

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 27 October 2009

**Public Authority:** Bedfordshire Police Authority  
**Address:** Bridgebury House  
Woburn Road  
Kempston  
Bedford  
MK43 9AX

### Summary

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In November 2008 the complainant made a request for information, about his complaint against a police officer, under the Freedom of Information Act ("the Act"). The public authority responded by neither confirming nor denying that it held information, referring to section 30 (investigations and proceedings conducted by public authorities) and section 40 (personal information). It later varied this citing section 40(2).

Although not cited by the public authority, the Commissioner's decision is that the entire information, if held, would be the complainant's 'personal data' under the terms of the Data Protection Act ("the DPA"). He therefore finds that the correct response was to neither confirm nor deny holding any information by reference to section 40(5) of the Act. The complaint is not upheld.

The public authority's handling of the request also resulted in breaches of certain procedural requirements of the Act as identified in this Notice.

### The Commissioner's Role

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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.

### Background

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2. The complainant raised a complaint against Bedfordshire Police as he believed that they had failed to investigate a crime he had reported. This complaint was directed against one of its Chief Officers. At the conclusion of enquiries, which

were conducted by Bedfordshire Police Authority (“the public authority”), the complainant requested information about his complaint, under the Act, in order to satisfy himself that appropriate enquiries had indeed been made and an adequate investigation had taken place.

3. The public authority confirmed to the Commissioner that a complaint against a senior police officer must be managed, and investigated if appropriate, by the Police Authority. A complaint against a senior officer may be categorised as either:
  - a complaint about the misconduct of that officer;
  - a complaint about ‘direction and control’.

### The request

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4. On 28 November 2008 the complainant made the following information request:

*“Under the relevant provisions of [the Freedom of Information Act 2000] I am formally requesting the following relating to my complaint against [a named chief Officer] of Bedfordshire Police...*

1. *All records of interviews with the [Chief Officer].*
2. *All correspondence with the [Chief Officer], including e-mails, memos and any contemporaneous notes.*
3. *All records of interviews with [name removed].*
4. *All correspondence with [name removed] to include e-mails, memos and contemporaneous notes.*
5. *All internal correspondence relating to the complaint.*
6. *Any other material relevant to the complaint.”*

5. On 15 December 2008 the public authority responded. It stated that, in accordance with the Act, it was obliged to treat the request “*in a manner that is ‘blind’ to the applicant*” and that it would neither confirm nor deny that it held any information in relation to the request. It further stated that any such information would be exempt by virtue of section 30 (investigations and proceedings conducted by public authorities) and section 40 (personal data).
6. On 11 February 2009 the complainant sought an internal review of the public authority’s decision to withhold the information. On 16 March 2009 an internal review was sent by the public authority. It varied the original position by removing reliance on section 30. It also provided a response in respect of parts (1) and (3) of the request.

## The investigation

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### Scope of the case

7. On 21 March 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He asked that the Commissioner give his opinion of the internal review.
8. The internal review had included a response in respect of parts (1) and (3) of the request. During his investigation, the Commissioner invited the complainant to submit any further views in respect of these two responses; none were received. The Commissioner also confirmed with the public authority that the response it had made to the complainant was to him personally and was a disclosure made outside the Act. The Commissioner is therefore satisfied that these responses were adequate and he has not considered them further. This Notice therefore only concerns items (2), (4), (5) and (6).
9. 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 relate to the complainant's dealings with the public authority prior to his request under the Act.

### Analysis

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10. A full legal annex is appended to this Notice.

### Exemption

#### Section 40 – personal information

11. As the DPA regulator the Commissioner has determined that it is necessary for him to first consider whether in fact the public authority should have complied with section 1(1)(a) of the Act when responding to the complainant, or whether it should have relied upon section 40(5)(b)(i) and refused to confirm or deny holding any of the requested information. If he concludes that it should have done he will not go on to consider the authority's compliance or otherwise with section 1(1)(b).
12. The complainant has requested a copy of information concerning *his complaint* and the public authority has taken the position of neither confirming nor denying the existence of such information. The Commissioner has made enquiries about how such information would be held if it existed. He has been advised as follows:
  - each complaint dealt with by the public authority is maintained in a paper filing system with one paper folder per complaint;
  - In relation to this particular case, any information would be contained in a single complaint folder;

- if there was only one single complaint about a Chief Officer then it would not have the complainant's name on the front of the file whilst it was being considered as that would not be necessary – if there were more than one complaint then the complainant's name would be added as a qualifier;
  - after completion of an investigation, the complaint would be filed with direct reference to the complainant.
13. Therefore, if it were held, the information would be contained in a unique file which would be cross-referenced to the complainant on completion of the investigation, or during the investigation if there were more than one complaint against any particular Chief Officer. Any correspondence relating to that complaint would be held on that file, which would include any emails or other enquiries undertaken to service the investigation.
14. In its case *Dr P Bowbrick v The Information Commissioner and Nottingham City Council* [EA2005/0006], the Information Tribunal found that it “... *is not the scheme of the Act that the Commissioner should have a general duty to consider the application of any possible exemption, even if not raised by the public authority*” (paragraph 48), but it also stated that the Commissioner “... *would be entitled to look for an appropriate exemption in some exceptional cases*” (paragraph 49). It went on to clarify (paragraph 51) that such a case may be one where section 40 is involved because:
- “The IC is in the position of being the guardian of both the rights of data subjects under the Data Protection Act 1998 (DPA) and of the rights of people seeking information under FOIA. If the Commissioner considered that there was a s.40 issue in relation to the data protection rights of a party, but the public authority, for whatever reason, did not claim the exemption, it would be entirely appropriate for the Commissioner to consider this data protection issue because if this information is revealed, it may be a breach of the data protection rights of data subjects.”*
15. In line with this, the Commissioner notes that the public authority has referred to ‘personal data’ in respect of third parties and to its position of neither confirming nor denying that it holds information. However, it is the Commissioner’s opinion that the information, were it held, would be the applicant’s ‘personal data’. Whilst the public authority failed to make any comment in this regard the Commissioner finds that section 40(1) should be considered, because, if the information existed, it would be the applicant’s personal data.
16. Under section 40(1), information that is requested that constitutes the applicant’s ‘personal data’ is exempt information. This exemption is absolute and requires no public interest test to be conducted. In relation to such information, the provisions of section 40(5) mean that the public authority is not obliged to comply with its duty under section 1(1)(a) to confirm or deny holding the requested information.
17. The Commissioner accepts that, in this case, it is likely that each piece of information may not solely refer to the complainant personally. However, it would be likely to bear a direct reference to being his ‘personal’ complaint and would

probably refer to him and his allegations about any related named parties. Even though any correspondence would be likely to include third party data and background information about the investigation of his allegations, nonetheless, this information would only have been created to resolve issues that the complainant has personally raised. In fact, the complainant would have been personally apprised of the outcome of any enquiry because of his direct involvement and it is also highly likely that the complainant would be the only person who would be aware of the existence of the information other than those parties directly concerned.

18. After considering the nature of the information requested, the Commissioner is satisfied that, if it were held, the complainant would, in the general sense described in the paragraph above, be the subject of all of the information requested. The information would be linked to him and would relate to issues involving his interaction with the public authority. It would have been created as a result of his personal concerns and interests. Accordingly, the Commissioner considers that the complainant is the 'data subject' within the meaning of the section 40(1) exemption and that the information would therefore be his 'personal data'.
19. Furthermore, as section 40(1) is engaged, under section 40(5)(a) the public authority is not required to comply with the duty to confirm or deny that the information is held as the duty to confirm or deny 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).
20. Any information held is therefore absolutely exempt under the Act and should not be disclosed. However, should the public authority hold any information falling within the scope of the request, then access should be considered under the terms of the DPA which is the appropriate access regime to use when seeking access to one's own 'personal data'. In his role as the regulator for the DPA, the Commissioner will now make a separate assessment under the terms of the DPA and will write to the complainant under separate cover.

## **Procedural requirements**

### **Section 17**

21. In its refusal notice the public authority failed to include details of any internal review procedure it had and also failed to inform the complainant of his right to ask the Commissioner to make a decision. By failing to do so, it breached section 17(7)(a) and (b). At internal review stage the public authority maintained its position of neither confirming nor denying that it held information but incorrectly cited the exemption at 40(2) rather than 40(5)(b). By failing to cite the correct exemption it breached section 17(1)(b).

## The Decision

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22. The Commissioner's decision is that the complainant is the 'data subject' of the information requested and, if held, it would therefore be exempt from disclosure in accordance with section 40(1) of the Act. Further, the public authority was not in fact required to comply with section 1(1)(a) of the Act because section 40(5) also applied. In failing to advise the complainant of its internal review procedure and of the Commissioner's role, it also breached section 17(7)(a) and (b). In failing to cite the correct exemption it breached section 17(1)(b).

## Steps required

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23. The Commissioner requires no steps to be taken.

## Other matters

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24. Although they do not form part of this Decision Notice the Commissioner wishes to make the following comments.
25. The Commissioner is of the opinion that this request ought to have been treated solely as a subject access request under the terms of the DPA. The Commissioner will therefore make a further assessment as to whether the public authority should supply any further information under the DPA.
26. The Commissioner believes it is important to stress that if a 'data subject' is not able to access their 'personal data' via the DPA then they cannot access it via the Act as an alternative because it is absolutely exempt.
27. In any case, the exemptions in the Act are generally drawn more widely than those in the DPA. Even if the Commissioner were wrong, and some or all of the information that might have been withheld from the complainant by the public authority is not his personal data, it is more than likely that the public authority would still be justified in withholding the information if access were considered under the freedom of information regime.
28. Furthermore, if a data subject disagrees with an assessment made by the Commissioner under the DPA then they are not bound by this and they have a right to ask for a separate assessment to be undertaken by the County Court. Details on how to do this can be found on the Commissioner's website<sup>1</sup>.
29. The Commissioner is also of the opinion that, where a public authority makes any disclosure to a requester outside the terms of the Act, it should clearly state this

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<sup>1</sup>[http://www.ico.gov.uk/upload/documents/library/data\\_protection/practical\\_application/taking\\_a\\_case\\_to\\_court.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/taking_a_case_to_court.pdf)

at that time. This makes it clear to all parties that the disclosure is for the eyes of the requester only and is not one that would necessarily be made to other parties.

## Right of appeal

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30. 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).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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 27<sup>th</sup> day of October 2009**

**Signed .....**

**David Smith  
Deputy Commissioner**

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



## Legal Annex

### Freedom of Information Act 2000

**Section 1(1)** provides that -

“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.”

**Section 17(1)** provides that –

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

**Section 17(7)** provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

**Section 40(1)** provides that –

“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.”

**Section 40(5)** provides 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)”.

### Data Protection Act 1998

‘**Data subject**’ is defined in section 1(1) of the DPA as:

“... an individual who is the subject of personal data”

‘**Personal data**’ is defined in section 1(1) of the DPA as:

“... data which relate to a living individual who can be identified -

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual”