

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 20 December 2010

Public Authority: Chief Constable of Devon and Cornwall Constabulary
Address: Middlemoor HQ
Exeter
Devon
EX2 7HQ

Summary

The complainant asked for a breakdown of the number of local teaching staff who had been investigated in connection with offences under section 16 of the Sexual Offences Act 2003 and for details of the outcome of these investigations. Devon and Cornwall Constabulary confirmed that it held such information but claimed it was exempt from disclosure under sections 31(1)(a), 31(1)(b) and 40(2). The Commissioner's decision was that some of the information was properly withheld by virtue of section 40(2) but that for other information this exemption was not engaged. The Commissioner also found that, in relation to the information that did not engage section 40(2), the Constabulary had failed to demonstrate that either of the sub-sections at section 31 was engaged. He therefore found the Constabulary in breach of sections 1(1)(b) and 10(1) in relation to this 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.

Background

2. Devon and Cornwall Constabulary ('the Constabulary') initially responded to the request by refusing to confirm or deny that it held

information falling within the scope of the request, and cited the exemptions provided by sections 30(3) (investigations), 38(2) (health and safety) and 40(5) (personal information). The Commissioner disagreed and issued a Decision Notice (reference FS50191587) directing the Constabulary to provide to the complainant confirmation or denial of whether the information requested was held. For any information that was held, the Constabulary was required to either disclose this to the complainant, or provide a refusal notice valid for the purposes of section 17 of the Act.

3. This Decision Notice assesses the Constabulary's subsequent handling of the request.

The Request

4. On 26 November 2007 the complainant requested the following information:

"1. How many teaching staff have Devon & Cornwall police investigated under section 16 of the Sexual Offences Act 2003 from Torbay schools and colleges in the period January 2005 to date, November 2007?

2. How many of those were cautioned? How many were charged? How many were no further actions?

3. How many teaching staff have Devon and Cornwall police investigated under section 16 of the Sexual Offences Act 2003 from Teignbridge schools and colleges in the period January 2005 to date, November 2007?

4. How many of those were cautioned? How many were charged? How many were no further actions?

5. How many teaching staff have Devon and Cornwall police investigated under section 16 of the Sexual Offences Act 2003 from South Hams schools and colleges in the period January 2005 to date, November 2007?

6. How many of those were cautioned? How many were charged? How many were no further actions?"

5. As a result of the Decision Notice issued on 25 August 2009, on 29 September 2009 the Constabulary issued a refusal notice, stating that

the requested information was held but that it was exempt from disclosure under sections 31(1)(a) (prejudice to the prevention or detection of crime), 31(1)(b) (prejudice to the apprehension or prosecution of offenders) and section 40(2) (personal data relating to a third party).

6. The Constabulary argued that section 31(1)(a) and (b) applied because disclosure of the information would reveal the identity of individual sex offenders, who may be physically harmed as a result.
7. It also argued that disclosure of information about offenders would be highly likely to erode levels of trust between offenders and the agencies responsible for monitoring them, leading to a consequent loss of intelligence data in respect of monitored individuals.
8. The Constabulary argued that section 40(2) applied in respect of the requested information on the grounds that its release would identify specific individuals involved in investigations. It acknowledged that, whilst the disclosure would not make the identity of specific individuals immediately obvious, whether or not information constitutes personal data depends upon *"all the means likely reasonably to be used either by the controller or by any other person to identify the said person"* (Recital 26, European Data Protection Directive 95/46/EC).
9. It commented that the information detailed the number of investigations made by the Constabulary into specific sexual offences within a number of specific geographical areas of Devon and that this made it reasonably likely that disclosure of the data would enable the identification of particular individuals, which meant that it constituted personal data. Furthermore, it claimed that the information constituted sensitive personal data in respect of the data subjects.
10. It set out public interest arguments it considered in arriving at its decision to withhold the information.

The Investigation

Scope of the case

11. On 21 October 2009 the complainant referred the Constabulary's response to the Information Commissioner. The complainant specifically asked the Commissioner to consider the following points:
 - that the request asked for anonymised statistics in its response, and that such information does not constitute sensitive personal data, nor could it be used to identify anyone;
 - in the event that the requested information could be described as sensitive personal data, provisions within the Data Protection Act 1998 would support its disclosure to the media (principally paragraph 3 of the Schedule to the Data Protection (Processing of Sensitive Personal Data) Order 2000 [S.I. 2000 No 417]).
12. In view of the fact that the Constabulary had provided a fairly detailed explanation of its reasons for refusing the request and that the Commissioner had previously issued a Decision Notice requiring the Constabulary to take action, the Commissioner agreed to investigate the matter without requiring the complainant to exhaust the Constabulary's internal review procedures.

Chronology

13. On 26 November 2009, the Commissioner wrote to the Constabulary, asking to see a copy of the withheld information.
14. The Constabulary replied on 22 December 2009, enclosing the information. The information was in the form of numbers of staff investigated and action taken and is reproduced in the Confidential Annex to this Decision Notice.
15. The Commissioner wrote to the Constabulary on 22 June 2010, formally commencing the investigation into the matter. He gave the Constabulary the opportunity to submit further arguments in respect of both exemptions. He specifically asked the Constabulary to revisit its application of section 40(2) and clarify who would be identified by the disclosure. He also asked it to consider the complainant's suggestion that the information could be released under the provisions of the Data Protection (Processing of Sensitive Personal Data) Order 2000.

16. On 26 July 2010 the Constabulary replied, clarifying who would be identified by the disclosure and how they could be identified.
17. It went on to argue that it had no lawful basis for processing the information for the purpose of disclosing it to the complainant, as section 6 of schedule 2 of the Data Protection Act 1998 did not provide adequate grounds. It also set out reasons as to why the disclosure was not in the public interest and thus why the Data Protection (Processing of Sensitive Personal Data) Order 2000 did not provide lawful grounds for the disclosure.
18. In respect of Section 31, it confirmed it had no further comments additional to those provided in the refusal notice issued on 29 September 2009.

Analysis

Exemptions

Section 40

19. Section 40(2) provides an exemption from disclosure for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in sections 40(3) or 40(4) is satisfied.
20. In this case, the condition in question is contained in section 40(3)(a)(i), which applies where the disclosure of the information to any member of the public would contravene any of the data protection principles. The Constabulary has stated that the disclosure of the requested information about investigations into allegations of sexual offences in local schools would be unfair to individuals who could be identified by the information and would therefore be in breach of the first principle of the Data Protection Act 1998 (the "DPA").
21. In order to establish whether this exemption has been correctly applied the Commissioner has first looked at whether the withheld information constitutes the personal data of a third party.
22. Section 1 of the DPA defines personal data as data which relate to a living individual, who can be identified:
 - (a) from that data, or

(b) from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

23. In this case the complainant has suggested that, as she clearly requested anonymised statistics, the withheld information does not constitute personal data.
24. The Commissioner accepts that truly anonymised statistics are not personal data and thus can be disclosed without reference to the DPA. However, the test of whether information is truly anonymised is whether any member of the public could identify individuals by cross-referencing the 'anonymised' data with information or knowledge already available to the public. Whether this 'cross-referencing' is possible is a question of fact based on the circumstances of the specific case. However, if identification is possible the information is personal data and the data protection principles need to be considered when deciding whether disclosure is appropriate.
25. The Commissioner has looked at the withheld information and, for some information, as specified in the confidential annex to this Notice, has established that it can be cross-referenced with other publicly-available information to identify particular individuals.
26. The Commissioner therefore considers that this information is not truly anonymised and that it constitutes personal data. Furthermore, because it relates to the commission or alleged commission of an offence and also to the sex lives of data subjects, the information constitutes sensitive personal data as defined in section 2 of the DPA.
27. For other information the Commissioner is not satisfied that this specific information can be cross referenced with other publicly-available information to identify particular individuals. He therefore considers that this information does not constitute the personal data of any individual.
28. Further explanation of the Commissioner's position in relation to the possible identification of individuals in this case is given, for the benefit of the Constabulary, in the confidential annex to this Notice. It has not been included in the main body of this Notice to avoid revealing any information that the Constabulary considers to be exempt.
29. The Commissioner has gone on to consider whether the disclosure of the information that he has found engages section 40(2) would be in breach of the principles of the DPA. In particular, the Commissioner

has considered whether the disclosure of this information would be in breach of the first data protection principle.

30. The first 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."*

31. The Commissioner has considered whether the disclosure of the withheld information would be fair to data subjects. In doing so he has considered the possible consequences of the disclosure, the reasonable expectation of data subjects as to how their data may be used and whether there is a compelling public interest in making the disclosure.

32. For the reasons set out in the confidential annex to this Decision Notice, the Commissioner has concluded that disclosure would be likely to result in detrimental consequences for data subjects, including the possibility of significant personal distress and compromise to personal safety, and that such consequences are unwarranted.

33. He has concluded that the data subjects would have an expectation that information about them would not be disclosed outside of the purposes for which it was held by the Constabulary, and that such an expectation is reasonable.

34. He acknowledges that the press has a legitimate interest in reporting criminal cases, and there is some evidence that the reporting of sex offence prosecutions encourages other victims to report incidents to the police. Furthermore, release of statistical information may also serve to reassure the populace of the effectiveness of the CRB vetting system and of the overall safety of local schools.

35. However, he does not consider that these public interest arguments are sufficiently strong to counterbalance the detrimental effect of disclosure on the data subjects.

36. The Commissioner has therefore concluded that to release the withheld information would be unfair and thus in contravention of the first data protection principle.

37. In light of the fact that the complainant has specifically argued that , the Data Protection (Processing of Sensitive Personal Data) Order 2000

provides grounds for disclosure in this case, the Commissioner has gone on to consider this argument.

38. The complainant has argued that paragraph 3 of the Schedule to the Data Protection Order 2000 provides a schedule condition 3 for disclosure. This is because, in the complainant's view, disclosure in this case would be made for the purpose of journalism. The Commissioner's view is that disclosures made under the Act are applicant blind and are not disclosures made for the purposes of journalism. Regardless of how information released under FOIA may ultimately be used, the purpose behind FOI disclosures is to comply with the provisions of the Act. He does not therefore accept the complainant's argument in this respect.
39. As the Commissioner has found that section 40(2) is not engaged in relation to some information, he has gone on to consider sections 31(1)(a) and (b) for this information.

Section 31

Section 31(1)(a) and (b)

40. Information will be exempt under these sections if it is not exempt under section 30, and its disclosure would or would be likely to prejudice the prevention or detection of crime, or the apprehension or prosecution of offenders.
41. Sections 31(1)(a) and (b) are prejudice based exemptions and therefore for the Commissioner to agree that they are engaged the Constabulary must demonstrate that disclosure of the requested information would, or would be likely to, prejudice its ability to prevent or detect crime, or apprehend or prosecute offenders. It must be able to demonstrate that some causal relationship exists between the potential disclosure and the prejudice, and that the prejudice is real, actual or of substance. The Constabulary must also indicate the likelihood of that prejudice occurring.
42. The Constabulary has argued the lower likelihood threshold, that the disclosure of the requested information "would be likely" to prejudice the matter listed at sections 31(1)(a) and 31(1)(b).
43. The Information Tribunal case *John Connor Press Associates Ltd v Information Commissioner* [EA/2005/0005] outlined its interpretation of "likely to prejudice". It confirmed, at paragraph 15, that: "the chance of prejudice being suffered should be more than a hypothetical possibility; there must be a real and significant risk". Following this,

the Commissioner's interpretation of "would be likely to prejudice" is that there should be evidence of a significant risk of prejudice to the subject of the exemption.

44. The Constabulary argued in its refusal notice that section 31(1)(a) and (b) applied because disclosure of the information would reveal the identity of registered sex offenders, who might be harmed as a result. The Commissioner does not accept that the Constabulary has demonstrated that the release of the information in question would actually reveal the identity of registered sex offenders.
45. The Constabulary listed three documented incidents of violence against registered sex offenders which occurred following the release of information about them into the public domain.
46. In view of this, it argued, the disclosure of information about registered sex offenders' identities would be highly likely to erode levels of trust between offenders and those agencies responsible for monitoring them. The breakdown of these relationships may lead to an environment where crimes are committed in spite of preventative policing.
47. The Constabulary did not provide any examples of instances where, as a result of the disclosure of crime statistics, monitoring relationships had broken down or instances of offences which had occurred as a result of offenders avoiding the monitoring system because of concerns about personal safety. It did make reference to an instance where a registered sex offender's identity was revealed in the press and he consequently left his job and moved away. However, it did not clarify whether he did so following harassment or whether he subsequently failed to comply with monitoring requirements. It stated that should such incidents become commonplace it was unlikely that such individuals would provide the relevant Constabulary with details of their intended location, effectively driving them 'underground'.
48. The Commissioner accepts that the disclosure of information about the identity and whereabouts of registered sex offenders may, on occasion, have serious implications for their personal safety. However this, in itself, has no relevance to the exemption being claimed here, which relies upon the Constabulary demonstrating that the prevention or detection of crime, or the apprehension or prosecution of offenders would be likely to be prejudiced by the disclosure. In any case this argument is dependant upon the identification of individuals, which the Commissioner has not been persuaded would result from disclosure of the information in question here.

49. The Commissioner also accepts that in some situations the release of crime statistics that cannot be linked to individuals could be prejudicial to the prevention or detection of crime or the apprehension or prosecution of offenders. He reached this view, for example, in Decision Notices FS50122063 and FS50142321.
50. However, the Commissioner does not consider that in this case the Constabulary has provided evidence of a causal link between disclosure of the statistical information in question and prejudice to the matters set out in subsections (a) or (b). For example, beyond the single example it referred to, it has not given a clear explanation of what a withdrawal of cooperation with monitoring authorities would be likely to involve or its likely outcomes (beyond a reference to “crimes” being committed). It does not detail the sorts of information it would find difficult to extract from registered sex offenders nor has it provided instances of registered sex offenders withdrawing cooperation with monitoring agencies over concerns about personal safety. The Constabulary also did not provide the Commissioner with any compelling explanation as to why the release of the statistical information in question (as opposed to more detailed information which reveals the identity and location of offenders) would lead to the argued effects. The Constabulary has instead provided general arguments based around supposition and conjecture, rather than considering the facts of this particular request.
51. Since the Commissioner has decided that the Constabulary has not demonstrated that the exemption is engaged by the information, there is no requirement to consider public interest arguments.

The Decision

52. The Commissioner’s decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
 - it correctly applied the exemption at section 40(2) in respect of certain information as specified in the confidential annex to this Notice.
53. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The Constabulary incorrectly applied the exemption at section 40(2) to certain information as specified in the confidential annex to this Notice.
- the Constabulary incorrectly applied the exemptions at section 31(1)(1)(a) and section 31(1)(b) in respect of certain information as specified in the confidential annex to this Notice.
- In failing to provide the information that the Commissioner does not consider to be exempt, the Constabulary breached section 1(1)(b) and section 10(1) of the Act.

Steps Required

54. The Commissioner requires the Constabulary to take the following steps to ensure compliance with the Act.
- Disclose the information specified at paragraph 31 of the confidential annex to this Notice.
 - The public authority must take the steps required by this Notice within 35 calendar days of the date of this Notice

Failure to comply

55. 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.

Right of Appeal

56. 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

57. 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.
58. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 20th day of December 2010

Signed

**Lisa Adshead
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Freedom of Information Act 2000

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Law enforcement.

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,

Personal information.

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

Data Protection Act 1998

Sensitive personal data

Section 2 provides that -

In this Act "sensitive personal data" means personal data consisting of information as to—

...

- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence

Schedule 1, Part I

First Data Protection Principle

- 1 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."

Schedule 2

Conditions relevant for purposes of the first principle: processing of any personal data

- 6(1) 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.

Schedule to the Data Protection (Processing of Sensitive Personal Data) Order 2000 [S.I. 2000 No 417]

- 3.—(1) The disclosure of personal data—
- (a) is in the substantial public interest;
 - (b) is in connection with—
 - (i) the commission by any person of any unlawful act (whether alleged or established),
 - (ii) dishonesty, malpractice, or other seriously improper conduct by, or the unfitness or incompetence of, any person (whether alleged or established), or
 - (iii) mismanagement in the administration of, or failures in services provided by, any body or association (whether alleged or established);
 - (c) is for the special purposes as defined in section 3 of the Act; and
 - (d) is made with a view to the publication of those data by any person and the data controller reasonably believes that such publication would be in the public interest.

European Data Protection Directive 95/46/EC

Recitals

- (26) Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas, to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person; whereas the principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable; whereas codes of conduct within the meaning of Article 27 may be a useful instrument for providing guidance as to the ways in which data may be rendered anonymous and retained in a form in which identification of the data subject is no longer possible;