 30(1)(b), 30(1)(c), 30(2), 31(1)(a), 31(1)(b) or 31(1)(c), 41(1) or 42(1) were engaged. In relation to the exemptions that were now cited, 30(1)(a) and 40(2), the public authority explained why it believed that these exemptions were engaged and why the public interest favoured the maintenance of section 30(1)(a). A representative of the Commissioner visited the public authority on 18 November 2009 and viewed the report in question.

Analysis

Exemptions

Section 40

9. The public authority has cited section 40(2). This section provides an exemption for information that constitutes the personal data of any individual aside from the requester and the disclosure of which would breach any of the data protection principles. Consideration of this exemption is a two stage process; first it must be established if the information in question does constitute the personal data of any individual other than the requester. Secondly, if the conclusion is that this information does constitute the personal data of any third party, it must be established if disclosure of this personal data would breach any of the data protection principles. Section 40(2) is set out in full in the attached legal annex as are all other sections of the Act referred to in this notice.
10. Turning first to the question of whether the report constitutes the personal data of any individual, section 1(1) of the Data Protection Act 1998 (the "DPA") defines personal data as follows:

"'personal data' means 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"

11. The argument of the public authority is that the requested report would constitute the personal data of those individuals who were subjects of the "cash for honours" investigation. In reaching a conclusion on whether this information does constitute the personal data of those individuals, the Commissioner has followed the approach recommended in his published guidance "Data Protection Technical Guidance: Determining what is personal data".

12. This guidance sets out a number of questions to ask when determining whether information constitutes personal data. The first of these questions relates to the issue of identifiability:

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?

13. The question in this case is whether the individuals who were subject to the investigation carried out by the public authority can be identified from the report. As noted above, a representative of the Commissioner viewed the report and verified that the subjects of the investigation are identified by name in the report. These individuals can, therefore, be identified from this information.
14. The second question in the Commissioner's guidance concerns the meaning of the term 'relates to' as it is used in section 1(1) of the DPA:

Does the data 'relate to' the identifiable individual, whether in personal or family life, business or profession?

15. The question here is whether the report relates to the individuals who were the subjects of the public authority's investigation and who are, as established above, identified in this report. The report records an investigation carried out with the intention of establishing if these individuals were guilty of an offence and was compiled for the purpose of assisting the Crown Prosecution Service in reaching a decision as to whether to prosecute these individuals. Given the content and purpose of this report, the Commissioner considers it clear that it does relate to the individuals who were the subjects of the investigation.
16. The conclusion of the Commissioner is that the report requested by the complainant is the personal data of the individuals who were the subjects of the "cash for honours" investigation. The basis for this conclusion is that those individuals are identifiable from the report and that the report relates to them.
17. The Commissioner notes that there are passages within the report which do not refer specifically to individuals. However, given that these passages form part of the report and given that the purpose of this report is to detail the investigation carried out into the actions of the identified individuals, the conclusion of the Commissioner relates to the entirety of this report.
18. Having concluded that the report does constitute the personal data of individuals aside from the requester, the next step is to consider whether disclosure of this report would breach any of the data protection principles. The public authority has argued that disclosure would be in breach of the first data protection principle and the Commissioner will focus on this principle here.
19. The first data protection principle states that personal data shall be processed fairly and lawfully. Compliance with the first data protection principle requires that disclosure must be, in general, fair and lawful. The DPA also, in Schedule 2, sets out specific conditions, at least one of which must be met in order to comply with

the first principle. Where the personal data in question is sensitive according to the definition given in DPA section 2, it is also necessary to meet at least one of the conditions specified in DPA Schedule 3.

20. The public authority has argued that the information in question here constitutes sensitive personal data according to DPA section 2(g). This section provides that personal data consisting of information as to the commission or alleged commission of any offence by the data subject is sensitive personal data. In order to establish whether it is necessary to meet a condition from DPA Schedule 3 it is necessary for the Commissioner to consider whether the personal data in question is sensitive.
21. The report concerns whether the data subjects committed an offence in relation to the awarding of honours. Given this, the Commissioner considers it clear that the report consists of information as to the alleged commission by the data subjects of an offence and is, therefore, sensitive personal data according to DPA section 2(g). This means that it is necessary for at least one of the conditions in DPA Schedule 3 to be met for disclosure of this information to be compliant with the first data protection principle.
22. In considering the Schedule 3 conditions, the Commissioner has followed the approach set out in his published guidance on the exemptions provided by section 40: *"The exemption for personal information"*. This states the following about sensitive personal data and the Schedule 3 conditions:

"If the information [is sensitive personal data], you should consider Schedule 3 first. This is because if none of the Schedule 3 conditions apply, the information cannot be disclosed and there is no need to go on to consider Schedule 2 or the general balance of fairness.

It is unlikely that you will be able to satisfy any of the Schedule 3 conditions unless you have explicit consent for the disclosure (condition 1), or the information has already been made public by the individual concerned (condition 5) – for example, the political affiliations of MPs. This is because the other conditions concern disclosure for a stated purpose, and therefore cannot be relevant to the applicant and purpose-blind nature of disclosure under the FOIA.

It is therefore very unlikely that sensitive personal data could be released in response to an FOI request without explicit consent."

23. The Commissioner has therefore considered whether the public authority has the explicit consent of the data subjects to the disclosure of the report and, if not, whether it has sought that consent and, if it has not sought that consent, whether it is reasonable to expect that it should have sought that consent. The Commissioner has also considered the fifth condition in DPA Schedule 3, which is met where the sensitive personal data has previously been disclosed as a result of steps deliberately taken by the data subjects.

24. The public authority has stated that it does not have consent from the data subjects. As the public authority has made no reference to having sought this consent, the Commissioner assumes that it did not. On the issue of whether the public authority should have sought that consent, the Commissioner considers that it is not reasonable to expect that the public authority should have sought that consent. The Commissioner's opinion on this point is that, given the subject matter and purpose of this report, there was no realistic possibility of the data subjects consenting to disclosure. Therefore, the first condition in DPA Schedule 3 is not met.
25. Turning to whether the report, or any part of it, has been disclosed as a result of steps deliberately taken by the data subjects, for this condition to apply in relation to the report in its entirety, it would be necessary for all of the data subjects to have deliberately taken steps resulting in disclosure of the content of this. Even if it were the case that one, or all bar one, of the data subjects had taken such steps, the condition would not be met in relation to any of the data subjects that had not done so. The Commissioner is not aware of any evidence or suggestion that all the data subjects have deliberately taken steps resulting in disclosure of the report.
26. The Commissioner is aware that one of the data subjects has authored a book which was first published on 12 May 2008, prior to the date of the request, which comments on the "*cash for honours*" investigation. Given this, the Commissioner has considered whether any part of the content of the report is disclosed in this book and, if so, whether that part of the report could be said to be solely the personal data of the author and not the personal data of the other data subjects. If the relevant content of the report were the personal data solely of the author, then it may be the case that the fifth condition from DPA Schedule 3 would be satisfied in relation to that part of the report.
27. The public authority suggested that reference to one of the data subjects having published a book should be confidential in order to avoid identifying the author as one of the individuals who was subject to the investigation. The Commissioner believes, however, that it is well established, in part through the publication of the aforementioned book, that this individual was a subject of the investigation. The Commissioner has not, therefore, included this part of his analysis within a confidential annex.
28. Having reviewed the content of the book, the Commissioner does not believe that this reveals any part of the content of the public authority's report. Whilst it does cover the "*cash for honours*" investigation, this is from the perspective of the author. The Commissioner does not believe that this book provides sufficient insight into the investigation by the public authority that it could be said to disclose information included in the report.
29. The Commissioner is aware of no other evidence suggesting that any of the data subjects may have disclosed any part of the information in the report. The fifth condition in DPA Schedule 3 is not, therefore, met, either in relation to the report as a whole, or in relation to any part of the report.

30. The Commissioner concludes that disclosure of the report requested by the complainant would not meet any condition from DPA Schedule 3. Having already concluded that the information in this report constitutes sensitive personal data, this means that disclosure of the report would be in breach of the first data protection principle. The overall conclusion of the Commissioner is, therefore, that the exemption provided by section 40(2) is engaged.

Section 30

31. As the above conclusion on section 40(2) relates to the entirety of the information falling within the scope of the request it has not been necessary to also reach a conclusion on section 30(1)(a).

Procedural Requirements

Section 17

32. The public authority cited section 40(2) for the first time at internal review stage. In failing to cite this exemption within 20 working days of receipt of the request, the public authority did not comply with the requirement of section 17(1).
33. The public authority failed at either refusal notice or internal review stage to provide an adequate explanation for why any of the exemptions were believed to be engaged. In so doing the public authority failed to comply with the requirement of section 17(1)(c).
34. In relation to the qualified exemptions cited the public authority failed to provide any adequate explanation at either refusal notice or internal review stage as to why it believed that the public interest favoured the maintenance of these exemptions. In so doing the public authority failed to comply with the requirement of section 17(3)(b).

The Decision

35. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act in that it correctly applied the exemption provided by section 40(2). However, the Commissioner also finds that the public authority failed to comply with the procedural requirements of sections 17(1) and 17(3)(b) in its handling of the request.

Other matters

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

The Commissioner's published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days. In this case the Commissioner notes that there appeared to be no exceptional circumstances, but that the public authority failed to provide the outcome to the review within 20 working days. Neither did the public authority provide the outcome to the review within 40 working days. The public authority should ensure that internal reviews are carried out promptly in future.

Right of Appeal

37. 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.

38. 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 15th 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

Freedom of Information Act 2000

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 31

Section 31(1) provides that –

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in

subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.”

Section 40

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.”

Data Protection Act 1998

Section 2

Section 2 provides that –

“In this Act “sensitive personal data” means 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 [1992 c. 52.] 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, or
(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.”