

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 February 2013

Public Authority: Independent Police Complaints Commission
Address: 90 High Holborn
London WC1V 6BH

Decision (including any steps ordered)

1. The complainant has requested information as to whether a DNA sample and other samples were taken from a named police officer. He also asked for further detail about this. The Independent Police Complaints Commissioner ("IPCC") confirmed that it held information which would answer his question as to whether the samples were taken. However, the IPCC refused to confirm or deny whether it held the further detail he had requested. It cited provisions of section 40 (the personal data exemption) in support of its position. It upheld this position at internal review.
2. The Commissioner's decision is that the IPCC is entitled to rely on the provisions of section 40(2) and section 40(5) in relation to this request.
3. No steps are required.

Request and response

4. On 4 September 2012, the complainant wrote to the IPCC and requested information in the following terms:
5. *"Can the IPCC provide a response to the questions [contained in an earlier request to the Metropolitan Police] about whether [named police officer's] DNA etc. was obtained and whether it is on the PNC."*

The complainant's earlier request to the Metropolitan Police had been for information of the following description: *"If and when was [the named police officer's] DNA taken."* His preamble to this request was as follows: *"The Metropolitan Police have ... not given any answer as to if and when*

his DNA, fingerprints and photographs etc was obtained, and is now on the Police National Computer".

6. The Metropolitan Police directed the complainant to the IPCC on this matter. The relevant investigation was conducted by this body.
7. The IPCC responded on 28 September 2012. It cited section 40(2) of the FOIA as the basis for its refusal to provide a full response to the complainant's request.
8. Following an internal review the IPCC wrote to the complainant on 26 October 2012. It upheld its original position.

Scope of the case

9. The complainant contacted the Commissioner on 6 November 2012 to complain about the way his request for information had been handled.
10. In correspondence with the IPCC, the Commissioner established the full detail of its position with regard to section 40 (the personal data exemption). It explained that it saw the complainant's request as being in 3 parts as follows:
 - i. Were fingerprints, photographs and a DNA sample obtained from the named officer in connection with an alleged offence?
 - ii. On what date was this data taken from the named officer?
 - iii. Were the named officer's fingerprints, photographs and DNA recorded on any official database, such as the Police National Computer?
11. The Commissioner agrees with this analysis of the complainant's request. The Commissioner notes that the request of 4 September 2012 refers to "DNA etc" and not specifically to other samples. The Commissioner is satisfied from the correspondence provided by both parties that "etc" includes fingerprints and photographs because they are referred to in the complainant's earlier request to the Metropolitan Police which the complainant provided to the IPCC.
12. IPCC also explained that in relation to the first part of the request, it was prepared to confirm that it held information which would answer the request but was not prepared to disclose it citing section 40(2) of the FOIA as its basis for doing so. The exemption at section 40(2) of the FOIA applies where disclosure of personal data would contravene any of the data protection principles of the Data Protection Act ("DPA"). It

argued that disclosure would be unfair and therefore in contravention of the first data protection principle.

13. As regards the second and third parts of the request, it said that it refused to confirm or deny whether it held information that would answer these parts of the request. It explained that it was excluded from its duty to provide confirmation or denial because doing this would, in itself, involve the unfair disclosure of personal data. It argued that, therefore, it could rely on section 40(5) of the FOIA as a basis for not providing confirmation or denial.
14. The Commissioner will therefore consider whether:
 - a) the IPCC is entitled to rely on section 40(2) of the FOIA in relation to the first part of the request; and
 - b) the IPCC is entitled to rely on section 40(5) of the FOIA in relation to the second and third parts of the request.

Reasons for decision

15. Section 40(2) of FOIA states that personal data is exempt if its disclosure would breach any of the data protection principles contained within the DPA. Section 40(2) can only apply to information that is personal data. This term is defined specifically in the DPA.¹
16. The IPCC has argued that the information described in the first part of the request is personal data and that disclosing it would be unfair and thus in breach of the first data protection principle of the DPA. This 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.”
17. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

¹ <http://www.legislation.gov.uk/ukpga/1998/29/contents>

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights;
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - particular circumstances of the case, e.g. established custom or practice within the public authority; and whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
 - The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor, the Commissioner may take into account
 - whether information of the nature requested is already in the public domain;
 - if so, the source of such a disclosure; and
 - even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
18. Furthermore, notwithstanding the individual in question's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling and legitimate interest in disclosure.
19. In considering 'legitimate interests' in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the individual in question, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.
20. In determining whether information is personal data, the Commissioner has referred to his own guidance and considered the nature of the

information in question.² The Commissioner is satisfied that the information described in the first part of the complainant's request is personal data. The information relates to a living individual. It is also biographically about that individual because it relates to his dealings with a law enforcement agency, namely the IPCC.

21. The Commissioner also considered whether the information in question is sensitive personal data within the meaning of section 2 of the DPA. Given that it is closely connected with allegations of criminality made against the named officer and his dealings with the IPCC in this regard, the Commissioner has concluded that all the personal data that has been requested is sensitive personal data within the meaning of section 2 of the DPA.
22. As noted above, disclosure of sensitive personal data under the FOIA must be fair and lawful and must be in accordance with one of the conditions of Schedule 2 of the DPA (as well as one of the conditions of Schedule 3 of the DPA) (see Note 1).
23. If one of the two limbs of the first data protection principle of the DPA cannot be satisfied, disclosure would contravene that data protection principle and the information is exempt from disclosure under section 40(2) of the FOIA.

The complainant's arguments

24. The complaint drew attention to the fact that a considerable amount of information had been put into the public domain about the named officer and how his actions were alleged to have contributed to the death of a member of the public.
25. He also drew attention to what is widely known about what happens to individuals who are arrested for a recordable offence such as the one relevant to the named officer's case. It would be expected that the relevant law enforcement agency would obtain the samples listed in his request and would retain those samples even if the individual was not charged or was acquitted of any charge. The complainant implied that there would be little or no damage or distress to the named officer because of the amount of information about his dealings with the IPCC that was already in the public domain.

² http://www.ico.gov.uk/for_organisations/data_protection/the_guide/key_definitions.aspx

26. The complainant also had strongly felt concerns about the practices of law enforcement agencies in relation to the collection of DNA and wanted to check that the named officer had been treated the same as an ordinary member of the public.
27. He also raised concerns about disclosures made to alleged victims about alleged offenders during the investigation process. He pointed to what he saw as inconsistencies in what the IPCC (and law enforcement agencies generally) did with sensitive personal data. He argued that if it was fair to give the name of alleged offenders to their alleged victims then it was fair to disclose the information had requested under the Act.

The IPCC's arguments

28. When asked by the Commissioner whether, in fact, the IPCC was seeking to refuse to confirm or deny whether it held any information within the scope of the first part of the request, the IPCC acknowledged that it would be nonsensical to do so. It took this view because so much information was in the public domain about its dealings with the named officer. It was prepared to provide confirmation that it held information which would answer the first part of the request but not prepared to disclose it under the FOIA.
29. The public authority's arguments focussed on the fact that the information that it held which would answer the first part of the request constituted the sensitive personal data of the named officer. It argued that it had no basis under schedule 3 of the DPA to disclose this information. It provided detail to the Commissioner in support of its position. Unfortunately, the Commissioner is unable to include this detail on the face of this Notice without disclosing the requested information.

The Commissioner's conclusion

30. Having read the IPCC's full submissions, the Commissioner is satisfied that it holds information which answers the first part of the request.
31. When considering the exemption at section 40(2), the Commissioner focusses on fairness – would it be fair in all the circumstances of this case to disclose the requested information? Where the information in question is sensitive personal data, one of the conditions in Schedule 3 of the DPA must also be satisfied to permit disclosure without breaching the first data protection principle of the DPA. To meet one of the conditions described in Schedule 3 constitutes a very high test for processing. This reflects the sensitivity of the information in question.
32. The Commissioner thinks that where information is sensitive personal data, the data subject (in this case, the named officer) has a greater expectation of confidentiality. The Commissioner also thinks that such

an expectation is both reasonable and legitimate given the type of information in question. In this case, the information relates to that person's dealings with a law enforcement agency that took place as a result of allegations of criminality made against that person.

33. Where a person has allegations of criminality made against them, particularly in a high profile case, a certain amount of information will inevitably be put into the public domain about them as part of the process of law enforcement and as a consequence of media reports, particularly if the matter goes to court. However, this does not mean that there is a compelling and legitimate interest in putting all sensitive personal data of a similar nature about that person into the public domain. Even if where there is a compelling and legitimate interest (as the complainant has argued there is), it is important to consider whether disclosure, in whole or in part, would be necessary to serve that interest.
34. The complainant is seeking to identify inconsistencies in the approach taken by law enforcement agencies in the collection and retention of DNA samples. He also believes there is an inherent unfairness arising from what he considers to be inconsistencies. He is particularly concerned that samples are taken and retained where a person is not charged with a recordable offence. The Commissioner agrees that there is a legitimate interest in informing the debate around this subject.
35. The first part of his request seeks information about whether fingerprints, photographs and a DNA sample were taken from the named officer. The Commissioner notes that it is only information about the collection of a DNA sample which could serve the legitimate interest identified by the complainant. His focus is on the process of DNA collection and not on the collection of other samples.
36. Arguably, disclosure of information about DNA collection in this case would, in part, serve the legitimate interest identified above. It would tell the public whether a DNA sample had been collected in a high profile case involving a law enforcement officer and whether, therefore, a consistent approach had been taken. However, the Commissioner thinks that such a disclosure would be wholly outside the reasonable expectations of the individual to whom it relates.
37. In light of the above, the Commissioner has concluded that disclosure of the requested information in this case would be unfair.
38. For completeness, the Commissioner has also considered whether it would be possible to satisfy a DPA Schedule 3 condition in order to allow disclosure. He has concluded that it would not.

Section 40(2) - Conclusion

39. The Commissioner has decided that disclosure of information within the scope of the first part of the complainant's request would contravene the first data protection principle of the DPA. The information in question is therefore exempt under section 40(2) of the FOIA.

Section 40(5) - Neither confirm nor deny whether personal data is held

40. The IPCC is prepared to provide confirmation or denial as to whether it holds information that would answer the first part of the request. In this case, it has confirmed that it holds such information but, as set out above, the Commissioner agrees that it is not obliged to provide it.
41. The IPCC is not prepared to confirm or deny whether it holds information described in the second or third part of the complainant's request. It argues that providing confirmation or denial would, in effect, provide the information described in the first part of the request.
42. In practical terms, this means that if the IPCC were to confirm or deny whether it held the date on which the samples and photographs described in the request were taken it would answer the question as to whether samples and photographs were taken. Similarly, if the IPCC were to confirm or deny whether it held information about the retention of the samples and photographs on a national database such as the Police National Computer, this would answer the first part of the complainant's request as to whether the samples and photographs were taken in the first place.
43. Section 40(5) states that:
- "The duty to confirm or deny-
- (a) 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), and
 - (b) does not arise in relation to other information if or to the extent that either-
 - i. the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded, or

- ii. by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

44. The IPCC argues that section 40(5)(b)(i) applies; that it would contravene the first data protection principle to provide confirmation or denial as to whether it holds the information described in the second and third parts of the complainant's request

The second part of the request – the date that samples and photographs were taken

45. As outlined above, the IPCC argued that were it to confirm or deny that it held such information, this would, in effect provide the information described in the first part of the request. It would disclose the information that IPCC holds as to whether or not the samples in question and photographs were taken.

46. The arguments put forward by both parties in relation to section 40(2) should also be considered here. The complainant argues that there is an overwhelming and legitimate interest in knowing more about whether standard procedures were followed in this case and in informing the debate about whether those procedures are appropriate and fair. The IPCC argues that it would be unfair to disclose this sensitive personal data because it is wholly outside the reasonable expectations of the named officer and no DPA Schedule 3 condition can be satisfied.

47. The Commissioner has considered whether confirmation or denial would, of itself, have the detrimental consequences described by the IPCC. He is satisfied that confirmation or denial would, in effect, provide the information described in the first part of the request. For the reasons outlined above, he agrees that it would be unfair to provide that information and that no DPA Schedule 3 condition can be satisfied to allow for it. He therefore agrees that the IPCC is excluded from its duty to provide confirmation or denial in response to the second part of the request by virtue of section 40(5).

The third part of the request – whether the samples and photographs were placed on a national database

48. As with the second part of the request, the IPCC argued that were it to confirm or deny that it held such information, this would, in effect provide the information described in the first part of the request. It would disclose the information that IPCC holds as to whether or not the samples in question and photographs were taken.

49. Again, as with the second part of the request, the complainant's arguments in favour of providing confirmation or denial are set out above as are the IPCC's arguments in favour of refusing to provide confirmation or denial.
50. The Commissioner took into account the detailed submissions of both parties. For the reasons outlined above, he agrees that the IPCC is also excluded from its duty to provide confirmation or denial in response to the third part of the request by virtue of section 40(5).

Right of appeal

51. 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

52. 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.
53. 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

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