

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 March 2011

**Public Authority: Chief Constable of Avon and Somerset
Constabulary**

**Address: PO Box 37
Valley Road
Portishead
Bristol
Avon
BS20 8QJ**

Summary

The complainant made two requests to Avon and Somerset Constabulary (the Constabulary), both of which have been considered by the Commissioner in this Notice. The first request relates to investigations into the death of the complainant's father; the second to alleged advice given to the complainant's MEP by the Constabulary's Chief Constable, confirming that a police surgeon had been investigated by the General Medical Council (GMC). Following investigation, the Commissioner has concluded that the Constabulary does not hold any relevant information to either request. However, in not citing this in its initial responses to the complainant's requests or making this sufficiently clear in the outcome of the internal review, the Constabulary breached section 1(1)(a). Furthermore, in not replying to the complainant's first request within the prescribed 20 working days the Constabulary breached section 10(1).

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 two requests to the Constabulary, the first of these being on 24 May 2010. This stated:

'Under the terms of the Freedom of Information Act, I would like to see documentary evidence of these various "investigations" into the circumstance surrounding the sudden and unexpected and still unexplained death of my father.'

3. The second request was made on 31 May 2010 and stated:

'You stated to my MEP that the former police surgeon [Surgeon's name] has been investigated by the GMC...

I want to see the evidence on which you are basing that statement.

There has never been any investigation by the GM Council or [Surgeon's name] professional colleagues and relatives at the GMC.

Under the terms of the Freedom of Information Act I believe I have the right to see the evidence of your lies.'

4. The Constabulary responded to the first request on 1 July 2010. In this it stated that the requested information could not be released as it was exempted under sections 40(2) and the provisions of sections 30(1) and (2).
5. The second request was responded to on 4 June 2010. In this the Constabulary explained that this requested information was exempt under section 40(2) of the Act.
6. The complainant requested an internal review of both decisions on 14 July 2010. The Constabulary provided the decision of its internal review to the complainant on 11 August 2010, having considered both requests in the same letter.
7. In respect of the first request, the Constabulary stated that an initial investigation had taken place but it had no other records of further investigations (it was later confirmed that records of the initial investigation were no longer held, having been lost). It also stated that although the complainant's allegations had been considered, they had not led to any further investigations.
8. In relation to the second request it stated that the data protection principles (relating to section 40(2) of the Act) no longer applied. This is due to the death of the relevant police surgeon. Nevertheless the Constabulary considered that it may still have a common law duty to the

surgeon's estate and would therefore be unable to disclose any personal information. The Constabulary further stated that it could find no records of advising the complainant's MEP that the General Medical Council (GMC) had investigated the police surgeon mentioned in request 2. The Commissioner notes that no further exemptions were cited at this point.

The Investigation

Scope of the case

9. On 23 August 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled. She stated that the application of the exemptions to her requests must be erroneous as she considered there to have never been any investigations about which the Constabulary could cite exemptions. The Commissioner therefore pursued the complaint on the basis of deciding whether the exemptions were correctly cited and whether any relevant information was in fact held by the Constabulary.

Chronology

10. The Commissioner contacted the Constabulary on 28 January 2011 to ask it further questions relating to whether or not it held any relevant information and the application of exemptions to the requests.
11. The Commissioner also contacted the complainant on 2 February 2011 to outline the scope of his investigation. This being whether the Constabulary held information relevant to the complainant's request and whether the Constabulary had correctly applied the stated exemptions to the first request and whether relevant information was held relating to the second request.
12. The Constabulary responded to the Commissioner's letter on 14 February 2011. It provided its evidence showing that it does not hold any relevant information with regards to both of the requests. It stated that given that no relevant information is held by it, it would no longer be relying on the previously cited exemptions. The evidence provided in this letter forms the basis of this Decision Notice.

Analysis

Substantive Procedural Matters

13. 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."

14. The effect of section 1(1)(a) and (b) is that a public authority is under a duty to confirm to a requestor whether or not it holds the requested information and if it does, to provide it to the requestor unless it can rely on one of the Act's exemptions.
15. In determining whether a public authority holds requested information, the Commissioner makes enquiries that will satisfy the civil standard of proof, that is, the information is or is not held on the balance of probabilities.
16. In deciding where the balance of probabilities lies, the Commissioner will consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and results the searches yielded. He will also consider any other information or explanation offered by the public authority which is relevant to his determination.
17. The Constabulary has stated that it does not hold relevant information for either of the complainant's requests. However, for the sake of clarity the Commissioner shall consider the Constabulary's evidence for these assertions for both requests respectively.

Request 1 (dated 24 May 2010)

18. The Constabulary explained that there was an initial investigation into the death of the complainant's father in 2000. This investigation identified no criminal offences. This investigation was reviewed by a senior detective in 2003 and the original findings were upheld. Since then, the Constabulary has stated that no new evidence has been provided which would lead the Constabulary to instigate any new investigations. Therefore the only relevant information which may have been held is that relating to the initial investigation.
19. The Constabulary confirmed that it can no longer locate the file in relation to the initial investigation. It has however stated that this investigation was recorded as a 'no crime' file. The Constabulary's retention policy for 'no crime' files is a maximum of six years. Therefore the original file would have been destroyed at the latest in 2006.

20. The Constabulary has further stated that it believes it highly unlikely that the review of the investigation in 2003 would have created a new file but nevertheless, searches for such a file did not yield a result.
21. Given the Constabulary's retention policy regarding 'no crime' files and its assurance that no further investigations have taken place, the Commissioner considers that, on the balance of probabilities, the Constabulary does not hold the information requested by the complainant in relation to request 1.
22. Therefore the Commissioner has not considered the application of sections 40(2) and 30(1) and (2) of the Act, as the Constabulary is no longer relying on these exemptions and he has determined that the Constabulary does not hold information relevant to the complainant's requests.
23. The Commissioner accepts that the Constabulary should have confirmed that this information was not held in its initial response to the complainant's request. However in not doing so - and in not providing sufficient clarity as to this in the outcome of the internal review with respect to the full scope of request 1 - the Constabulary breached section 1(1)(a) of the Act.
24. 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."
25. The complainant submitted request 1 on 24 May 2010 and a response was provided to her on 1 July 2010. Given that this goes beyond the prescribed 20 working days allowed by the Act, the Constabulary breached section 10(1) of the Act in relation to request 1.

Request 2 (dated 31 May 2010)

26. The Constabulary has explained to the Commissioner that it does not hold any relevant information regarding this request. It has advised that in looking for relevant information, it performed searches of the Chief Constable's Staff Office and the Professional Standards department. These are the branches of the Constabulary most likely to hold any relevant information. Despite several searches, no relevant information has been found.
27. The Constabulary has pointed out that the complainant stated that she has a copy of a letter regarding the alleged statement made by the Constabulary's Chief Constable to the complainant's MEP regarding an investigation having taken place by the GMC. The Constabulary

requested details of the date and author of that letter from the complainant on 11 August 2010, in order that it could perform a more focussed search for the information. Prior to the date on which the Commissioner began drafting this notice, the complainant had not responded to the Constabulary's request. Given that this is now several months ago the Commissioner accepts that enough time has passed for the complainant to have been able to supply the letter if she wanted to.

28. The Constabulary has pointed out that it holds a letter which had been provided to it by the complainant. The letter is dated 20 July 2005 and was sent from the Constabulary's Chief Constable to the complainant's MEP. The letter confirms the Chief Constable as saying that he understands the complainant has made representations to the GMC but it does not confirm that any investigation took place.
29. Given the unproductive searches performed and the lack of any further evidence from which the Constabulary could perform more complex searches, the Commissioner accepts that on the balance of probabilities no information relevant to request 2 is held by the Constabulary.
30. The Commissioner has not considered the application of the exemption found in section 40(2) of the Act, as there is again no relevant information to exempt.
31. As with request 1 above, the Constabulary should have confirmed to the complainant in its initial response to her that it holds no relevant information. In not doing so – and again in not providing sufficient clarity as to this in the outcome of the internal review with respect to the full scope of the request - it is also breached section 1(1)(a) in relation to request 2.

The Decision

32. The Commissioner's decision is that the public authority did not deal with the following elements of the request in accordance with the Act.
 - i) It did not confirm to the complainant in its initial responses that it did not hold any relevant information for either request and did not sufficiently correct its position in the outcome of the internal review. In not doing so, it breached section 1(1)(a) in both instances.
 - ii) It did not respond to request 1 within the prescribed 20 working days. As such it also breached section 10(1) of the Act.

33. However, on the balance of probabilities, the Commissioner upholds the public authority's clarified position that it holds no information relevant to the requests.

Steps Required

34. The Commissioner requires no steps to be taken.

Right of Appeal

35. 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

36. 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.
37. 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 30th day of March 2011

Signed

**Alexander Ganotis
Group Manager – Complaints Resolution
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

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.”

Investigations and proceedings conducted by public authorities

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)."

Personal information

Section 40(1) provides that –

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

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”