

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 17 June 2009

Public Authority: The Chief Officer
Address: Greater Manchester Police
Police Headquarters
Chester House
Boyer Street
Old Trafford
Manchester
M16 0RE

Summary

The complainant asked Greater Manchester Police (GMP) for information concerning the disciplinary records of a former police officer, copies of two investigations where the officer was the subject and copies of the officer's day book for a specified period. The police refused to supply the information in reliance on section 40(2) of the Act.

In relation to the disciplinary records of the named officer and to the investigations into his conduct, the Commissioner has determined that GMP incorrectly applied section 40(2) of the Act. His decision is that GMP should have neither confirmed nor denied whether it held relevant information in reliance of section 40(5)(b)(i).

The Commissioner also found that section 40(1) applied to some of the officer's day book. The Commissioner's decision is that GMP breached section 17(1) and section 17(1)(b) of the Act.

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 Greater Manchester Police (GMP) on 10 November 2006 making the following request:
 - *'Could you please let me have copies of [a named police officer's] disciplinary records whilst he was a serving police officer?*
 - *Also copies of any investigations [a named officer] was subject to regarding his conduct whilst serving as a police officer. The complainant specified two enquiries which involved the named officer.*
 - *I would like to make an application under the Freedom of Information Act for copies of [a named officer's] note book / day book entries from [specified date] through to the day [a named officer] ceased to have any involvement in [a specified murder] investigation.*
3. GMP responded to the complainants request on 5 December 2006. It informed the complainant that it was not obliged to supply the information he had requested on 13 November 2006 and addressed the complainant's request in four parts.
 - 1) The disciplinary records of the named officer.
 - 2) Investigations concerning the conduct of the named officer.
 - 3) Copies of the named officer's note book / day book from [specified date] to the present day.
 - 4) Information relating to the named officer's involvement in [a specified murder] investigation.
4. GMP refused to supply information relating to parts 1 and 2 in reliance on section 40(2) of the Act (personal information relating to third parties). The police gave an outline of how this section works and referred to the Information Commissioner's previous decisions which supported the withholding of internal disciplinary matters of officials.
5. GMP applied section 40(1) of the Act (personal information of the applicant) to part 3. The police referred to a newspaper article, supplied by the complainant, which reported the Commissioner's decision to order disclosure of a police officer's note book. The police pointed out that this decision was not upheld by the Information Tribunal and that the Tribunal held that officer's note books / day books should be disclosed under section 7 of the Data Protection Act 1998 (DPA), as the information concerned the requestor's personal data. The complainant was invited to make a subject access request under the DPA for item 3.
6. In relation to part 4, the police informed the complainant that the information related to a third party and was therefore exempt under section 40(2).

7. The complainant wrote to GMP on 28 December 2006. He enclosed a letter from Greater Manchester Crown Prosecution Service (CPS) which confirmed that the named officer was a prosecution witness in a specified murder trial. The complainant stated that the withheld information 'has a potential significance' on the basis that the named officer was an 'unreliable witness'. The complainant asserted his belief that he is entitled to full disclosure of what he believes to be fresh evidence.
8. The CPS letter informed the complainant that the two enquiries, specified in his request to GMP, were still ongoing at the time of his trial. The letter also informed the complainant that the CPS was not in a position to disclose PII rulings (Public Interest Immunity rulings) which the trial Judge had ordered not to be disclosed to him.
9. The complainant wrote to the Information Commissioner's Office on 28 December 2006 to complain about GMP's decision not to release the information he had requested. At this stage the complaint case was closed because the complainant had not asked GMP to review its decision.
10. The complainant wrote to GMP on 21 March 2007 asking for an internal review of its decision not to disclose the information he had requested.
11. On 7 June 2007 the complainant wrote to the Commissioner again. He complained about GMP failing to conclude its internal review of its decision. The complainant enclosed a copy of part of the Commissioner's Legal Guidance on the Data Protection Act: specifically, '5.10 Disclosures made in connection with legal proceedings (Section 35(2))'. The complainant asserted that this guidance entitled him to the disclosure of evidence.
12. On 17 January 2008, following the intervention of the Commissioner's Office, GMP concluded its internal review and wrote to the complainant informing him of its outcome. GMP advised the complainant that the information he had requested is exempt under section 40(2) of the Act. The review stated: *'Disclosure would breach one of the data protection principles and would be unfair and unlawful processing of the information'*. GMP's letter noted that the complainant wanted the information in order to make an appeal. It stated: *'The Freedom of Information Act is not the correct route to request disclosure of information for use at court appeals'*.

The Investigation

Scope of the case

13. The scope of the Commissioner's investigation is determined by the complainant's letter of 7 June 2007 and by the conclusions of GMP in its internal review. The Commissioner has investigated whether GMP was correct in withholding the requested information in reliance on section 40(2) of the Act.

14. The Commissioner's investigation concerns the complainant's request of 10 November 2006. He is cognizant of the fact that GMP responded to a request made by the complainant on 13 November 2006 and thereby issued a refusal notice which addressed a four-part request rather than a three-part request.
15. The Commissioner acknowledges that there was significant correspondence between the complainant and GMP at the time of the two requests; therefore he understands why and how GMP responded to the complainant as it did. He has determined, and agreed with the complainant, that the focus of his investigation would be the request made on 10 November 2006 against the response made by GMP on 5 December 2006 and its internal review of 17 January 2008. He has adopted this approach following an analysis of the documentation supplied by the complainant and comparing the three-part request against the four-part response. He notes that the three-part request and the four-part response relate to the same substantive information.

Chronology

16. The Commissioner wrote to GMP on 1 February 2008. He detailed the complainant's information request and the chronology of the case to the date of the internal review. He asked GMP to send him the withheld information and to provide its response to questions concerning the application of section 40(2); particularly in relation to the data protection principles and the conditions for processing in schedules 2 and 3 of the Data Protection Act 1998 (DPA).
17. On 18 March 2008 the Commissioner telephoned GMP to discuss its failure to respond to his letter of 1 February.
18. GMP responded to the Commissioner on 15 April 2008. It failed to respond to the Commissioner's questions concerning the application of section 40(2) to the withheld information.
19. The Commissioner wrote to GMP again on 4 August 2008. He asked the police:
 - to confirm the date when the named officer ceased to be involved in the specified investigation and to send the relevant pages from the officer's note book / day book;
 - whether it had sent him all the recorded information it holds relevant to the officer's disciplinary records or to send him proof of destruction; and
 - to supply an unredacted copy of the enquiry document.
20. GMP responded to the Commissioner on 6 August 2008 by inviting him to view the withheld information at its premises.
21. On 16 August 2008 GMP wrote to the Commissioner again. GMP re-stated its refusal to send the Commissioner un-redacted copies of the withheld information and also withdrew its invitation to view the material.
22. The Commissioner wrote to GMP on 25 September to ask it to review its decision not to allow access to the withheld information.

23. On 29 September 2008 GMP invited the Commissioner to a meeting to discuss this decision.
24. The Commissioner wrote to GMP again on 3 October 2008. He asked to view the withheld information on GMP's premises and explained why this was necessary. The Commissioner informed the police that the complainant had provided him with evidence which contradicted the police statement concerning the date that the named officer ceased to be involved in the specified investigation. He also asked GMP to provide him with its reasons for applying section 40(2) to each piece of redacted information and for its considerations concerning the application of the data protection principles and the schedule 2 and 3 conditions of the Data Protection Act. Finally, in the event that GMP maintained its position concerning access to the withheld information, the Commissioner asked for a full explanation of GMP's reasons for this.
25. GMP responded to the Commissioner's letter on 24 October. It confirmed that it would allow access to the withheld information only if the names of individuals and of any circumstances which could lead to their identification were heavily redacted. GMP failed to address the Commissioner's questions relating to each piece of redacted information, preferring to limit its response to generalities.
26. On 6 November 2008 the Commissioner served an Information Notice on the Chief Officer of Greater Manchester Police. The notice required GMP to provide supervised access to unredacted copies of the withheld information and to provide its considerations concerning the data protection principles and conditions contained within schedules 2 and 3 of the Data Protection Act.
27. GMP responded to the Information Notice on 5 December 2008. It provided background information about the enquiry specified in the complainant's request. GMP invited the Commissioner's representative to view the withheld information on its premises.
28. The Commissioner's representative met with GMP on 10 December 2008 and again on 12 May 2009. The representative was given supervised access to the withheld information on both occasions.

Analysis

The disciplinary records of a named officer

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

29. Although GMP failed to consider this subsection, the subject matter of this part of the complainant's request prompted the Commissioner to consider whether GMP would have been automatically excluded from the duty imposed by the provisions of section 1(1)(a) of the Act by virtue of section 40(5)(b)(i).

30. Section 40(5)(b)(i) provides –

“ the duty to confirm or deny...

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

(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.”

31. Generally, under section 40 subsections (1) to (4), personal data is exempt from disclosure if to do so would breach the data protection principles. 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 Data Protection Act 1998.

32. Personal data is defined in section 1(1) of the DPA as:

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

from those data, or

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”.

33. The Commissioner considers that a disciplinary record is the personal data, and potentially the sensitive personal data, of the person to whom it relates.

34. GMP asserts that to disclose information relating to the named officer's disciplinary records would contravene the first data protection principle.

35. The first data protection principle has two components:

- 1) personal data must be processed fairly and lawfully; and
- 2) personal data shall not be processed unless one of the conditions in Schedule 2 of the DPA is met.

36. The Commissioner agrees that the relevant principle here would be the first principle; the requirement that any processing should be fair and lawful.

37. In the Commissioner's view there is a widespread expectation that the details of a person's employment should be considered confidential. Equally, there is a

recognised expectation that information about the internal disciplinary matters of an individual is private.

38. The confirmation by GMP that it holds a disciplinary record for any officer would be in itself disclosure the officer's personal data. Making this fact known to the public may give rise to unwarranted speculation about the nature of the officer's past conduct. The Commissioner considers that this would be unfair to the officer and would therefore contravene the first data protection principle.
39. The Commissioner is satisfied that the nature of the requested information is such that GMP should have applied section 40(5)(b)(i) and should have neither confirmed nor denied holding a disciplinary record for the named officer.

Investigations concerning the conduct of a named officer

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

40. The complainant is seeking information relating to investigations concerning the conduct of a named officer. The Commissioner is satisfied that any such information would be disclosure the officer's personal data and that its disclosure would, for the same reasons given above, contravene the first data protection principle.
41. In the Commissioner's view the appropriate response for GMP was to cite section 40(5)(b)(i) and to neither confirm nor deny it held any information relevant to this part of the complainant's request.

Copies of the named officer's note book / day book

Section 40(1) and Section 40(2) - exemptions from duty to provide information

42. GMP's initial response to this part of the complainant's request was to exempt the information under the provisions of section 40(1) of the Act.
43. When GMP subsequently reviewed its handling of the complainant's request, it did not cite section 40(1) and instead cited section 40(2) in relation to the information.
44. GMP did not explicitly confirm that it held information relevant to the complainant's request. However, GMP's initial citation of section 40(1) and its invitation to the complainant to make an application under section 7 of the Data Protection Act implied that it holds relevant information and that this constitutes the complainant's personal data.
45. The Commissioner is satisfied that GMP hold the named officer's day book. He accepts GMP's assurance that officers at the rank of the named officer do not have a note book.
46. The Commissioner considers that the request was for any entries made in the named officer's daybook or notebook (whichever applied) between two specified

dates; the end date being the day upon which the named officer's involvement in a specified murder investigation ceased. Whilst the Commissioner understands from the complainant that the information he is particularly interested in is any information related to the named officer's involvement in the specified murder investigation, he considers that the request is worded more widely than this, and encompasses any and all entries made between these two dates, regardless of whether or not they specifically relate to the named officer's involvement in the specified murder investigation.

47. The Commissioner is satisfied that GMP holds information relevant to the request in that it holds a day book for the named officer which contains entries made between the two dates in question. He is satisfied that the end date used by the GMP in considering this request, is the correct end date. In reaching this conclusion he has considered the representations of both the complainant and the GMP, and the content of a series of letters from the Crown Prosecution Service (CPS) to the complainant. The full reasons for his conclusion on this point are specified in the confidential annex to this notice. A confidential annex, made available only to the public authority, has been used in this case so as to avoid revealing the content of the withheld information.
48. Having viewed the withheld information the Commissioner is further satisfied that some of it (as specified in the confidential annex to this notice) represents the complainant's personal data.
49. The withheld information which is the complainant's personal data is exempt by virtue of section 40(1) of the Act. This is an absolute exemption and therefore the provision of section 1(1)(b) does not apply to this information.
50. Having viewed the withheld information the Commissioner is also satisfied that some of it (as specified in the confidential annex to this notice) is not the complainant's own personal data. He considers that this information is, however, the personal data of third parties and is exempt information by virtue of section 40(2) of the Act.
51. Third party personal data is exempt from disclosure under the Act by virtue of section 40(2) and the provisions of section 40(3)(a)(i) if disclosure would contravene any of the data protection principles.
52. The Commissioner has considered the nature of the withheld information in relation to the data protection principles. He considers that the first data protection principle is relevant in this case.
53. The first data protection principle provides that –

'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 or sensitive personal data, at least one of the conditions in schedule 3 is met.

54. The Commissioner is satisfied that disclosure of the withheld information would be unfair to the third party data subjects. He considers that it would be unfair to these data subjects to disclose into the public domain information relating to any connection they may have with a criminal investigation. The Commissioner has considered redaction of the information and has concluded that in this case this would not be possible without rendering any un-redacted information meaningless. As the Commissioner has concluded that disclosure would be unfair, he has not gone on to consider whether any of the conditions in schedules 2 and 3 are met.
55. The Commissioner finds the third party data contained within the withheld information is exempt by virtue of section 40(2) and the provisions of section 40(3)(a)(i).

The Decision

56. The Commissioner has decided that the following aspects of the request were not dealt with in accordance with the Act:

GMP incorrectly applied section 40(2) of the Act to the named officer's disciplinary record and to any investigations he may or may not have been the subject of. The appropriate response to both of these parts of the complainant's request would have been to cite section 40(5)(b)(i) and to have refused to confirm or deny that any information was held.

GMP's final position after completion of its internal review was that section 40(2) of the Act applied to the contents of the officer's day book. The Commissioner's view is that for some information (specified in a confidential annex) the appropriate response would have been to refuse the information under section 40(1) of the Act.

He finds the public authority in breach of section 17(1) of the Act for failing to specify that it wished to rely upon the exemption at section 40(2) of the Act within the statutory time limit of 20 working days.

He finds the public authority in breach of section 17(1)(b) for failing to specify that section 40(2) applied by virtue of section 40(3)(a)(i).

Steps Required

57. The Commissioner requires no steps to be taken.

Other matters

58. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
59. The complainant drew the Commissioner's attention to the time taken by GMP to conduct an internal review of its decision. The Commissioner notes that it took 10 months for the internal review to be conducted.
60. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his 'Good Practice Guidance No 5', published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner remains concerned that, despite his guidance, it took 10 months for an internal review to be completed. His concerns in this regard are echoed in the practice recommendation served to Greater Manchester Police in March of this year.
61. As the Commissioner has concluded that some of the information constitutes the personal data of the applicant he would suggest that the GMP contact the complainant to ascertain whether he wishes to proceed with the Subject Access Request it suggested he make in paragraph 5 of this notice.

Right of Appeal

62. 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.
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 17th day of June 2009

Signed

**Lisa Adshead
Senior FOI Policy Manager**

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

Legal Annex

General Right of Access

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.”

Personal information

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).”