

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 April 2012

Public Authority: Chief Constable of Nottinghamshire Police

Address: Police Headquarters

Sherwood Lodge

Arnold

Nottingham

NG5 8PP

Decision (including any steps ordered)

1. The complainant made 6 requests for information concerning a speeding offence committed by a named Police Superintendent and other related information regarding any police officers cautioned for speeding offences where the cases had not been referred to the Crown Prosecution Service (CPS). Nottinghamshire Police withheld the information under sections 40(2) (personal data) and 30(1) (investigations) of FOIA.
2. The Information Commissioner's ("the Commissioner's") decision in relation to requests 1 and 2 is that the correct response was to have neither confirmed nor denied holding any information on the basis of section 40(5)(b)(i). This is because confirming or denying the existence of information would constitute processing of sensitive personal data in breach of the first data protection principle.
3. In relation to requests 3, 4 and 5, the Commissioner has found that Nottinghamshire Police incorrectly refused to respond on the basis that the requests were not valid under section 8 of FOIA. However he has also decided that the correct response in respect of those requests would have been to refuse to confirm or deny holding any information on the basis of section 40(5)(b)(i).
4. In relation to request 6, Nottinghamshire Police correctly refused to provide the information in accordance with section 12(1) (costs limit), but failed to provide appropriate advice and assistance to the applicant under section 16(1) of FOIA. The Commissioner requires Nottinghamshire Police to contact the complainant and provide advice

and assistance either with regards to refining the request to enable compliance or explaining in greater detail why it cannot be refined adequately to bring it under the cost limit.

Request and response

5. On 29 December 2010, the complainant wrote to Nottinghamshire Police and made 6 requests for information, which the Commissioner has numbered for ease of reference, in the following terms:

"I wrote to you recently requiring information under the Freedom of Information Act, and note that as yet there has been no reply.

Under the Freedom of Information Act I require further information from you. In the case of [named Superintendent] the judge said (as quoted in the press) 'THE PUBLIC HAVE A RIGHT TO KNOW WHAT WENT ON AT THE ROADSIDE' [emphasis added by complainant]. So I am asking you to tell me [1] what went on at the roadside and the name of the P.C who issued a caution. Under the Freedom of Information Act I am exercising a right that a judge says I have. If you do not give me this information I will have no hesitation in writing to the judge and telling him so. I shall also inform my MP.

[2]What I also want to know is what happened at the Police Station the following day. [3] Why did an inspector then take it upon himself to refer it to the C.P.S? [4] Would he have done so if had been another officer? And not [named Superintendent]? [5] If the answer to this question is no (as I am 99% sure it is) then why?

This raises a much bigger issue.[6] How many times have Police Officers been caught excessively speeding (as [named Superintendent] was), received a caution from a fellow police officer and the case not been referred to the CPS meaning that the officer has 'got away with it' simply because of who he or she was? Under the Freedom of Information Act, I want to know...".

6. Nottinghamshire Police responded on 26 January 2011. With regard to request 1, the name of the officer concerned, Nottinghamshire Police withheld this information under section 40(2) of FOIA. Any further information regarding what happened at the roadside between the named Superintendent and the PC was withheld under section 30(1) – information held for criminal investigations. Nottinghamshire Police also withheld the information concerning request 2, *'what happened at the Police Station the following day'*, under section 30(1) as it considered that it related to a criminal investigation.

7. Nottinghamshire Police also considered that requests 3-5 relating to whether or not an Inspector would refer the matter regarding the named Superintendent's caution or another matter of a similar nature to the CPS were not valid requests for information under section 8(1) of FOIA.
8. Finally, with regard to request 6, how many times police officers had been caught and cautioned for speeding and the cases had not subsequently been referred to the CPS, Nottinghamshire Police refused to comply with the request stating that information was not held centrally and therefore retrieving and extracting the information from various sources would engage the appropriate costs limit – section 12(1) of FOIA.
9. Following an internal review Nottinghamshire Police wrote to the complainant on 10 June 2011. It upheld its original response.

Scope of the case

10. The complainant contacted the Commissioner to complain about the way his requests for information had been handled. The complainant did not accept that if the requested information was held it constituted personal data or if it was personal data that it should still be withheld from the public. He also did not accept that the information should be withheld as part of a criminal investigation; that the appropriate cost limit would be reached by compliance with request 6; or that some of the requests were invalid under the terms of FOIA.
11. The Commissioner considers that the exemption found at section 40 of FOIA concerning sensitive personal data would cover all of the information relevant to request 1. Therefore, he has not gone on to consider whether that information engages section 30 of FOIA – information held for criminal investigations and the associated public interest test.
12. The Commissioner has, therefore, investigated the following:
 - whether the public authority should have refused to confirm or deny holding information in relation to requests 1 and 2;
 - whether requests 3, 4 and 5 are valid under the terms of section 8(1) of FOIA and if so, how the public authority should have responded to those requests; and,
 - whether request 6 engages section 12(1) of FOIA in that it exceeds the appropriate costs limit as defined by the Freedom of

Information and Data Protection (Appropriate Limit and Fees)
Regulations 2004 (the Regulations).

Reasons for decision

Section 40 (5) (b) (i) – exclusion from the duty to confirm or deny

13. Although Nottinghamshire Police failed to consider this subsection, the subject matter of the case prompted the Commissioner to consider whether Nottinghamshire Police would have been excluded from the duty to confirm or deny holding the information by virtue of section 40(5)(b)(i). He has done this bearing in mind his responsibilities as the regulator of the Data Protection Act 1998 ('the DPA').
14. Generally, the provisions of section 40(1) to (4) exempt 'personal data' from disclosure under FOIA if to do so would breach the data protection principles. Section 40(5)(b)(i) further excludes a public authority from complying with the duty imposed by section 1(1)(a), confirming whether or not the requested information exists, if complying with that duty would contravene any of the data protection principles or section 10 of the DPA, or would do so if the exemptions in section 33A(1) of the DPA were disregarded.
15. The DPA defines personal information as:

'...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,*

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'
16. In this instance, the Commissioner is satisfied that confirming or denying if information relevant to requests 1 and 2 is held would reveal whether or not the named individual had commissioned (or had been alleged to have commissioned) an offence. This would constitute processing of that individual's sensitive personal data by the public authority, irrespective of whether such information is already in the public domain via other means. Therefore he has considered whether confirming or denying in relation to those requests would in itself breach the first data protection principle.

Would complying with section 1(1)(a) contravene the first data protection principle?

17. The first data protection principle states that, "*Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless 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 also met.*"
18. The Commissioner considers the most applicable condition for processing in this case is likely to be Schedule 2, Condition (6)(1) which states:

'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.'
19. In considering whether confirming or denying if the information is held would contravene the first data protection principle, the Commissioner has taken into account the reasonable expectations along with the rights and freedoms of the named Superintendent and the legitimate interests of the public.
20. The Commissioner notes that the named individual is a police officer of relatively senior rank. Whilst individuals in such a public position of responsibility may expect a degree of scrutiny that is higher than members of the public or more junior officers, the Commissioner does not consider that this extends to expecting that the public authority would reveal to the general public whether they had been alleged to have committed speeding offences of the nature relevant to this request. If this were the case then that individual would expect the matter to be dealt with via the relevant regulatory mechanisms. Moreover, even if some information was made public as a result of those mechanisms or the media, they would have the right to expect that they should serve any penalty or punishment and that the matter would then be forgotten. It would not be reasonable for the individual to expect that the public authority would constantly process any specific sensitive personal data of this nature by disclosing it as a result of confirming or denying in response to requests.
21. The Commissioner recognises that there is a legitimate public interest in transparency of police officers and accountability for their conduct and actions. However, he also has to consider the individual(s) involved and their right to privacy. Whilst it is true that confirmation or denial in this case would provide limited information regarding the conduct of an

individual officer and this may to some degree further transparency and accountability, given the circumstances, the Commissioner does not believe that the legitimate interests of the public in this case outweigh the unfairness to the data subject.

22. On the basis of the above considerations, the Commissioner has determined that to confirm or deny whether the requested information is held would be unfair to the data subject, the named Superintendent. As disclosure would breach the first data protection principle, section 40(5)(b)(i) is engaged and therefore Nottinghamshire Police was not in fact obliged to confirm or deny whether information relevant to requests 1 and 2 was held.

Section 8 – Request for information

23. Section 8(1) of FOIA states that:

“In this Act any reference to a “request for information” is a reference to such a request which –

(a) is in writing,

(b) states the name of the applicant and an address for correspondence, and

(c) describes the information requested.”

Nottinghamshire Police argued that requests 3, 4 and 5 were not valid requests for information under FOIA.

24. Nottinghamshire Police argued that these requests posed hypothetical questions and sought opinion rather than access to official, recorded information.
25. The Commissioner disagrees with Nottinghamshire Police in this regard. In his view any written question to a public authority is technically a request under FOIA. However, public authorities are only required to consider whether or not they hold any recorded information relevant to a request. They should then confirm or deny its existence, subject to any exemption to that duty applying. If information is held then it should be provided, again subject to any relevant exemption applying.
26. FOIA does not require public authorities to create information in order to respond. In this instance the Commissioner considers that it is feasible that recorded information could be held which would have been relevant to the requests, for example policies detailing what actions should be taken in the event that a serving officer is alleged to have committed an offence.

27. However, notwithstanding the point above, the Commissioner considers that the effect of confirming or denying in relation to requests 3, 4 and 5 would have been to reveal the existence or otherwise of material relevant to requests 1 and 2. Therefore, for the same reasons as set out above in respect of requests 1 and 2, the Commissioner considers that Nottinghamshire Police would not have been required to confirm or deny in relation to requests 3, 4 and 5 on the basis of section 40(5)(b)(i) as to do so would breach the first data protection principle.

Section 12 – Cost of compliance exceeds appropriate limit

28. Nottinghamshire Police refused to comply with request 6 on the grounds that compliance would exceed the appropriate costs limit.

29. Section 12(1) of FOIA states that:

'Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.'

30. The 'appropriate limit' as defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Regulations) is £600 for central government departments and £450 for all other public authorities. Therefore, the appropriate limit in this case is £450.
31. The Regulations allow a public authority to charge the following activities at a flat rate of £25 per hour of staff time:
- determining whether the information is held;
 - locating the information, or a document which may contain the information;
 - retrieving the information, or a document which may contain the information; and
 - extracting the information from a document containing it.
32. In order to determine whether Nottinghamshire Police applied section 12(1) to the request correctly, the Commissioner asked it to illustrate the cost involved in complying with the request. The Commissioner asked Nottinghamshire Police to provide him with a realistic and reasonable estimate, only taking into consideration the activities listed above, of the costs compliance would incur.
33. Nottinghamshire Police explained, as it had done to the complainant in its letter of 26 January 2011, that information relating to request 6 was not held centrally. Information of this nature would be held on each individual officer's personnel file. Nottinghamshire Police stated that there are approximately 2,500 police officers working in

Nottinghamshire Police Force and each officer's personnel file would need to be manually searched to determine whether they had received such a speeding caution as described in the request.

34. Nottinghamshire Police estimated that it would take five minutes per file to retrieve and extract information regarding any speeding cautions received and this would therefore equate to a total of 208 hours' worth of work. At £25 per hour this work would cost Nottinghamshire Police over £5000. The Commissioner notes that, even if the estimate of five minutes per file was exaggerated, a minute per file would still equate to 41 hours and therefore compliance would incur a cost of over £1000.
35. The Commissioner accepts that, due to the information not being held centrally, compliance with request 6 would exceed the appropriate cost limit and therefore it was not required to provide the requested information on the basis that section 12(1) applied.

Section 16 – Duty to provide advice and assistance

36. Section 16(1) of FOIA states that:

'It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.'

37. Advice and assistance provided by public authorities in relation to requests that have engaged section 12(1) usually involves some form of communication with the applicant in order to help him or her refine the request so that it can be answered under the appropriate costs limit.
38. With regard to this case, the Commissioner has not been provided with or seen any evidence that Nottinghamshire Police attempted to provide advice and assistance of the nature described above to the complainant.
39. As section 16(1) has evidently been breached, the Commissioner requires Nottinghamshire Police to contact the complainant with a view to providing some advice and assistance as detailed in his decision at the top of this notice.

Right of appeal

40. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

41. 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.
42. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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