

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 31 March 2010

Public Authority: The Chief Officer
Address: Thames Valley Police
Thames Valley Police Headquarters
Oxford Road
Kidlington
OX5 2NX

Summary

The complainant made a request to Thames Valley Police (“the public authority”) for information about a police officer, a named individual, an alleged statement made about the complainant and alleged personal surveillance of him. The public authority originally neither confirmed nor denied that it held most of the information by virtue of section 40(5); it claimed further information was ‘not held’. This position was revised to withholding some information by virtue of section 40(2), this same information being subsequently disclosed during the investigation. The public authority also further amended its position during the investigation and stated that the information which it had originally claimed was ‘not held’ should also have been exempted under section 40(5).

The Commissioner’s decision is that the public authority was correct to neither confirm nor deny that it holds the information requested by virtue of sections 40(5)(a) and 40(5)(b)(i). 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

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 wrote to the public authority on 6 October 2007, making the following request:

- 1) *"When did [named police officer] 's deployment at Maidenhead police station commence, & at what rank?"*
- 2) *What is [named police officer] 's relationship with [named person 1] of [address] ?*
- 3) *Kindly state the post [named person 1] held when employed by the TVPC [the public authority] and specify whether he is currently undertaking contracts for services for the TVP.*
- 4) *With reference to the alleged false statements made to the TVPC by [named person 2] (then resident at [address]), did [named person 2] so act in collusion with [named person 1]?*
- 5) *Please confirm that the TVPC is responsible for the placement of a surveillance device positioned adjacent to a pendant / ceiling light bulb / fitting in a bedroom at [the complainant's address] & specify the function of that device. What other surveillance equipment is planted at [the complainant's address] and where is it sited."*

3. The public authority responded to the complainant's request on 30 October 2007 by issuing a refusal notice. The notice stated:

"In response to questions 1 to 4 your request for information has now been considered and I am not obliged to supply the information you have requested. Such information is exempt under section 40 of the Freedom of Information Act 2000. This exemption applied because the right under the Act to request official information held by public authorities does not apply to personal data.

In accordance with the Act, this letter represents a Refusal Notice for this particular part of your request. Under the Freedom of Information Act 2000, we neither confirm nor deny that the information you requested exists. We are, however, advising you as required by section 17 of the Act, that such information, if it were to exist could reasonably be expected to be exempted

under the relevant sections of the Act. This action cannot be taken as confirmation or denial that Thames Valley Police holds the information you have asked for.

In response to question 5, no information is held relevant to your request."

4. On 1 November 2007 the complainant wrote to the public authority making the following points.

Parts 1 and 3

"How is a police officer's rank & deployment personal?"

Part 2

"If [named police officer] and [named person 1] worked together as TVPC officers, then surely that is a matter of record? Did they work together?"

Part 4

"A TVPC officer has already written to me to advise that [named person 2] has made a false statement about me to the TVPC. He clearly did not consider the matter personal."

Part 5

"Your response is ambiguous. Are you saying that the TVPC did not plant the surveillance device discovered or are you saying that you do not propose to trouble yourself to find out whether the TVPC sited the device? Kindly advise of the nature of the device & the location of any other devices positioned at [his home address]".

5. The complainant's letter of 1 November was not received by the public authority and was re-sent on 22 December 2007.
6. The public authority acknowledged receipt of the complainant's letter and informed him that an internal review of its handling of his request would now take place.
7. On 19 February 2008 the public authority concluded its internal review and communicated its findings to the complainant. It made a separate response to each of the five parts of the request stating that:
 - Part 1 was exempt by virtue of section 40(2)(a)(b) (Personal Information) and that release of information would contravene the principles of the Data Protection Act 1998.
 - Part 2 had been redefined and was now considered to concern whether or not the named police officer and named person 1 worked

- together. It refused to confirm or deny whether it held any information by virtue of section 40(5).
- Part 3 and 4 were also exempt by virtue of section 40(5).
 - In respect of part 5, it maintained that: *"Information that is not held by Thames Valley Police cannot be provided"*.
8. The public authority also informed the complainant that he could access his 'personal data' by making a subject access request under the provisions of the Data Protection Act and it enclosed the relevant application form.

The Investigation

Scope of the case

9. On 23 February 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant asked the Commissioner to determine whether the public authority's responses to his questions were correct. He stated that he did not believe the public authority had answered his questions; particularly question 5, the response to which he considered to be *'ambiguous'*.
10. On 24 March 2010 the public authority provided the information requested in respect of the first part of the request. The Commissioner has therefore removed this from the scope of his investigation.

Chronology

11. The Commissioner wrote to the public authority on 3 July 2008 making specific enquiries about its response to each of the complainant's questions.
12. The public authority responded to the Commissioner's enquiries on 29 July 2008.
13. On 6 August 2008 the Commissioner raised further queries. On 19 August 2008 the public authority telephoned the Commissioner to discuss the case. At this point it advised him that it wished to change its response in relation to the fifth part of the request. Instead of saying that nothing was held it wished to apply the exemption at section 40(5).
14. On 21 August 2008 the Commissioner spoke to the complainant. The complainant provided information about the background to his request

which included reference to allegations which were supposedly reported to the police about him. He confirmed that he had never made a request under the 'subject access' provisions of the Data Protection Act ("the DPA") and advised that he had not been invited to do so by the public authority. However, the Commissioner would here note that such an invitation was made when the public authority sent out its internal review. It clearly stated:

"I must bring to your attention that any disclosure made under [the Act] is disclosure into the public domain and not just to you as the requestor. Should you wish to know what information (if any) Thames Valley Police holds about you, you must complete a Subject Access form. Payment of a £10.00 fee and proof of identification must accompany a completed application form. For your convenience I have enclosed a form".

15. On 29 August 2008 the public authority called the Commissioner again to discuss the case. It confirmed that it was prepared to release the information in respect of the first part of the request but that the remaining information was exempt under section 40(5).
16. On 10 January 2010 the complainant chased a response to his case. On 4 February 2010 the Commissioner responded and apologised for the delay.
17. On 22 March 2010 the Commissioner contacted the public authority. It agreed to write to the complainant and provide information in respect of the first part of the request. It did so on 24 March 2010.

Analysis

18. For simplicity the Commissioner has divided the remaining four parts of the request into two areas. Parts 2 and 3 of the request would relate to third parties and so are considered together. Part 4 and 5 of the request would relate to the complainant himself so these are also considered together.

Exemptions

Section 40(5)(b)(i) – personal data and the exclusion from the duty to confirm or deny

Parts 2 and 3 of the request - Third party data

19. The information was requested by the complainant in the belief that a named party was involved with the public authority in a 'professional' capacity. This therefore prompted the Commissioner to initially consider whether the public authority would have been automatically excluded from the duty imposed on it by the provisions of section 1(1)(a) (confirming or denying) because of the provisions of section 40(5)(b)(i).
20. Generally, the provisions of section 40 subsections 1 to 4 exempt 'personal data' from disclosure under the Act. In relation to a request which constitutes the personal data of an individual other than the applicant, section 40(5)(b)(i) further excludes a public authority from complying with the duty imposed by section 1(1)(a) if complying with that duty would contravene any of the data protection principles or section 10 of the DPA, or would do so if the exemptions in section 33(A) of the DPA were disregarded.
21. A full text of section 40 of the Act is available in the Legal Annex at the end of this Notice.
22. Section 40(5)(b)(i) states:

"The duty to confirm or deny –

(b) does not arise in relation to other information if or to the extent that either –

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with 1(1)(a) would (apart from this Act) contravene any of the data protection principles..."

23. So far as is relevant to this case, section 40(5)(b)(i) will be engaged if the following two conditions are satisfied:
 - 1) to confirm whether or not the information is held would reveal the personal data of a data subject as defined by section 1(1) of the DPA, and
 - 2) that to confirm whether or not the information is held would contravene one of the data protection principles.

Would confirming or denying whether the information is held reveal the personal data of the data subject?

24. Personal data is defined by section 1(1) of the DPA. It states that –

"personal data means data which relate to a living individual who can be identified -

- (a) from those data,*
 - (b) from those data and other information which is in the possession of the, or 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”.*

25. The Commissioner accepts that the information requested would be the 'personal data' of a third party as it was requested by direct reference to that party's name and address. He also accepts that, even if it were to confirm that no information is held - if this were the case - the public authority would still be processing personal information about that individual as it would be revealing something about its association with that party.
26. The public authority has argued that it is its normal practice to neither confirm nor deny whether any information is held when responding to requests for information about individuals and any involvement they may or may not have had with the police. It believes to do otherwise would breach their rights under the DPA. It did not state which principles would be breached or why. It did not offer any further arguments which were relevant to breaching any of the data protection principles.

Would confirming or denying whether the information is held contravene any of the data protection principles?

27. Turning now to the second test, the public authority did not state which data protection principle/s would be breached by confirming or denying whether the requested information is held. The Commissioner has therefore decided that the most appropriate principle would be the first one. The first data protection principle states in part that:

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met, and in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”

Would disclosure be fair?

28. The Commissioner's guidance on section 40 suggests a number of issues that should be considered when assessing whether disclosure of information would be fair, namely:

- the individual's reasonable expectations of what would happen to their personal data;
 - the seniority of any staff;
 - whether the individuals specifically refused to consent to the disclosure of their personal data;
 - whether disclosure would cause any unnecessary or unjustified distress or damage to the individuals;
 - the legitimate interests in the public knowing the requested information weighed against the effects of disclosure on the individuals.
29. Furthermore, the Commissioner's guidance suggests that when assessing fairness, it is also relevant to consider whether the information relates to the public or private lives of the third party. The guidance suggests that:
- "Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned."*
30. Although the original request sought information about the 'relationship' between a police officer and a named party, this was later clarified by the complainant as meaning '*did they work together*'. The Commissioner has confirmed with the public authority that, if the named party had been a police officer, then it would have advised the complainant of this and not sought to neither confirm nor deny holding the information. Furthermore, if he was a police officer then it would have normally confirmed any 'working relationship' he had with another named police officer and would also have usually provided information about the officer's posting. The Commissioner therefore concludes that any employment the named person may or may not have with the public authority was therefore not in the capacity of 'police officer'.
31. The Commissioner does not know the reason behind the complainant's request or why he is seeking to ascertain whether or not 'person one' has been engaged in any employment with the police. In such circumstances, the Commissioner will often consider it reasonable for a public authority to release basic information about an employee, particularly when the requester has only asked for minimal information. However, in this case the complainant has not only named the party about whom he is seeking information, he has also given an address, which identifies him as a neighbour of the complainant. Although the Commissioner does not normally consider the identity of

the requester to be relevant to requests made under the Act, he finds that, in his position as regulator for the DPA too, the circumstances in this case are of significance and need to be taken into account.

32. The named individual is a neighbour of the complainant, and the Commissioner does not consider it fair for the public authority itself to pass on information when there is no evidence that the named person would consent to such disclosure, unless there is a legitimate and overriding interest in doing so. He is not aware of any such interest in this particular case and he therefore considers that confirming or denying it holds such information would be unfair and would breach the first data protection principle.

Parts 4 and 5 of the request - Personal data of the complainant

33. 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).
34. 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.
35. After considering the nature of the information requested, the Commissioner is satisfied that, if it were held, the complainant would be the subject of the information requested. The complainant himself has stated that the alleged false statement he refers to at part 4 of his request is 'about me' and also that alleged surveillance was at his home address. Therefore any information would be directly linked to him and would relate to issues involving his interaction with the public authority. Although the Commissioner here notes that the public authority changed its position during the course of his investigation in respect of part 5 of the request, from stating that nothing is held to saying that it would neither confirm nor deny holding any information, he accepts that this latter position is the correct one to take. Accordingly, the Commissioner considers that the complainant is the 'data subject' within the meaning of the section 40(1) exemption and that the information, if held, would therefore be his 'personal data'.

36. 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).

Procedural Requirements

Section 17 – refusal of request

37. Section 17(1) of the Act requires that, where a public authority is relying on a claim that an exemption in Part II of the Act is applicable to the information requested, it should in its refusal notice: -
- (a) state that fact,
 - (b) specify the exemption in question,
 - (c) state why the exemption applies.
38. In this case, the public authority stated that it was relying on section 40 but failed, by the time of the completion of the internal review, to specify which sub-section of the exemption it was relying on or state why the exemption applied. It therefore breached section 17(1)(b) and (c).
39. Furthermore, having initially maintained that it held no information in relation to part 5 of the request, the public authority advised the Commissioner during his investigation that it now wished to rely on the exemption at section 40(5)(a) by virtue of section 40(1). In failing to advise the complainant of this by the time of the completion of the internal review it breached section 17(1)(a), (b) and (c).

The Decision

40. 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 was correct in neither confirming nor denying this it holds any information in respect of parts 2 and 3 of the request.
41. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- in failing to specify which sub-section of the exemption it was relying on in respect of parts 2, 3 and 4 of the request, or to state how confirmation or denial would breach any data protection principle/s, it breached section 17(1)(b) and (c);
- in failing to cite an exemption in respect of part 5 of the request it breached section 17(1)(a), (b) and (c).

Steps Required

42. The Commissioner requires no steps to be taken.

Other matters

43. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following.
44. When he sought an internal review, the complainant also commented that the public authority had previously written to him to advise him that a false statement had been made about him and he did not therefore understand how it could now consider that this information was 'personal'. However, the Commissioner would here note that any previous correspondence that may have been sent to the complainant would not have been provided under the Act but would have been provided on a 'one-to-one' basis. Disclosures under the Act are not personal disclosures to individuals but are disclosures which are made to the general public.
45. The Commissioner also notes that the public authority has already invited the complainant to submit a 'subject access request' if he wishes it to consider disclosing any of his 'personal data' that it may or may not hold, including sending him a copy of its 'application form'. The Commissioner considers that this is sufficient action by the public authority and does not require the public authority to take any further steps.

Right of Appeal

46. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: 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 31st day of March 2010

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 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(2)

Provides that –

“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.”

Section 40(3)

Provides that –

“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."

Section 40(4)

Provides that –

"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)."

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), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."