

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 13 February 2007

Public Authority: Chief Officer of Sussex Police
Address: Police Headquarters
Malling House
Church Lane
Lewes
East Sussex BN7 2DZ

Summary

The complainant requested investigation information relating to a serious allegation that was made against him. The public authority refused to provide this information citing Section 30(1) and Section 30(2) (Information obtained during an investigation), Section 38 (Health and Safety), Section 40(1) (Personal Data relating to the applicant) and Section 40(2) (Unfair Disclosure of Personal Data). The Commissioner has decided that the public authority should have specified in its refusal notice that it did not hold some of the requested information. In failing to do so, it contravened the requirements of Section 1(1) (a) of the Act. In relation to the withheld information, the Commissioner has decided that it was exempt under Section 30(1). The Commissioner has also decided that the public interest in maintaining this exemption outweighs the public interest in disclosure in relation to the majority of the withheld information. However, the Commissioner has decided that the public interest in maintaining the exemption did not outweigh the public interest in disclosure in relation to one officer statement included in the withheld information. The Commissioner has also decided that it would not breach any of the data protection principles to disclose the names of officers mentioned in the withheld information.

The Commissioner requires the public authority to disclose the specified officer statement and to disclose the names of officers mentioned in the withheld information within 35 calendar days of the date of this Notice.

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 FOI Act"). This Notice sets out his decision.

The Request

Background

2. Before setting out the chronology of the request, the Commissioner's investigation and the reasoning behind the Commissioner's decision, this notice will outline the background to this case. At this point, the Commissioner would note for the benefit of the general reader that some may find the subject matter distressing.
3. On Sunday 25 August 2002, an individual ("Ms B") made a serious allegation against the complainant with whom she was living at the time. Ms B alleged that the complainant had raped her that morning and that he had held her against her will at their residence for the rest of the day. Ms B claimed that she was unable to escape the residence until the evening at which time she made her way to a police station to report the incident. At the police station where she reported the incident, Ms B was also examined by a doctor.
4. The complainant was arrested and questioned about this allegation. He refuted the allegation and asserted that Ms B had been shopping that afternoon at the local branch of Waitrose and at a local jewellery store. Upon his release he was able to supply receipts of purchases Ms B had made on that day to support this assertion. He also contacted both shops himself and asked the shop managers to retain any CCTV footage they might have of Ms B's visits for later collection by officers of the public authority.
5. Having investigated the allegations and having considered the evidence, the public authority decided not to submit the matter to the Crown Prosecution Service. The complainant remained in contact with the public authority raising concerns about the turn of events and the impact those events had on him and his reputation. He was also in contact with the public authority in regard to other matters which are not directly relevant to the Commissioner's investigation.
6. In Summer 2005, Ms B visited a solicitor with the complainant and a statement was prepared withdrawing her allegation against him. The public authority asked Slough Police to interview Ms B about this. During the interview, Ms B stated that she had been pressurised into making the withdrawal statement and that her original allegation had been true.
7. The complainant evidently continued to press for the matter to be marked as "No Crime" and involved his MP in his efforts. On 25 November 2005, the public authority wrote to his MP outlining much of what is recounted in paragraphs 2 to 6 above. Although this letter postdates the information request which is the subject of this notice, the Commissioner considers that it would be useful to refer to its content at this stage of the Notice in order to provide additional relevant background information.
8. The 25 November 2005 letter explained why the public authority had decided not to mark the matter as "No Crime". It also explained that the matter had been

reviewed by a senior officer at the public authority who had not been involved in the original decision making process. That senior officer's decision not to record the matter as "No Crime" was made taking into account the Home Office Counting Rules for Recorded Crime ("HOOCR")

<http://www.homeoffice.gov.uk/rds/pdfs06/countgeneral06.pdf>.

These rules are published by the Home Office Research Development Statistics Directorate and an outline of HOOCR's provisions was provided to the MP. The HOOCR will be discussed later in this notice from paragraph 103.

9. The 25 November 2005 letter also explained that "*there was no substantiating medical evidence that a rape had taken place.*" It further commented on reviews the author regularly conducted into both detected and undetected rapes. It stated that "*In the vast majority of cases, especially those involving an element of contested consent [as was the case here], there is no medical evidence of injury. So whilst this information is always considered, its weight can vary from case to case.*" It added that "*[Ms B] was alleging rape over a period of time and therefore any fresh injuries [here it provided examples of what those injuries might be] would not necessarily be evident if the account was true.*"
10. The author of the letter expressed some sympathy with the complainant's position but added that "*we are bound by the [HOOCR] and indeed recognise on a daily basis, the low threshold for recording crime and the high threshold for expunging crimes from our records.*"
11. Finally, the author advised the MP that he had explained this to the complainant on a number of occasions and commented that the complainant was not recorded on the Police National Computer as a suspect or offender for this matter. He added that "*whilst he does remain a suspect on the Sussex Police Crime Information System, this does not mean that we have proven any offence against him, it is just that he has been identified as the person possibly responsible for this.*" The complainant was advised to contact the IPCC (Independent Police Complaints Commission) if he had any further complaints about the public authority but the author noted that "*the IPCC have already indicated that the decision not to record this rape as a no crime is not a misconduct issue but one of judgement, which they appear to support.*"

Chronology of the request

12. This notice will now deal with the information request itself. The Commissioner notes that the public authority believed it had already explained much of the 25 November 2005 letter to the complainant on a number of occasions prior to the date of that letter. Having no evidence to dispute this statement, the Commissioner can only assume that when the information request was made much of the content of the 25 November 2005 letter had already been provided to the complainant. That said, it is far from clear to the Commissioner that the complainant had fully understood any explanation that had been given to him about the impact of HOOCR on his individual situation. The Commissioner notes, for example, that during telephone conversations with one of his caseworkers, the complainant had not fully appreciated that "*[Ms B] was alleging rape over a period of time*" until the caseworker drew his attention to this comment in the 25

November 2005 letter to his MP (see paragraph 9 above).

13. It should also be noted that that there were, in fact, 2 requests, the second of which repeated much of the first. For practical reasons, the Commissioner has combined the public authority's response to both requests in this Notice. This approach was explained to both parties on 16 October 2006 and neither party objected to it.

First request

14. On 31 October 2005, the complainant sent a request for information to the IPCC on the understanding that it would be passed to the public authority. The complainant was in correspondence with the IPCC in relation to complaint he had made about the public authority. The Commissioner understands that it is normal practice for the IPCC to forward such complaints to the police force in question. The complainant appeared to misunderstand the limits of the IPCC's remit and to assume that it acted as a conduit for all correspondence between him and the public authority. The relationship between the complainant and the public authority had, by this stage, broken down. In any event, the IPCC faxed the request to the public authority on 8 November 2005. The request was for the following information:

1. "Waitrose CCTV [footage showing Ms B shopping there]"
2. "Jewellery CCTV [footage showing Ms B shopping at a local jewellery shop]"
3. "Statements from both managers (CCTV)"
4. "Police report on CCTV tapes"
5. "[Ms B's] forensic report"
6. "Any police statements officers involved. And anything else they have"

15. The public authority failed to respond to this request and the complainant made a complaint to the Commissioner's office on 16 January 2006. Following the intervention of the Commissioner's office, the public authority responded to the complainant in a letter dated 17 February 2006. The public authority refused to provide the information citing 5 exemptions as being applicable:
- Section 30(1) - Investigations conducted by a public authority
 - Section 30(2) - Information provided in confidence during an investigation
 - Section 38 - Health and Safety
 - Section 40(1) - Information which is the complainant's personal data and for which the appropriate access route is Section 7 of the Data Protection Act 1998 ("DPA98")
 - Section 40(2) – Where disclosure of personal data relating to other people would contravene one of the data protection principles of DPA98.

The aforementioned failure to respond to this request was resolved informally by the Commissioner's office and following correspondence with the complainant, the complaint was deemed withdrawn.

16. The complainant sent an appeal to the public authority's refusal in a letter to the Commissioner's office dated 22 February 2006. While it is not the usual practice

of the Commissioner to act as a conduit for correspondence between complainants and public authorities, this appeal was forwarded to public authority in the interests of expediency.

17. The complainant's appeal reiterated the request. The complainant received a response to this appeal from the public authority in a letter dated 3 May 2006 and the response upheld the original refusal. On 10 May 2006, the complainant sent a letter of complaint about the outcome of this appeal to the Commissioner's office.

Second request

18. The complainant had indicated in a letter to the Commissioner's office and to the IPCC dated 6 January 2006 that he wished to include the following additional information into the scope of his request:

7. *"Video of [Ms B], Statement Aug 2002 Made to police recorded by police"*
8. *"Statement made by [Ms B] taken at Slough police station re her statement that she made up the false rape allegation. Approx 2005, the police were questioning her about her withdrawal"*

He also restated his request for the information listed in paragraph 14 above and requested additional information already caught by the scope of the request listed in paragraph 14 namely:

9. *"Name of officer who questioned [Ms B] Aug 02 original statement.*
10. *"Police timeline Events and times of forensic examination, questioning, release, no charge, for the whole of the 6 week period Aug Bank Hols 02 to approx 10 October 02."*

19. Neither the Commissioner's office nor the IPCC noted this new element in the complainant's correspondence at the time his letter was received. For the reasons outlined in paragraph 14, at the time he sent this letter to the IPCC and to the Commissioner's office, the complainant was still under the impression that all public authorities would act as a conduit for any of his correspondence with this public authority as part of their respective complaints handling processes.
20. Again, in the interests of expediency, one of the Commissioner's caseworkers wrote to the public authority on 3 October 2006 forwarding the 6 January 2006 letter with initial comments and questions on the case. (More detail about this letter is provided later in this Notice.) The caseworker wrote to the complainant on 5 October 2006 to advise that the letter had been forwarded in this instance and to reiterate the fact that requests under the FOI Act should be made directly to the public authority in question. This point had already been made to him in during a succession of telephone calls he had made to the Commissioner's Enquiry Line.
21. The public authority responded to the complainant about this further request in a letter dated 11 October 2006. It noted that the request included items that were, in its view, already caught by the scope of his earlier request and noted that the

matter was now under appeal at the Commissioner's office. It also provided a response in relation to the other items raised in the complainant's letter including a data protection matter. This letter also advised the complainant of his right to a review of this response and right to appeal the matter to the Commissioner. Both the public authority and the complainant provided the Commissioner with a copy of this response.

22. The Commissioner's caseworker noted that the public authority had mistakenly included items 7 & 8 as being part of the earlier request. The caseworker clarified the scope of the request during a call received from the complainant on 16 October 2006. The Commissioner called the public authority on the same day to advise the apparent error and to advise that, for practical purposes, items 7 and 8, as well as items 9 & 10 were to be included in the scope of his investigation. The public authority raised no objection to this approach.

The Investigation

Scope of the case

23. The complainant sought access to the following information:

1. "Waitrose CCTV [footage showing Ms B shopping there]"
2. "Jewellery CCTV [footage showing Ms B shopping at a local jewellery shop]"
3. "Statements from both managers (CCTV)"
4. "Police report on CCTV tapes"
5. "[Ms B's] forensic report"
6. "Any police statements officers involved. And anything else they have"
7. "Video of [Ms B], Statement Aug 2002 Made to police recorded by police"
8. "Statement made by [Ms B] taken at Slough police station re her statement that she made up the false rape allegation. Approx 2005, the police were questioning her about her withdrawal."
9. "Name of officer who questioned [Ms B] Aug 02 original statement."
10. "Police timeline Events and times of forensic examination, questioning, release, no charge, for the whole of the 6 week period Aug Bank Hols 02 to approx 10 October 02."

24. The complainant also raised a number of other issues with the Commissioner that are not addressed in this Notice because they are not requirements of Part 1 of the FOI Act.

25. In the Commissioner's view, item 9 is already caught by the scope of item 6. It is also included in the scope of item 7. The Commissioner believes that item 10 is not held as a separate document but the information that would constitute a "timeline" is contained within other information caught by the scope of the above listed items.

26. The Commissioner considers that the phrase "Aug Bank Hols 02" includes Sunday 25 August 2002. This is the date that the complainant allegedly raped

Ms B and held her at their residence against her will. The Commissioner understands that “*approx 10 October 2002*” is the date on or around which the complainant was told that the matter was not going to be put forward for prosecution.

27. In correspondence with the Commissioner, the public authority acknowledged that it should have explained to the complainant that it did not hold the following items:
1. “*Waitrose CCTV*” [footage showing Ms B shopping there]
 2. “*Jewellery CCTV*” [footage showing Ms B shopping at a local jewellery shop]
 3. “*Statements from both managers (CCTV)*”

On the Commissioner’s instruction, it explained this to the complainant in a letter dated 25 September 2006.

The public authority advised that it held information caught by the scope of the remaining items on the list but that this information was exempt under Section 30(1) (Investigations Information), Section 30(2) (Investigations Information provided by a confidential source), Section 38(1) (Health and Safety), Section 40(1) (Personal Data of the applicant) and Section 40(2) (Unfair disclosure of third party personal data). All four exemptions are provided in a legal annex to this notice.

28. Having considered the complainant’s formal complaint dated 16 January 2006 and his various written submissions to the Commissioner’s office since that date, the Commissioner’s investigation focussed on
- a) Whether the public authority held items 1 – 3
 - b) Whether items 4 – 10 had legitimately been withheld under the Act.

Chronology of the Investigation

29. A member of the Commissioner’s Case Reception Team contacted the public authority on 10 May 2006 to advise the public authority that a complaint had been received. The team member asked the public authority to forward to the Commissioner’s office a copy of the information that the complainant had requested in his first request. The public authority forwarded this information to the Commissioner’s office with an explanatory letter dated 17 May 2006. As outlined in paragraph 27, the public authority acknowledged in this letter that it should have advised the complainant in its refusal notice that it no longer held the Waitrose and jewellery shop footage that he had requested and that no statements were taken from the managers of those shops. It further acknowledged that this point should have been included in its internal review where it had not been addressed in its initial refusal notice. As also outlined in paragraph 27, the Commissioner instructed the public authority to tell the complainant directly that it did not hold items 1-3. It did so in a letter to the complainant dated 25 September 2006.

Does the public authority hold items 1 and 2? – Investigation

30. In its letter of 25 September 2006 to the complainant, the public authority explained that although it seized tapes containing the footage from both Waitrose and the jeweller's, it had not retained them as evidence. It explained that “*for technical reasons*” it was not able to interrogate on its own systems the footage which it had seized from one of the stores. It stated that it returned this to the store. It further explained that the other tape had been incorrectly labelled and did not show the relevant times.
31. The complainant disputed the public authority's assertion that it did not hold the CCTV footage of Ms B shopping at Waitrose or at a local jeweller's store and that it did not take managers' statements at the time. In the complainant's view, it was implausible that the evidential difficulties mentioned by the public authority could have happened bearing in mind what, in his view, was the likely timeline for evidence gathering at the time. He also reiterated that he had made efforts himself to ensure that the managers retained the relevant evidence. He asserted that the managers had willingly co-operated with him despite the fact he had been accused of such a crime and he found it difficult to believe that his efforts appeared to have been in vain.
32. The complainant also submitted in evidence the 25 November 2005 letter to illustrate his position that the tapes must still be held. He drew the Commissioner's attention to a section of the letter which refers to Ms B “*being sighted on CCTV in various shops around the City Centre*” and asserted that this undermined the public authority's assertion that it did not hold the tapes.
33. The complainant further submitted in evidence a letter from Waitrose's Bracknall office dated 10 November 2006 which referred to the CCTV system it had in place in the store in question in August 2002 as being a “*digital to tape*” record facility. He also reported a telephone conversation he had had with an unspecified representative of Waitrose where that representative reported that “*It was more likely that that the recording was a Video VHS, less likely to be a computer database system.*” However, this was not substantiated in writing and the Commissioner noted that the letter from Waitrose Bracknall also stated that “*Having spoken with the managers working at the [store in question] during this period, they are unable to recall events at the time.*”
34. The Commissioner asked the public authority for the following information:
- What format was the Waitrose tape (if known)?
 - What software did Waitrose use to record onto the tape (if known)?
 - What hardware and software do the police use in order to interrogate CCTV footage from external sources?
 - Does it regularly arise that Sussex Police is unable to access CCTV footage from external sources?
35. The Commissioner also asked for comments as to how the jeweller's shop tape came to be mislabelled, drawing the public authority's attention to the complainant's efforts to ensure that both shops retained the footage for later

scrutiny.

36. The Commissioner also asked for evidence of any paper trail that might have accompanied the movement of the tapes to and from the stores to the police station or, as an alternative, a statement of policy or procedure for the return of evidence that was not deemed necessary for an investigation.
37. The public authority advised that it was unable to identify information in its records relating to the format of the tape from Waitrose nor the software that Waitrose used. However, it understood that the items supplied by Waitrose had an approximate value of £500. Due to the value of the equipment, it said that Waitrose was understandably anxious to have it returned.
38. It also advised that in 2002, it only had the facilities to copy tapes supplied on VHS, SVHS, Hi8 or DV tape format providing that the original contained the video footage in unencrypted form. If the footage was in one of those formats and not in encrypted form it would be able to copy it onto a standard VHS tape. It also explained that the phrase "*digital to tape*" used by Waitrose in its letter to the complainant dated 10 November 2006 provided a clue as to why the public authority was unable to interrogate what Waitrose supplied at the time. It had no capability at the time to retrieve video footage "*from any kind of digital media*". If, at the time, a case warranted extracting footage from a format other than the ones listed above, the work would be contracted out to a private company. It advised that this exercise was normally quite costly and generally used for serious offences. Although this case related to an allegation of a serious offence, it had sufficient evidence from elsewhere to support the suggestion that Ms B had been shopping in Waitrose at the time she alleged she was being held against her will by the complainant. It added that its own Technical Support Unit would now be able to retrieve 95% of external CCTV systems assuming that the external source provided the correct decoding software.
39. In relation to the jewellery shop tape, the public authority advised that the tape was also viewed in situ by the investigating officer but was not seized until later. When the tape was brought to the station it became clear that the wrong label had been put on the tape because it did not show footage from the date and time that it purported to represent. In effect, the wrong tape had been seized. The shop was contacted and it was at that stage that the public authority discovered that the tape had been incorrectly labelled. The public authority also learned that the tape showing the relevant footage had, by that time, already been recycled.
40. The public authority was unable to find a paper trail to show the seizure and subsequent return of the equipment from Waitrose or the tape from the jewellery shop but drew the Commissioner's attention to sections of the withheld information which included reference to the progress of the tapes to and from the public authority. It stressed that the Waitrose equipment could not be interrogated and was therefore returned to the shop because of its value to Waitrose. The jewellery shop tape showing footage from a different time period was of no value to the investigation and there was, therefore, no need to retain it.

41. At the same time, having noted the content of the Waitrose Bracknall letter, the caseworker made informal inquiries to Waitrose to see if it could shed any further light on what might have occurred in relation to the tapes. The Commissioner is grateful for the prompt and wholly voluntary co-operation provided by Waitrose.
42. The Waitrose security team confirmed that in August 2002, the CCTV system in place at the store in question was a “*digital to tape*” system. It explained that footage was recorded onto Digital Audio Tapes (DAT) that were loaded onto a Sony drive unit. They could only be played back on this unit and Waitrose understood that the police did not have such a device. However, to address this, footage could be selected for playback from the unit. A standard VCR could then be connected to the unit to record events shown on the monitor onto a normal VHS tape. Waitrose also advised that, given the passage of time, it was unable to confirm whether police attended the branch at the time in question and whether an officer viewed or removed any tapes.
43. The Commissioner’s analysis of the submissions outlined in paragraphs 30 to 42 in relation to items 1 and 2 is found later in this notice from paragraph 66.

Does the public authority hold item 3? – Investigation

44. The public authority’s letter dated 25 September 2006 also explained that it did not take formal statements from the shop managers. Given the difficulties that it had asserted in relation to the collection of the CCTV footage, it argued that “*it therefore follows, that neither [shop] manager would have produced a statement at the time*”.
45. The public authority, in correspondence with the Commissioner, drew attention to elements within the withheld information which referred to what had been seen on the footage and the conclusions that had been drawn from this. The public authority explained that although it spoke to the managers at the time and noted comments made, it had not been considered necessary to obtain formal statements because it had not been able to retain useable CCTV footage. It also confirmed that an officer had, in any event, seen the footage in situ for himself and noted the contents before attempts were made to retrieve it in evidence.
46. The Commissioner’s analysis of the submissions outlined in paragraphs 44 and 45 in relation to item 3 is found later in this notice from paragraph 77.

Have items 4-10 legitimately been withheld under the Act? – Investigation

47. In covering notes to each section of the first bundle of withheld information that it had forwarded to the Commissioner’s office, the public authority had listed each exemption that it sought to rely upon in relation to that section. It should be noted that when this first bundle was forwarded, the second request referred to above had not yet been received by the public authority.
48. The caseworker assigned to the case wrote to the public authority on 3 October 2006. The letter noted that the public authority had, in its refusal notice, conflated its public interest arguments against disclosure in relation to the qualified

exemptions that it sought to rely on (Section 30 – Investigations information and Section 38 – Health and Safety). As such its arguments in relation to each exemption were not clearly set out. The caseworker then asked the public authority to clarify how it believed each exemption applied to each section of correspondence in the bundle it had already forwarded. It asked the public authority to focus on the following points:

- “1. *Where you are seeking to apply Section 30(1), please indicate precisely which information this refers to.*
 2. *Also in relation to Section 30(1), please expand on the public interest arguments you have provided to date.*
 3. *In relation to Section 40(1), please indicate which information is, in your view, [the complainant's] personal data.*
 4. *[The complainant] appears to suggest that he has already received some of his personal data. Please let me know whether he was provided with copies of information or a verbal account of the reasoning behind your decisions about his case. If the former, please indicate what information he has received. If the latter, please outline what he was told verbally.*
 5. *In relation to Section 40(2), please list the third parties whose personal data are, in your view, caught by the scope of [the complainant's] request.*
 6. *With specific reference to each individual on the list, please outline why, in your view, disclosure of their personal data would contravene the data protection principles of the Data Protection Act 1998.*
 7. *In relation to Section 38(1), please outline which information this refers to and how, in your view, disclosure would endanger an individual's physical or mental health and/or their safety.*
 8. *Also in relation to Section 38(1), please expand on the public interest arguments you have provided to date.”*
49. In a response dated 13 October 2005, the public authority specified the information to which Section 30(1) had been applied. It also specified the information to which Section 30(2) had been applied. Although it had referred to Section 30(2) in its refusal notice it had not listed this exemption in the bundle it had provided to the Commissioner.
50. It provided the following public interest arguments in relation to Section 30(1) and Section 30(2) in addition to the points it had already raised in its refusal:
- It referred to ACPO's (Association of Chief Police Officers) position that information caught by Section 30 would rarely be disclosed under the Act even though this section is qualified by a public interest test.
 - It commented that such information may be released to serve a core policing purpose – to prevent or detect crime or to protect life or property but only where there are strong public interest considerations favouring

disclosure. It added that “*the further the considerations favouring disclosure are from a core policing purpose, the lighter the consideration will be*”.

- It stressed that a public interest consideration is one which is common to all members of the community or a substantial part of them and for their benefit. It contrasted this with matters of purely personal or private interest and commented that this was such a case. In its view, release of this information to the public as a whole would not serve to resolve the situation that the complainant was in.
 - It also noted that some of the information in question may be available to him under DPA98 subject access procedures and that it was therefore not in the public interest to disclose this information under the FOI Act.
51. In relation to Section 40(1), it identified 3 officer statements and another document that, in its view, included the complainant's personal data. It noted that these documents would be included in its consideration where the complainant made a DPA98 subject access request although DPA98 exemptions may apply.
52. The author of the public authority's response then stated that he was not aware that the complainant had made a formal DPA98 subject access request at that stage. It was therefore difficult to say what personal data the complainant had already received. He speculated that the complainant may be referring to correspondence which had been sent to his MP and to correspondence received from the public authority's Professional Standards Department in the course of handling the complainant's wider complaints.
53. In relation to the application of Section 40(2), the public authority specified that this related to Ms B. It noted that the personal data included her sensitive personal data and that it could not meet a condition for disclosing this information in either Schedule 2 or Schedule 3 of DPA98.
54. The Commissioner notes that this comment relates to one of the requirements of the first data protection principle where processing of personal data must be fair and lawful and must also meet at least one DPA 98 Schedule 2 condition for processing. If the personal data is “sensitive personal data” as defined in DPA98, a DPA98 Schedule 3 condition for processing must also be met. The 8 data protection principles are listed in a Legal Annex to this Notice. The definition of “sensitive personal data” is also listed in the Annex. Weblinks to Schedule 2 and Schedule 3 of DPA 98 are also provided in the Annex.
55. The public authority stressed that it obtained the information for the purpose of investigating the serious allegation that Ms B had made and that there was no consent for this information to be further processed by way of release to the complainant.
56. In relation to the application of Section 38(1), it identified the information to which this had been applied – it included the forensic report specifically requested by the complainant at item 5. It acknowledged that it had already applied Section 40(2) to this information. However, it was particularly concerned about the effect disclosure would have on Ms B. It felt that Ms B would suffer undue stress if she

knew that the information in those documents, which is of an intimate nature, were to be disclosed. Such stress would, in its view, endanger her mental or physical wellbeing sufficient to engage this exemption.

57. As far as public interest considerations were concerned in relation to Section 38, it felt that there was no public interest in the disclosure of such intimate information, particularly given the likely impact on the individual in question. It also believed that victims of serious crime such as the crime alleged in this case would be reluctant to report such incidents if they believed that such intimate information would be placed in the public domain. It stressed the importance to its operations of co-operation from such individuals and that anything which may affect that co-operation would seriously affect its ability to prosecute offenders.
58. In relation to the further request (referred to at paragraph 20 above), the caseworker asked for a copy of this information to assist in the investigation.
59. The public authority provided withheld information caught by the scope of item 8 but advised that release of item 7, the video statement, would need to be agreed with a senior officer. As an alternative, it offered to provide a copy of a statement that was compiled as a result of the video and which was signed by Ms B. The caseworker agreed in the interests of expediency to receiving a copy of the written statement rather than the video.
60. It should be noted that the Act provides access to information. This includes not only written information but also visual material such as video or audio recordings. While the Commissioner notes that a video recording will show information that a written statement does not, e.g., body language, intonation and the general demeanour of the individual making the statement, he did not consider that it was essential to his deliberations to see the video. The Commissioner did not propose to base his decision on whether or not Ms B's body language, intonation and general demeanour could be interpreted as those of an individual making a false statement. In the Commissioner's view, it is not the purpose of the FOI Act, nor is it his role, to investigate or call to account private individuals who allegedly make false statements that they have been raped. Where their accuser is not prosecuted for making such statements, those who are the subject of such statements may, in the Commissioner's view, seek their own independent legal advice about pursuing a private action against their accuser so that the matter can, more properly, be decided by a court. For this reason, the Commissioner was satisfied that sight of the written statement would be sufficient to inform his decision.
61. The public authority cited Section 40(2), Section 30(1) and Section 38(1) in relation to this additional information it had withheld. It reiterated the arguments it had already made in relation to the application of these exemptions. It also referred to Articles 8 and 6 of the Human Rights Act and suggested that Ms B's right to a private life would be violated. It added that were the matter to be re-opened (e.g., where further evidence came to light) disclosure to the public at large under the FOI Act might prejudice the right to a fair trial.

62. The Commissioner also noted the complainant's arguments in relation to disclosure. These can be summarised as follows:
- He believes he has been falsely accused of rape and he believes that the police are deliberately refusing to mark this allegation as "No Crime" because of its attitude towards him
 - He believes that its investigation was flawed
 - He believes that the information he has requested will prove that Ms B is lying. Unless it is disclosed, he will be unable to demonstrate that the matter should be marked as a "No Crime" and that an injustice has been done to him
 - Unless the information is disclosed, he will be unable to demonstrate properly his concerns to the IPCC.
 - Unless the information is disclosed to him, he will be unable to restore his reputation or seek redress.
63. The Commissioner's analysis of the submissions of both parties is detailed in paragraphs 79 to 120 below.

Findings of fact

64. The public authority failed to respond to the complainant's request under the Act within the statutory time period of 20 days. However, this matter was resolved informally by the Commissioner and the complaint with respect to this element of the public authority's non-compliance with the Act was withdrawn.
65. With regard to the detail of the alleged incident on 25 August 2002, it is not disputed by the complainant or Ms B that sexual contact occurred. However, Ms B asserts that she did not consent to the contact whereas the complainant asserts that she did.

Analysis

Procedural matters

Does the public authority hold items 1- 3? - Analysis

66. As mentioned at paragraph 27 the public authority did not explain to the complainant in its refusal notice that it did not hold the CCTV footage of Ms B shopping at Waitrose and a local jeweller's store nor did it hold statements from the managers of both shops. In failing to do so, the public authority contravened the requirements of Section 1(1) (a) of the Act. Section 1(1) is provided in full in a legal annex to this Notice.
67. The Commissioner considered the arguments and the evidence that the complainant put forward to counter the public authority's assertion that it no longer held the CCTV footage of Ms B shopping and that it did not take formal statements from the shop managers. He also considered the explanation provided by the public authority as to why it no longer held the footage in question

and why it did not take formal statements from the shop managers. In addition, the Commissioner considered the information provided informally by Waitrose.

68. The complainant was adamant that Waitrose provided the public authority with a tape and that this tape must have been in a format which the public authority could easily access. Where the tape was easily accessible, the complainant further argued, the public authority would have every reason to retain a copy of that tape as evidence in order to verify the complainant's version of events on that day, i.e., that Ms B was shopping at a time she alleged she was being held against her will by the complainant. Similarly, the complainant did not believe that the jewellery shop tape, once viewed by the investigating officer, could have been mislabelled prior to its being seized and taken to the police station.
69. As far as the Waitrose tape is concerned, the Commissioner has concluded that the public authority seized Digital Audio Tapes from the store in question and took them to the police station. The Commissioner is satisfied that attempts were made to interrogate the tapes using the unit owned by Waitrose and that these were unsuccessful. The Commissioner notes Waitrose's informal comment that an ordinary VCR could be attached to the unit in order to access the footage for recording on to a standard VHS tape. The Commissioner is unable to determine why this approach was not attempted at the time or, alternatively, why such an approach may have failed in this instance.
70. He also notes that the public authority's comment that "[it could not] *retrieve video footage from any kind of digital media*". The Commissioner further notes the formats which the public authority could interrogate in August 2002 and which were listed in its submission on this point, namely "*VHS, SVHS, Hi8 or DV tape*". He understands that Hi8 and DV are digital formats. He therefore remains unclear as to the detail of the public authority's capacity for retrieving footage in August 2002.
71. In any event, the Commissioner does not consider that this unresolved point, i.e., what CCTV evidence the public authority should have been able to retrieve in August 2002, undermines the public authority's assertion
- a) that an officer saw the footage in situ and was satisfied that it showed Ms B shopping,
 - b) that Digital Audio Tapes were seized from Waitrose
 - c) that attempts were made using Waitrose's Sony drive unit at the public authority's premises to retrieve the footage and record it in a format that the public authority could use,
 - d) that those attempts failed; and
 - e) that the Digital Audio Tapes and Waitrose's Sony drive unit were returned to Waitrose.
72. Similarly, the Commissioner is satisfied that an officer saw the jewellery shop footage in situ. He is also satisfied that there was a clear intention to retain this footage for the investigation but that, at some point, the tape holding the footage was mislabelled either by the shop or by the officer retrieving the tape. He is also satisfied that the public authority did not retain either the mislabelled tape or the

- tape on which the actual footage had been recorded but which had already been recycled.
73. The Commissioner is satisfied that the public authority holds information which supports the complainant's statement that Ms B was shopping on the afternoon of the day she alleged that he raped her and held her against her will. This is the evidence provided by the officer who saw the shop footage in situ. In such circumstances, the Commissioner believes it is wholly plausible that the public authority would not choose to expend any further resources on confirming what it already knew about the events of that afternoon by making further attempts to retrieve the Waitrose footage or by putting the jewellery shop manager to the trouble of making a formal statement where there was no footage retained to support that statement.
74. The Commissioner notes that there is no paper trail to follow the progress of the tapes other than reference to it in the withheld information. The Commissioner also notes that the public authority was unable to provide him with a specific guidance document to address such circumstances. However, he does not consider that this apparent absence of supporting documentation undermines the plausibility of the public authority's explanation as to what happened to the footage.
75. While the Commissioner agrees it is curious that misfortune appeared to befall both separate evidence gathering exercises, he believes that human or technical error (or both) is a more likely explanation than deliberate concealment of the facts by the public authority. He has no reason to believe that, had the footage been crucial to the investigation, the public authority would not have made further attempts to retrieve the Waitrose footage by, for example, outsourcing retrieval to its usual subcontractor as described in paragraph 38. Similarly, he has no reason to believe that the public authority would not have sought a formal statement from the jewellery shop manager had it considered this to be necessary.
76. The complainant believes that the public authority is lying about what happened to the footage because of what is, in his view, its unjustified refusal to mark the incident as "No Crime". He has also made other allegations about the way he has been treated by the public authority which are outside the scope of this Act and, therefore, of this Notice. While it is clear to the Commissioner that the relationship between the complainant and the public authority has broken down, the Commissioner does not consider that this, of itself, proves anything in relation to the tapes. The Commissioner notes the letters that the complainant drew to his attention and does not consider that they prove that the footage is still held by the public authority simply because they make references to the CCTV footage. In the Commissioner's view, these letters prove that an officer of the public authority saw the footage and that the images on the footage were noted and used to inform the public authority's decision about the case. The letters do not, in the Commissioner's view, prove that tapes are still held and that the public authority is deliberately lying about it.
77. As far as the witness statements of the two shop managers are concerned, the complainant believes that investigation records would normally include a formal

statement from both shop owners and disputes the public authority's assertion that it does not hold such statements. While noting the complainant's view that the public authority must include more detailed paperwork such as sworn statements from the shop owners, the Commissioner is satisfied that it does not. Whether or not the public authority should have:

- a) obtained these statements,
- b) made further attempts to retrieve the Waitrose footage, and/or
- c) retained the incorrectly labelled tape

as part of its investigation is not a matter which falls within the remit of the Commissioner.

Items 1-3 – Summary

78. The Commissioner is satisfied that items 1 and 2, namely, CCTV footage from Waitrose and the local jewellery shop are not held by the public authority although the footage was held for a brief period during the investigation. As regards item 3, witness statements from the managers of both stores, the Commissioner is satisfied that the public authority did not take formal statements from either shop manager although reference to a conversation with one of the managers is included in the withheld information.

Exemptions

Have items 4-10 legitimately been withheld under the Act? - Analysis

79. The Commissioner then considered the public authority's refusal to provide items 4-10 and the exemptions it cited as its basis for doing so.

As a reminder, the information caught by the scope of the request and to which exemptions had been applied is as follows:

4. *"Police report on CCTV tapes"*
5. *"[Ms B's] forensic report"*
6. *"Any police statements officers involved. And anything else they have"*
7. *"Video of [Ms B], Statement Aug 2002 Made to police recorded by police"*
8. *Statement made by [Ms B] taken at Slough police station re her statement that she made up the false rape allegation. Approx 2005, the police were questioning her about her withdrawal."*
9. *"Name of officer who questioned [Ms B] Aug 02 original statement."*
10. *"Police timeline Events and times of forensic examination, questioning, release, no charge, for the whole of the 6 week period Aug Bank Hols 02 to approx 10 October 02."*

Which exemption applies?

80. Having read the requested information, the Commissioner notes that all of it is held by the public authority for the purpose of an investigation (which it has a duty to conduct) in order to ascertain whether a person should be charged with an

- offence. The information is therefore caught entirely by the scope of Section 30(1) – details of which are given in the Legal Annex to this Notice.
81. Even if the requested information is caught entirely by the scope of Section 30, that exemption only applies if the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information. This point will be considered later in this notice.
 82. The Commissioner also notes that the requested information includes a substantial amount of information which is the personal data of the complainant and of Ms B. It also includes personal data relating to other parties such as the names and statements of officers involved in the investigation. Further, it includes personal data relating to one of the shop managers in that it refers to a conversation an officer had with that person regarding Ms B's visit to the shop. The Commissioner also notes that, for the most part, the personal data of each of these individuals is inextricably linked with one or more of the other individuals.
 83. Where the personal data relates to the complainant, the Commissioner believes that the complainant should apply for this information under Section 7 of DPA98 and not under Section 1 of the FOI Act. An application for information under DPA98 is known as a "subject access request". The public authority advised him of this route and how to follow it. It asked for payment of the statutory fee of £10 before processing the request and also required proof of identity. This is permissible under DPA98 and guards against other individuals gaining unauthorised access to his personal data.
 84. Where the complainant makes a subject access request and is dissatisfied with the outcome of that request, he can make a complaint to the Commissioner under Section 42 of DPA98. Under Section 42 of the DPA98, where the Commissioner receives such a complaint, he would normally make an assessment as to whether it is likely or unlikely that the public authority has complied with his subject access request in accordance with the requirements of DPA98. The complainant may also be able to apply to a court to enforce his right of subject access. The Commissioner provided the complainant with information about his right of subject access in the course of correspondence about this complaint.
 85. The Commissioner also advised the complainant about his rights under Section 10 and Section 14 of the DPA98. Under Section 10 of the DPA98, an individual can issue a notice to a data controller requesting that it cease processing his personal data on the grounds that it is causing or likely to cause substantial and unwarranted distress to him or to another. Where a data controller believes that notice is unjustified in whole or in part and refuses to comply with it as a whole or in part, the individual can apply to a court to order the data controller to take such steps for complying with the notice as it sees fit. Under Section 14 of DPA98, an individual can apply to a court to order a data controller (such as the public authority in this case) to rectify, block, erase or destroy personal data relating to that individual which is inaccurate.
 86. The Commissioner also provided the complainant with the following leaflets which he, the Commissioner, has produced in order to assist those seeking to exercise

their rights under Section 7, Section 10 and Section 14 of DPA98. At the same time, he strongly recommended to the complainant that he seek his own independent legal advice before making any application to the Courts.

Section 7 – Right of subject access

http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/subject_access_-_guide_for_data_subjects.pdf

Section 10 – Right to prevent processing likely to cause damage or distress

http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/how_can_i_stop_them_processing_my_personal_information.pdf

Section 14 – Rectification, blocking, erasure or destruction of inaccurate data

http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/incorrect_information_-_what_can_i_do.pdf

General information about taking a case to court

http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/taking_a_case_to_court.pdf

87. Taking into account the fact that all of the information satisfied the definition of the class of information that would be caught by the Section 30 (1) and that some but not all of the information would be caught by the provisions of Section 40, the Commissioner decided that the most practical approach would be to examine the application of Section 30(1) to all of the requested information. The Commissioner noted that Section 38 was also cited in relation to Ms B's personal data but decided that it would only be necessary to consider Section 38 if he determined that this information was not exempt under either Section 30 (1) or Section 40(2).
88. Having determined that he would consider the application of Section 30(1) in relation to all the withheld information, the Commissioner commenced that consideration on that basis that disclosure under the Act of Ms B's name would constitute unfair processing in contravention of the first data protection principle of the DPA98. Even though the name of that individual is known to the complainant, this is irrelevant when deciding whether or not disclosure would be fair under the Freedom of Information Act. Disclosure under the Freedom of Information Act is, in effect, disclosure to the public at large. If Ms B's name were to be disclosed under the FOI Act in this case on the basis that it was already known to the complainant, it would be disclosable to any person who asked for it at a later date. In the Commissioner's view, such a disclosure would be wholly unfair. The Commissioner also notes that Sections 1 and 2 of the Sexual Offences (Amendment) Act 1992 ("SOA92") impose restrictions on the publication of information which might lead members of the public to identify a person who alleges that they are a victim of rape during the lifetime of that person. In the Commissioner's view, disclosure under FOI of information which could lead members of the public to identify this person and, in particular, that person's name, would contravene Sections 1 and 2 of SOA92 and would therefore be unlawful processing. The relevant provisions of SOA92 are found in the Legal Annex to this Notice.
89. The Commissioner also considers that disclosure of the name of the shop manager would contravene the first data protection principle of the DPA98. The complainant has argued that he supplied the person's name to the public

authority in the first place but neglected to make a note of it. While noting it is unfortunate that the complainant did not retain a note of this name, the Commissioner considers that this is also irrelevant to his determination in this case. Disclosure of the shop manager's name is disclosure to the public at large and not just to the applicant. The public authority is rightly concerned that individuals with relevant evidence may be reluctant to co-operate with the police if their names and their comments are routinely released to the public on request. Their names and their comments may become a matter of public record if a prosecution is pursued or they may volunteer that information to the media should a case be covered in the press, subject to any reporting restrictions that may be imposed. However, the possibility that such information may find its way into the public domain at some point does not mean that routine disclosure of this information under the FOI Act upon request is in the reasonable expectation of an individual who has co-operated with the police. Disclosure in such circumstances would in most cases be unfair and not in accordance with any of the data protection principles. The Commissioner considers that disclosure of the shop manager's name would be unfair in this case.

90. Furthermore, the Commissioner does not believe that the complainant was the only possible source of this information for the public authority's investigation. The public authority would have determined the shop manager's name when it approached the shop in the course of its investigations. The fact that the complainant provided it to the public authority in this case is, in the Commissioner's view, not relevant in terms of disclosure under the FOI Act.
91. However, the Commissioner does not consider that disclosure of the names of any of the police officers or non-uniformed staff involved in the investigation and the role they played in that investigation would constitute unfair processing in contravention of the first data protection principle of DPA98. This is because those officers and staff were acting in their professional capacity in non-covert operations. As mentioned at paragraph 53, the Commissioner asked the public authority to list those individuals whose personal data should not, in its opinion, be disclosed in response to this request because of the requirements of the Data Protection Act 1998. The Commissioner also asked the public authority to explain further its application of Section 38 (Health and Safety) in relation to possible risk to any individual. The public authority did not mention officers or staff in relation to possible unfair disclosure or in relation to a possible risk to the health and safety of any individual.
92. As outlined in paragraph 80 above, Section 30(1) applies to a particular class of information, namely information held at any time for the purpose of an investigation with a view to ascertaining whether a person should be charged with an offence. In deeming this exemption class based rather than prejudice based, Parliament determined that there was an inherent harm in disclosing information of this class or type. However, as also outlined in paragraph 81 above, Parliament also determined that even where the exemption is engaged, the information itself is only exempt from disclosure where the public interest in maintaining the exemption outweighs the public interest in disclosure.

93. For reasons explained in paragraph 80, the Commissioner is satisfied that the exemption is engaged. He went on to consider the balance of public interest in this case.

The Public Interest Test

94. The Commissioner notes the public authority's argument that the public interest in disclosure would only ever outweigh the public interest in maintaining the Section 30 exemption where disclosure serves a "core policing purpose". The Commissioner respectfully disagrees with this position. Where the Commissioner receives a complaint under the FOI Act, he must consider all the circumstances of the case and all relevant public interest factors. He cannot consider a Section 30 case on the basis that disclosure would only ever be legitimate where it serves a core policing purpose.
95. The Commissioner has recently updated his guidance on this exemption. http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/section_30_investigations_13_oct_06.pdf . In considering the public interest test, the guidance states as follows:

"For this exemption, it will involve weighing the harm that may be caused to an investigation against the wider public interest in disclosure. A critical issue is likely to be the timing of disclosure. The public interest in the disclosure of information is likely to be weaker while an investigation is being carried out. However, once an investigation is completed, the public interest in understanding why an investigation reached a particular conclusion, or in seeing that the investigation had been properly carried out, could well outweigh the public interest in maintaining the exemption.

Similarly, the public interest is likely to outweigh the disclosure of most information about investigations which, having been suspended, may be reopened. There tends to be considerable public interest in criminal cases and in seeing that justice is done. There will be occasions when this factor favours disclosure, for instance where there is a well reported suspicion that justice was not done either to an accused person or a victim. In some cases, this may shift the balance of public interest in favour of the disclosure of information about completed cases or those which have been abandoned with no reasonable prospect of being reopened. However, there will be other cases where disclosure should not take place because it could prejudice the right to a fair trial.

Public authorities should not assume that they should not release all information relating to ongoing investigations. Much will depend on the effect of disclosure. There will be a stronger case for maintaining the exemption where the confidentiality of the information is critical to the success of the investigation. In cases where a prosecution has collapsed for reasons of procedural failure or mismanagement on the part of the investigating or prosecuting authority, there will be a stronger public interest argument in favour of the disclosure of information about this and other ,similar investigations."

96. The Commissioner also notes a recent Information Tribunal judgement which dealt with the application of Section 30(1). In the case of *Toms v The Information Commissioner*, the Information Tribunal stated, with regard to the consideration of the public interest in relation to s.30(1) that:

"In striking the balance of interest, regard should be had, inter alia, to such matters as the stage or stages reached in any particular investigation or criminal proceedings, whether and to what extent the information has already been released into the public domain, and the significance or sensitivity of the information requested." (para 8)

97. The Information Tribunal also indicated that in considering the public interest test it had also had regard to the White Paper which preceded the introduction of the 2000 Act: [Your Right To Know: The Government's Proposals for a FOI Act](#) (Cm.3818, 11 December 1997). The Information Tribunal stated:

"Although the Act as enacted differs in some respects from the model propounded in the White Paper [the Commissioner assumes this refers to the fact that Parliament determined that Section 30 should be qualified by a public interest test and should not be absolute], the following extract is relevant:

"[freedom of information] should not undermine the investigation, prosecution or prevention of crime, or the bringing of civil or criminal proceedings by public bodies. The investigation and prosecution of crime involve a number of essential requirements. These include the need to avoid prejudicing effective law enforcement, the need to protect witnesses and informers, the need to maintain the independence of the judicial and prosecution processes, and the need to preserve the criminal court as the sole forum for determining guilt. Because of this, the Act will exclude information relating to the investigation and prosecution functions of the police, prosecutors, and other bodies carrying out law enforcement work such as the Department of Social Security or the Immigration Service. The Act will also exclude information relating to the commencement or conduct of civil proceedings." (para 7)

98. Taking all the above points into account, the Commissioner therefore approached his analysis of the public interest in this case by considering the following questions:

- Is the investigation completed?
- Has the investigation been suspended?
- Is there a well-reported suspicion or evidence that justice was not done to either the accused or to the individual who made the allegation?
- Is confidentiality critical to the success of the investigation?
- Has a prosecution collapsed because of a procedural failure or mismanagement on the part of the investigating authority?
- Is any of the information already in the public domain?
- Is the withheld information significant to the investigation?
- Is the withheld information sensitive?

Is the investigation completed?/Has the investigation been suspended?

99. It appears to the Commissioner that the investigation into the events of 25 August 2002 has ended. However, the Commissioner notes that there is a further related and equally serious allegation which has not been subject to a detailed investigation at this time. It would appear to the Commissioner that any investigation of this wider allegation has been suspended. The public authority asserts that its investigations may be re-opened at a later date. It is difficult for the Commissioner to judge how likely it is that its investigations into this matter may be re-opened and he has been given no evidence to suggest that re-opening of investigations is imminent or likely. The Commissioner therefore does not consider this, on its own, to be a compelling argument for maintaining the exemption in this case.

Is there a well-reported suspicion or evidence that justice was not done to either the accused or the individual who made the allegation?

100. As far as the Commissioner is aware, this matter has not been reported at all. However, the Commissioner notes the complainant's genuinely felt concerns that he has been unfairly treated in this instance. A very serious allegation was made against him in relation to the events of particular day and it has been evidenced that the events of that particular day were not wholly as represented by the person who made the allegation, Ms B. There is a related and equally serious allegation which has not, to date, been the subject of further investigation by the public authority. The complainant asserts that the flaws in Ms B's representation of events on that particular day undermine the veracity of her further allegation against him. The complainant also alleges that Ms B has withdrawn her complaint against him although the public authority does not accept that the alleged withdrawal was freely made.
101. The complainant has also alleged that the public authority submitted the initial statement made by Ms B as evidence of his character in an unrelated court case. He explained that he was not given an opportunity to challenge the veracity of Ms B's statement because he was unable to attend the hearing. He argues that this demonstrates further injustice done to him and supports his argument for disclosure. While this argument is noted, it is not the Commissioner's role to comment on what was and what was not deemed admissible in court, nor is it his role to examine how it came to be that such evidence, if admitted to the hearing, was not challenged by his legal representative. For this reason, the Commissioner did not seek evidence to substantiate this allegation.
102. Moving away from the complainant's personal concerns and grievances against the public authority and looking at the wider issues related to this case, the Commissioner recognises that investigations of sexual assault allegations are far from straightforward, particularly where both parties are in (or were in) a sexual relationship but dispute consent. The Commissioner notes that there are strongly held views about which of the two parties should be given the benefit of the doubt, particularly where the evidence is not conclusive. An individual who is the victim of such a heinous crime should be treated with care and with respect at a time when they are likely to be at their most vulnerable. That individual has often

had to show great courage in coming forward with the allegation, particularly if the person they accuse is someone with whom they have a relationship and perhaps even share a home. On the other hand, a person falsely accused of such a heinous crime also finds him or herself in a distressing situation. The Commissioner notes recent high profile cases where individuals, falsely accused of sexual assault, suffered considerable damage to their reputations as a result of those unfounded allegations. The Commissioner also notes that where cases of sexual assault are brought to trial, the accuser's name is generally subject to reporting restrictions but the accused's name is not. Where the matter does not go to a trial (either of the accused for the offence itself or of the accuser for making a false allegation), the matter remains unresolved and both accuser and accused find themselves in the situation where their account of what took place between them remains in question.

103. As mentioned in paragraph 7, the complainant seeks to have the allegations marked as "No Crime". In correspondence with the complainant's MP on the subject, the public authority quoted from HOCR.
104. The Commissioner accessed this document via the Home Office's website and notes that two sections of this document are particularly relevant to the complainant's individual case. The first refers to the general approach for Crime Reporting Standards. The Commissioner notes that these are referred to on Page 32 of the aforementioned document in an Annex. Paragraph 3.2 of that Annex states:

"When examining a report of a crime related incident, the test to be applied in respect of recording a crime is that of the balance of probabilities: that is to say is the incident more likely than not the result of a criminal act? In most cases, a belief by the victim (or person reasonably assumed to be acting on behalf of the victim) that a crime has occurred is sufficient to justify its recording as a crime, although this will not be the case in all circumstances. Effectively, a more victim oriented approach is advocated."

105. The Commissioner understands that officers of the public authority were satisfied in this case that the National Reporting Crime Standard was met in relation to the alleged victim's allegations in this case. The Commissioner has read the victim's allegation in full and is not in a position to judge whether the officers were correct in reaching this decision. However as mentioned in paragraph 11, the public authority understands that the IPCC did not rule that an incorrect judgement had been made in this regard. The complainant has not provided the Commissioner with evidence of an adverse judgement from the IPCC.
106. Section C of the aforementioned document covers the approach that should be taken with regarding to marking a case as "No Crime". It sets out a list of criteria for recording a "No Crime" and provides a series of examples such as the following:

"A man reports that he has been blackmailed. The crime is recorded and investigated but the complaint is shown to be false. The complainant is prosecuted for wasting police time.

No crime the blackmail.

A burglary is reported and recorded but the subsequent investigation reveals that the report was false and a fraudulent insurance claim has been made.

No crime the burglary and record one crime of fraud.”

However, it appears to modify this general approach specifically where the allegation relates to rape. It states:

“Example of a crime which should remain recorded

A rape is reported to and recorded by the police. Following investigation, the police are unclear whether a crime actually took place.

The rape remains recorded.”

107. In this case, there was an allegation against the complainant relating to events of a particular day. Investigation showed that the victim’s version of events on that day did not stand up to close scrutiny. However, both this allegation and the wider allegation made against the complainant about earlier events (events which do not appear to have been the subject of detailed investigation) nevertheless satisfied the National Crime Reporting Standard to be recorded as a crime and did not satisfy the reporting standard requirement to be marked as a “No Crime”.
108. The Commissioner notes that the Home Office policy document seeks to encourage a more “*victim-orientated approach*” and the reasons for that approach are set out in the document. The complainant would argue that this policy is weighted in favour of the accuser to his significant detriment. The Commissioner recognises that there is a public interest in informing a debate about whether this policy strikes a fair and just balance in such cases and that he considers that disclosure to the wider public of some of the details of the complainant’s case could inform that debate.
109. The Commissioner recognises that such cases require investigating and prosecuting authorities to make difficult and finely balanced judgements. Arguably, greater public understanding of the difficulties faced by those authorities, perhaps with reference to a particular case such as this, could facilitate more informed public contribution to this debate.

Is confidentiality critical to the success of the investigation?

110. The Commissioner notes that the success of an investigation in cases of disputed consent would not depend on keeping the name of the accuser from the accused but could well depend on withholding details of her accusation from him until such time as it is appropriate to confront him with those details. If an accused person is permitted to know all the evidence against him before he is questioned, he is able to plan his answers accordingly. The Commissioner recognises that, as a general principle, there is a strong public interest in allowing the police to withhold case evidence from an accused party until such time as it is appropriate to confront him or her. However, where it is far from clear that there will be a further

investigation, the Commissioner considers that this general principle carries less weight in the consideration of the public interest test.

111. This does not, however, mean that confidentiality is irrelevant in consideration of the public interest test in this case. As has already been outlined in this Notice, disclosure under the FOI Act is disclosure to the world at large and not just to the parties involved in the case. The Commissioner recognises the importance of confidentiality in investigating allegations of rape, even where the parties are known to each other. Individuals who are considering coming forward to report a sexual assault are less likely to do so if they believe that sensitive and extremely personal information about them is routinely going to be made public. If the matter goes to court, further disclosure would be made to the accused person and to an open court under the supervision of the court service. Also, if the case goes to court, the name of the accuser is usually subject to reporting restrictions. The Commissioner recognises that there is a strong public interest in reassuring individuals that they can come forward with allegations of sexual assault safe in the knowledge that their details will not be disclosed to any person who asks for it under the FOI Act.
112. The Commissioner recognises that there is a further debate about whether or not those accused of sexual assault should have their details treated confidentially. He recognises that individuals accused of sexual assault may find that their details are more readily placed in the public domain and may suffer significant personal detriment before the matter has ever been considered by a court. Where those accusations are false, the detriment suffered can clearly be viewed as unjustified and unwarranted. While the Commissioner recognises that there is a strong public interest in informing that further debate, he does not consider that in this case this argument has sufficient weight to outweigh the arguments in favour of maintaining the exemption.
113. Furthermore the Commissioner does not believe that this apparent disparity in treatment of accuser and accused justifies public disclosure under the FOI Act of the accuser's details including the disclosure of the police's forensic examination of her person and the details of her allegations against the accused.

Has a prosecution collapsed because of a procedural failure or mismanagement on the part of the investigating authority?

114. The complainant alleges that there has been mismanagement of the investigation by the public authority. He has also made certain allegations of violent treatment at the hands of the public authority. He believes he was arrested without proper cause. Also, in his view, the accuser should, herself, have been prosecuted for what he considers to be a false allegation and wasting police time. He believes that the flaws in her evidence concerning 25 August 2002 undermine her entire allegation. Arguably, there is a public interest in understanding the actions of the police and in understanding decisions that have had a significant impact on individuals, particularly where it is alleged that the investigation was flawed.
115. It is not the role of the Commissioner to investigate whether or not the public authority has mismanaged an investigation. Such matters are more properly dealt

with by the IPCC. The Commissioner has received no evidence to show that the IPCC has ruled that the investigation was mismanaged. As outlined in paragraph 75 the Commissioner notes a number of apparent inconsistencies in relation to the public authority's account of the seizure and return of the CCTV tapes. However, in his view, these do not add sufficient weight to the public interest argument to favour disclosure of all the requested information.

Is any of the information already in the public domain?

116. While much of the detail is known to the complainant and some of the detail is known to witnesses such as the Waitrose and jewellery shop managers, the Commissioner does not consider that any of the information is already in the public domain.
117. The complainant has argued, as indicated at paragraph 101, that the public authority voluntarily put Ms B's statement into the public domain in that it cited it as evidence against him in an unrelated case. The Commissioner does not consider that evidence submitted in court, particularly where it relates to an allegation of a sexual offence, is necessarily information that has been put into the public domain. Such evidence, as the Commissioner has already noted, is inevitably subject to reporting restrictions. If events in court occurred as the complainant represents them, the Commissioner acknowledges that this would be a matter of concern to him, however, the Commissioner cannot base his decision on an unsubstantiated allegation of an injustice done to the complainant in an unrelated case.

Is the withheld information significant to the investigation?

118. The Commissioner notes that the vast majority of the withheld information is highly significant to the investigation in that it includes specific allegations, comments and observations. It also includes some information which seems to the Commissioner to be of minor importance to the investigation such as an officer statement relating to the operation of Town Centre CCTV equipment. It does not recount what the Town Centre CCTV footage showed nor does it reveal anything about the operation of CCTV equipment which would be unexpected. The Commissioner is therefore satisfied that the level of harm caused by disclosure of this specific portion of the withheld information would be minimal. As such, he is not persuaded that the public interest in maintaining the Section 30 (1) exemption outweighs the public interest in disclosure in relation to this portion of the withheld information and in the circumstances of this case. The Commissioner's general guidance on the public interest test explains that the public interest in disclosure not only relates to informing public debate of issues of the day, it also relates to the positive benefits of transparency and accountability:

"There is a presumption running through the Act that openness is, in itself, to be regarded as something which is in the public interest. Setting out the considerations for a public authority when adopting or reviewing its publication scheme, the Act requires that

"... a public authority shall have regard to the public interest –

*(a) in allowing public access to information held by the authority, and
(b) in the publication of reasons for decision held by the authority.” “*

Awareness Guidance 3 – The Public Interest Test

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_3_-_public_interest_test.pdf

119. Similarly, the Commissioner does not consider that the names of the officers involved in the investigation are significant to the investigation itself. The Commissioner notes that item 9 of the complainant's request is for the name of an officer. As outlined in paragraph 91, the public authority did not mention officer names in support of its Section 40(2) fairness arguments or its Section 38(1) prejudice and public interest arguments. Officer names are included either explicitly (at item 9) or implicitly (at item 6) within the scope of the complainant's request. Although they are clearly also caught by the scope of the Section 30(1) exemption in that they constitute part of the information held at any time for the purpose of conducting investigation (see legal annex), the Commissioner does not consider that disclosure of officer names would have a harmful effect sufficient to maintain this exemption in this case.

Is the withheld information sensitive?

120. Having read the information, the Commissioner is satisfied that a significant proportion of it is sensitive personal data relating either to the complainant or to Ms B. The DPA98 definition of sensitive personal data is provided in a legal annex to the notice but it includes a person's medical information, information about their sexual life and information about allegations that they have committed a criminal offence. Disclosure under the FOI Act of this information is likely to be wholly unfair and in contravention of the first data protection principle of DPA98 for reasons which have already been outlined above. This contrasts with the information relating to the operation of CCTV cameras in the Town Centre or the names of police officers in this case. The Commissioner does not consider that this information could be considered sensitive to any degree other than the fact that it was created by the police and is held on an investigation file. For the reasons outlined in paragraph 110 and paragraph 119 above, the Commissioner does not consider that the harm disclosure of this information might cause outweighs the public interest in disclosure.

Public interest - conclusions

121. The Commissioner has considered all the above points and considers that a wholesale disclosure of the requested information under the FOI Act is not justified in the public interest. However, he considers that one of the officer statements which relates to the operation of CCTV in the Town Centre should be disclosed under the FOI Act. He also considers that the names of officers involved in this investigation case should be disclosed under the FOI Act. This information falls into the class of information which is caught by Section 30(1). As such it is inherent in information of that class that its disclosure under the FOI Act could cause harm to the investigation process. However, the Commissioner

considers that the harm caused by its disclosure does not outweigh the public interest inherent in disclosure.

The Decision

122. 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 Section 30 (1) to the majority of the withheld information.

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

It contravened the requirements of Section 1(1)(a) in that it did not inform the complainant that it did not hold items 1-3 listed in paragraph 14 above.

It contravened the requirements of Section 1(1)(b) in that it incorrectly applied the Section 30(1) exemption in relation to one officer statement included in the withheld information which relates to the operation of CCTV cameras in the Town Centre in question.

It contravened the requirements of Section 1(1)(b) in that it incorrectly applied Section 30(1) to the names of those officers whose identity is recorded in the withheld information

Steps Required

123. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

To disclose the officer statement included in the withheld information which relates to the operation of CCTV cameras in the Town Centre in question.

To disclose the names of those officers whose identity is recorded in the withheld information.

124. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

125. 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

126. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

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 13th day of February 2007

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF**

Legal Annex

Freedom of Information Act 2000

Section 1 – General right of access information held by public authorities

1. - (1) 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.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

(3) Where a public authority-

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

(4) The information-

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

(5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).

(6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as "the duty to confirm or deny".

Section 30 (1) & (2) – Investigations Exemption

30. - (1) 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.
- (2) 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 38 (1) - Health and Safety Exemption

38. - (1) Information is exempt information if its disclosure under this Act would, or would be likely to-

- (a) endanger the physical or mental health of any individual, or
- (b) endanger the safety of any individual.

Section 40 (1), (2) & (3) – Personal Data Exemption

40. - (1) 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.

(2) 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.

(3) 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.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

Data Protection Act 1998

Section 2 - Definition of sensitive personal data

2. 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 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.

Schedule 1 – The 8 Data Protection Principles

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.

2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

3. Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.

4. Personal data shall be accurate and, where necessary, kept up to date.
5. Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.
6. Personal data shall be processed in accordance with the rights of data subjects under this Act.
7. Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.
8. Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

Weblinks to Schedules 2 and 3 (referred to above)

Schedule 2: CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST PRINCIPLE: PROCESSING OF ANY PERSONAL DATA

<http://www.opsi.gov.uk/acts/acts1998/80029--n.htm#sch2>

Schedule 3: CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST PRINCIPLE: PROCESSING OF SENSITIVE PERSONAL DATA

<http://www.opsi.gov.uk/acts/acts1998/80029--o.htm#sch3>

Sexual Offences (Amendment) Act 1992

Sections 1 and 2

- 1 Where an allegation has been made that an offence to which this Act applies has been committed against a person, *neither the name nor address, and no still or moving picture, of that person shall during that person's lifetime—*
 - (a) *be published in England and Wales in a written publication available to the public; or*
 - (b) *be included in a relevant programme for reception in England and Wales [no matter relating to that person shall during that person's lifetime be included in any publication], if it is likely to lead members of the public to identify that person as the person against whom the offence is alleged to have been committed.*
- 2 Where a person is accused of an offence to which this Act applies, no matter likely to lead members of the public to identify a person as the person against whom the offence is alleged to have been committed (“the complainant”) shall during the complainant's lifetime—
 - (a) *be published in England and Wales in a written publication available to the public; or*
 - (b) *be included in a relevant programme for reception in England and Wales [be included in any publication].*