

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 16 October 2007**

**Public Authority:** Sussex Police  
**Address:** Police Headquarters,  
Malling House,  
Church Lane,  
Lewes,  
East Sussex,  
BN7 2DZ

### Summary

---

The complainant made five information requests to the public authority. One file was ultimately deemed to be exempt under Section 40(1) by the public authority and it claimed not to hold the other information.

The Commissioner investigated whether he agreed with the use of the Section 40(1) exemption regarding this request, and then considered whether it was the most applicable exemption for all of the requested pieces of information. He has concluded that the section 40(1) exemption did or would have applied to all of the information. 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).

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 complainant made a series of five requests for information between January 2005 and January 2007. The Commissioner has investigated whether the complainant should have access to these pieces of information in this Decision Notice. A sixth request was made by the complainant. The Commissioner sought clarification from the complainant as to whether he wanted this request investigated. As the complainant declined to clarify whether he wanted this request investigated, the Commissioner has not investigated access to the pieces of information covered by the sixth request.

3. First request 10 January 2005

In this request the complainant sought information about the sealed copy of the tape of a 999 call which had been used in evidence in a criminal trial in which he had been the defendant. He sought the following information about this tape:

- The name of the person or persons who removed and destroyed the tape
- The date the tape was destroyed
- The name and rank of the person who authorised this destruction.

4. The public authority answered this request on 11 February 2005. In their response they said that, 'Sussex Police has previously held a copy of the 999 call you refer to in your letter dated 6 February 2005. The original copy of this tape is currently in the possession of the Criminal Cases Review Commission' (CCRC).

5. The complainant wrote to the public authority about this request on 17 February 2005. In that letter he sought details about who had told the FOI officer the master copy had not been removed and destroyed. The complainant also wanted to see the booking out entry for the tape.

6. On 1 March 2005 the public authority responded to this letter. In their letter they confirm that the tape was taken away for examination by the CCRC on the 30<sup>th</sup> September 2004. A property receipt log confirms that the tape was released to the CCRC, however this log was not available for public viewing.

7. Second Request:

On 28 April 2005 the complainant made a second request for information. This request was for information held by the public authority regarding three complaints he had made about the destruction of the master tape of the 999 call referred to in his first request. These complaints had been made to the Police Complaints Authority (PCA) and the complainant provided the PCA reference numbers to the public authority, those being D2000/135/100081; D2000/135/100938 and D2003/102167. The complainant sought 'copies of all documents relating to the investigation of the above mentioned complaints and the reasons given by Sussex Police to justify those three complaints not being recorded'.

8. Third Request:

On 6 May 2005 the complainant made a third request for information. He referred to evidence given in court by a police officer from the public authority about the complainant's telephone activity on 9 and 10 December 1997, which the officer said was given to him by BT. The complainant contacted BT who had told him that as such data is subject to the Data Protection Act they will only release it with the consent of the customer or in compliance with a court order. As the complainant had not given his permission he assumed that the police had obtained a court order to get this information from BT. He therefore asked for confirmation that the information had been obtained by court order and he sought details of the date of the application; the name of the court to which the application was made; the name and address of the BT person or department who responded and the date of their response.

9. Requests two and three were answered on 31 May 2005. The refusal notice cited Sections 30(1) and (2); Section 38; Section 40(2) and Section 41 as the reasons for refusal. Other information given to support the use of these exemptions was:

- The information had been collected in connection with a criminal investigation;
- The information, if released, may potentially cause physical or mental harm to some individuals;
- Some of the information requested is third party data and disclosure would breach the data protection principles;
- An actionable breach of confidence would likely result from the disclosure of the information;
- A harm test and public interest arguments were provided.

10. On 7 February 2007 the public authority informed the ICO that they had revised their use of these sections and deemed request two exempt under Section 40(1) only.

Fourth request:

11. The complainant wrote to the public authority on 27 June 2005. In that letter he states ' I reject the reasons given because clearly and obviously the exemptions quoted are being used to cover up criminal acts by senior officers of the Sussex Police'. The complainant advised that he sought an appeal regarding the refusal.

12. A fourth request for information was also made: the complainant provided the public authority with a copy of a note attached to a tape, which had been provided to the CCRC. The complainant asked for the name of the author of the note.

13. This request was deemed to be vexatious on 7 July 2005. The reason for this classification was that the public authority deemed it to be identical or substantially similar to previous requests. The public authority noted they had received 54 letters from the complainant and that since January 2005 he had made four FOI requests. The authority also deemed that the request had the

effect of harassing the public authority and/or could be characterised as being obsessive or manifestly unreasonable.

14. On 25 July 2006 the ICO invited the public authority to perform an internal review of these requests.

15. An internal review of requests one to four was undertaken on 11 October 2006.

That review confirmed:

- the public authority's previous positions about what had happened to the original copy of the 999 tape;
- One complaint file was located, however it did not carry any of the reference numbers provided by the complainant, however they continued to submit that it was exempt under Section 40(1);
- No information was deemed to be held regarding the BT order;
- The question as to the identity of the signatory on the note dated 9 November 1998 could not be answered definitively as they held no document which would answer that question.

16. Fifth Request:

On 11 January 2007 the complainant made a fifth request for information. He asked for information relating to 'Serial 74 in the Major Incident Registry' relating to his case and the G83 book relating to his case. The complainant attached two extracts from the police exhibits register in his case. He had asked a friend of his who had been a high ranking police officer to interpret the entries. The complainant sought to locate the provenance of the original tape FA/216/97 as noted on this record. His friend advised him that this information should be held under Serial 74 in the Major Incident Registry relating to his case; and in the G 83 Book where all property, evidence, etc relating to his case would be recorded. He sought access to this information.

17. The public authority wrote to the complainant on 22 March 2007 explaining that they did not hold this information.

18. After a request for an internal review, the public authority again wrote to the complainant on 9 May 2007. In that letter they state:

- There is no Serial 74 in the Major Incident registry;
- There is no G83 book;
- The information given to the complainant by his friend regarding these items was not correct.

## The Investigation

---

### Scope of the case

19. On 22 July 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
20. 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 another public authority.

### Chronology

21. The case officer wrote to the complainant on 6 July 2006 seeking confirmation about the scope of his complaints. The case officer advised that he believed there were two complaints: one for copies of all documents relating to three complaints made about a criminal investigation undertaken by the public authority regarding the complainant; and the reasons given by the public authority to justify the three complaints not being recorded; and another seeking confirmation that the public authority had obtained information from BT related to the investigation, by way of court order, including details of the date of the application and the name of the court to which the application was made, as well as the name and address of the BT person or department who responded and the date of their response.
22. The complainant responded on July 7, 2006. In that letter he advised the case officer that he had understood his complaints correctly. The complainant also outlined the reasons why he wanted the information.
23. The Commissioner then proceeded to request copies of the withheld information from the public authority for investigation. The Commissioner also advised the public authority that in his view an internal review had not taken place, and the public authority were invited to undertake one.
24. This internal review took place on 11 October 2006.
25. On 14 October 2006 the complainant wrote to the ICO. In that letter he stated that he found the results of the internal review unsatisfactory.
26. On 9 January 2007 the caseworker asked that all available withheld information be forwarded to the ICO for investigation.
27. The public authority sent the available material to the ICO for investigation on 7 February 2007.
28. 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

---

### Exemption

29. The public authority cited the exemption contained at Section 40(1) for the second request made by the complainant. However, the Commissioner has in fact considered whether Section 40(1) covers all of the information requested by the complainant.
30. All of the items requested by the complainant are connected to either his criminal trial, or to events that occurred on the evening of the incident for which he was charged. His first request is for information about the destruction of the sealed copy of a 999 call which was used in evidence at his trial; his second request was for details about complaints made by him to the public authority; his third request was for information about a BT order which he believes was applied for to obtain information about his phone activity on the night of the incident; his fourth request is for details regarding a signature on a note attached to a copy of the 999 tape used in his trial; and his fifth request is for information relating to Serial 74 and the G83 book relating to his case.
31. The Commissioner is satisfied that all of the information sought by the complainant is, or if it were held would be, his personal data and that therefore the Section 40(1) exemption applies or would apply if the information were held. All of the items sought clearly relate to the complainant and are connected to the trial in which the complainant was the defendant. As the information is, or would be, exempt under Section 40(1), the public authority was not in fact required to confirm or deny that the information was held under the Act. It was not required to comply with Section 1(1)(a) by virtue of section 40(5).
32. In failing to advise the complainant that it was not obliged to comply with section 1(1)(a) 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.

### The Decision

---

33. During the course of the Commissioner's investigation the public authority determined that the information sought in the complainant's second request was exempt by virtue of section 40(1) of the Act. The Commissioner has determined that the public authority was correct to exempt that information under section

40(1). Therefore it was not in fact obliged to comply with section 1(1)(a) in relation to that information by virtue of section 40(5). He has also concluded that the public authority was not obliged to confirm or deny whether the other pieces of information requested were held by virtue of section 40(5). In failing to advise the complainant of this fact the public authority 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

---

34. The Commissioner requires no steps to be taken.

## Other matters

---

35. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
36. 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.
37. 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

---

38. 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](mailto: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 16<sup>th</sup> 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)”.