

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 October 2007

Public Authority: Independent Police Complaints Commission ('the public authority')
Address: 90 High Holborn,
London
WC1V 6BH

Summary

The complainant asked for information from three complaint files. The files held by the public authority related to complaints he had made about another public authority. The third file recorded information about two different complaints.

The public authority interpreted the request narrowly and did not consider access to the third file until after the Commissioner began his investigation. However, as the IPCC later considered access and cited section 40(1) in respect of the information on that file, the Commissioner considered the application of that exemption. He has concluded that the section 40(1) exemption did apply. He further concluded that the public authority was not in fact obliged to comply with 1(1)(a) in this regard by virtue of section 40(5).

The Commissioner also decided that the information on the two 2000 files would constitute the complainant's personal data if it were held. Therefore the public authority was not obliged to comply with section 1(1)(a) in that regard by virtue of section 40(5).

In failing to inform the complainant that section 40(5) applied the public authority breached section 17(1) of the Act. However the Commissioner has not ordered any remedial steps in the light of the contents 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 "Act"). This Notice sets out his decision.

The Request

2. The Police Complaints Authority (PCA) was in place from 29 April 1985 to 31 March 2004 and was the body responsible for overseeing complaints about Police. The PCA's functions were taken over by the Independent Police Complaints Commission on 1 April 2004, and their files were transferred to the new body at that time. The IPCC's functions and powers were broader ranging than the PCA's had been.
3. The complainant wrote to the Independent Police Complaints Commission ('IPCC') asking for, '*copies of the reasons given by Sussex police to the PCA when they refused to record earlier complaints submitted by me to the PCA*'. This letter was received by the IPCC on 24 February 2005 and was deemed by it to be a request for information under the Freedom of Information Act.
4. The request was responded to on 5 April 2005. The IPCC said that, '*under the Police Act 1996, the Chief Officer of an appropriate police force had the legal responsibility to decide whether or not a complaint against a police officer should be formally recorded. It was not the duty of the Chief Officer to send the PCA reasons for his decision not to record, and therefore any process the Chief Officer went through in making his decision on this case will be held by Sussex Police, rather than the PCA or the IPCC. Having said this, under the Freedom of Information Act 2000 the IPCC has a duty to assist. Therefore I would suggest that you make a Freedom of Information request in writing to the Sussex Police for the information you require*'.
5. The complainant appealed against this decision on 19 April 2005. His appeal is entitled, 'Appeal of FOI request for information on the following complaints: D2000/135/100081; D2000/135/100938; D2003/102167'.
6. An internal review was undertaken on 22 April 2005. The IPCC changed its position from not holding information relevant to the request to refusing to disclose information on the basis that the exemption in section 44 of the Act applied by virtue of Section 80 of the Police Act 1996.

The Investigation

Scope of the case

7. On 16 May 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. In his letter to the Commissioner the complainant said, '*I am writing to you to ask if the police can use exemptions to the FOI to stop me getting hold of evidence that I believe is quite likely to be very incriminating for some of their senior officers*'.
8. During the course of the investigation the IPCC confirmed that in a letter dated 13 November 2003 the reasons for the decision not to record the 2003 complaint

were communicated to the complainant. The IPCC also confirmed that it held the 2003 complaint file (reference D2003/102167).

9. The IPCC explained that the 2003 file was not originally considered relevant to the initial request under the Act. This was because an earlier letter from the complainant dated 15 February 2005 referred specifically to the complaints made in 2000 only. Therefore the IPCC interpreted the request narrowly as being for information relating to those complaints. The Commissioner has reviewed the correspondence in this matter and in particular the initial request and the request for an internal review. He notes that the original request did not specify which of the complainant's 'earlier complaints submitted to the PCA' he was interested in obtaining information about. However, he did clarify this in his request for an internal review by referring to specific file reference numbers, those being D2000/135/100081, D2000/135/100938 and D2003/102167. In view of this the Commissioner advised the IPCC that in his view the request should have been interpreted more widely, particularly in view of the file references cited in the request for an internal review. The IPCC then agreed to give further consideration to the information on the 2003 file following the Commissioner's intervention.
10. As a result of its further consideration, the IPCC agreed to release a copy of some of the information within the file D2003/102167 which set out the reasons for refusing to record the 2003 complaint. This information was provided to the complainant under the Data Protection Act 1998 ('the DPA') as it was deemed exempt from the Act under section 40(1).
11. Following the additional disclosure of information under the DPA, the complainant wrote to the Commissioner to express concern about the fact that the IPCC had provided information about his 2003 complaint when in fact he had requested information about complaints he said he made in 2000 and 2004. During the course of the investigation the complainant has further clarified that the 2003 complaint file contained correspondence about two separate issues. The Commissioner has established that the second issue was essentially a repeat of one of the complaints made during 2000 and was the complaint that the complainant was referring to when he said he wanted information about his 2004 complaint. For the sake of clarity, the second complaint on the 2003 file was made in December that year but the responses sent by the IPCC were dated 2004. As the 2003 file was not considered by the IPCC when responding to the request it did not consider whether material about the second complaint on that file could be released. However, as the Commissioner had already indicated that the request should have been interpreted more broadly he sought clarification from the IPCC about whether information about the second complaint was in fact held and could be released.
12. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. These issues relate to a complaint made to the Commissioner about another public authority.

Chronology

13. The complainant was initially in correspondence with Sussex Police and subsequently with the PCA and then the IPCC over a period of years about access to the master tape/sealed copy of a series of 999 calls which were used in a criminal trial in which he had been the defendant. The complainant's position is that these pieces of information should be held by Sussex Police.
14. Sussex Police advised the complainant that the master tape was no longer held by it and provided the complainant with a copy of the tape that it did hold. The complainant was dissatisfied with this approach and he made a succession of complaints to Sussex Police about the non provision of the master tape. The first complaint was made in February 2000 and was about the failure to provide the master tape as well as the failure to respond to previous correspondence. The second and third complaints (June 2000 and January 2003) were about the destruction of the master tapes.
15. Sussex Police elected not to record these complaints, as they were able to do under the Police Act 1996 which was in place at the time. The complainant then complained to the PCA about the fact that Sussex Police had not recorded these complaints. Under the Police Act 1996 the PCA had no authority to compel local police forces to record complaints and advised the complainant of this.
16. The complainant is seeking access to the files created by the PCA (now the IPCC) as a result of these complaints.
17. A caseworker from the Commissioner's Office wrote to the IPCC on 11 July 2006 and asked to be provided with a copy of the information sought by the complainant.
18. An officer of the IPCC responded on 17 July 2006. In that letter the officer referred to the recent Information Tribunal Decision of Higginson and the Information Commissioner EA 2005/0008, which had considered the issue of Section 80 of the Police Act 1996, and upheld the use of that section.
19. Between July 2006 and May 2007 the ICO corresponded with the IPCC to establish whether the information requested was held, or not held; and whether the costs of complying with the request exceeded the statutory limit.
20. In August 2007 the Commissioner updated his guidance on the definition of personal data. The guidance impacted on this case and specifically whether the information requested by the complainant constituted his personal data. The Commissioner therefore reconsidered the approach taken in this matter to determine whether the exemptions in section 40(1) and 40(5) were in fact applicable and whether the request should have in fact been processed in accordance with the Data Protection Act 1998 ('the DPA').

Analysis

Exemptions

Section 40 - Personal data

21. Section 40(1) states that –

“(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”.

Subsection (5) states that –

“The duty to confirm or deny-

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1)”.

File D2003/102167

22. As the IPCC considered the content of the D2003/102167 file during the course of the investigation, the Commissioner has gone on to consider whether the information was correctly deemed to be exempt under section 40(1) of the Act.
23. The Commissioner recognises that the IPCC disclosed information regarding the first complaint on file D2003/102167 whilst the investigation was ongoing. This was released under the DPA as it was considered exempt under section 40(1).
24. During the investigation the IPCC provided the Commissioner with a number of documents which were sent to the complainant in 2004 regarding the second complaint on file D2003/102167. The Commissioner is satisfied on the basis of that information that the IPCC had already provided the complainant with the information it held regarding the second 2003 complaint prior to receiving a request under the Act. He is also satisfied that the information provided to the complainant indicated the reasons given by Sussex Police to the PCA when it refused to record earlier complaints submitted by the complainant to the PCA. However, even though the complainant was in possession of that information, the IPCC was still required to respond to the complainant's FOI request either by disclosing the information again or citing an exemption.
25. Having reviewed the information on the D2003/102167 file, the Commissioner is satisfied that the material about both complaints recorded on it constitutes the complainant's personal data and that therefore the exemption in section 40(1) applies. The complaints are about the way in which the police handled evidence used in a court case in which the complainant was the defendant. It clearly relates to the complainant and includes information about the intentions of the PCA and the IPCC in respect of the complainant. As the information is exempt under section 40(1) the public authority was not in fact required to confirm or deny that it

was held under the Act. It was not required to comply with section 1(1)(a) by virtue of section 40(5).

26. In failing to advise the complainant that it was not obliged to comply with section 1(1)(a) in relation to file D2003/102167 because section 40(5) applied, the public authority breached section 17(1). However, in view of the contents of this decision notice the Commissioner has not ordered any remedial steps in this regard. However, as mentioned in the 'other matters' section below, he does consider it appropriate for him to carry out an assessment of the public authority's compliance with the DPA under section 42 of that Act.

Two 2000 complaint files

27. The public authority originally denied holding the two 2000 complaint files and then changed its position and argued that to confirm or deny the existence of the information would exceed the appropriate limit in section 12 of the Act. However, in view of the revised personal data guidance mentioned previously, the Commissioner has considered whether in fact the public authority was obliged to confirm or deny the existence of this information under the Act or whether this information request should have in fact been processed under the DPA.
28. The Commissioner looked at the wording of the original request made on 24 February 2005. The wording of that complaint was for '*copies of the reasons given by Sussex Police to the PCA when they refused to record earlier complaints submitted by me to the PCA*'. The focus of this request is the complaints made by the complainant to the PCA.
29. The Commissioner asked for a sample complaint file to be sent by the IPCC to the ICO for investigation. He was also able to review the documentation from the D2003/102167 file located in the course of the investigation. The sample file showed that a complainant's name will be on complaint files and that the material recorded on them will have been used to inform a decision about the complaint. In many cases, including this one, the Commissioner is satisfied that the decision will affect the complainant. In addition, where the complaint relates to the way in which a person has been treated by the police it is also likely to contain sensitive personal data, for example details of a crime that the applicant is alleged to have committed.
30. In this instance the complaints made in 2000 centred on the refusal of the police to record complaints made by the complainant about the way in which evidence was handled in a criminal investigation. The complainant was the subject of that criminal investigation. The Commissioner is satisfied that the information, if it were held by the public authority, would therefore constitute the complainant's personal data. Therefore the public authority was not obliged to comply with section 1(1)(a) and confirm or deny the existence of the information because the exemption in section 40(5) applied.

The Decision

31. During the course of the Commissioner's investigation the IPCC considered access to the material on D2003/102167. It determined that this information was exempt by virtue of section 40(1) of the Act. The Commissioner has determined that the information was exempt under section 40(1) and that therefore it was not in fact obliged to comply with section 1(1)(a) in relation to this information by virtue of section 40(5). He has also concluded that the public authority was not obliged to confirm or deny whether the two 2000 complaint files were held by virtue of section 40(5). In failing to advise the complainant of this fact the IPCC breached section 17(1) of the Act. However in light of the contents of this decision notice the Commissioner has not ordered any remedial steps in this regard.

Steps Required

32. The Commissioner requires no steps to be taken.

Other matters

33. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
34. Section 7 of the DPA gives an individual the right to request copies of personal data held about them – this is referred to as the right of Subject Access. The Commissioner notes that this request should have been dealt with as a subject access request, under section 7 of the DPA from the outset, and he would encourage public authorities to consider requests under the correct access regime at first instance.
35. The Commissioner will now go on to make an assessment under section 42 of the DPA. However, this assessment will be dealt with separately and will not form part of this Decision Notice, because an assessment under section 42 of the DPA is a separate legal process from the consideration of a complaint under section 50 of the FOI Act.

Right of Appeal

36. 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@tribunals.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 16th day of October 2007

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

Section 40 - Personal data

Section 40(1) states that –

“(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”.

Subsection (5) states that –

“The duty to confirm or deny-

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1)”.