

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 February 2009

Public Authority: Metropolitan Police Service
Address: Public Access Office
20th Floor Empress State Building
Lillie Road
London
SW6 1TR

Summary

The complainant asked the public authority for information about whether the record of a named officer's disciplinary hearing had been disclosed to any parties and, if so, requested the details of those parties. The public authority informed the complainant that it was not obliged to comply with section 1(1)(a) in relation to this information by virtue of section 40(5) of the Act. Having investigated the case the Commissioner is satisfied that the public authority applied section 40(5)(b)(i) of the Act correctly. The Commissioner finds that the public authority breached section 17(1) of the Act, because it took more than twenty working days in the issuing of a valid refusal notice and did not meet the requirements of section 17(1)(b) by failing to cite the exemption that it relied upon fully, but requires no steps to be taken.

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. After making previous requests, the complainant made the following request to the Metropolitan Police Service dated 12 April 2007:

"In relation to [named officer's] disciplinary hearing:

1. *Has this information been released to any bodies?*
2. *If any who."*

3. On 21 May 2007 the public authority issued a refusal notice. It stated that it was not obliged to comply with section 1(1)(a) in relation to this information by virtue of section 40(5) of the Act. It informed the complainant that:

“Where requests are made for personal information under the Act, to confirm or deny whether that information exists would publicly reveal information about that individual, breaching the right to privacy attributed to personal data under the Data Protection Act. The right to privacy must be observed in all instances by the MPS under the Freedom Information Act 2000.”

4. On 7 June 2007 the complainant wrote to the public authority and requested an internal review. On 15 June 2007 the public authority conducted its internal review and upheld its original decision.

The Investigation

Scope of the case

5. On 7 July 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
6. On 22 February 2008 the Commissioner wrote to the complainant to clarify the scope of the request prior to his investigation. In a letter dated 21 April 2008 the complainant confirmed that he was seeking to establish whether details of the named officer's disciplinary hearing had been released to any bodies in any form, and, if so, who. The Commissioner has interpreted this to be a reference to the complainant's request of 12 April 2007, and has therefore focused his investigation solely on this request. The Commissioner confirmed this interpretation to the complainant in a letter dated 23 April 2008.

Chronology

7. On 25 April 2008 the Commissioner informed the public authority of the scope of his investigation and asked it to provide submissions to support its use of section 40(5).
8. On 19 May 2008 the public authority provided its initial answers to the Commissioner's letter.
9. On 22 May 2008 the Commissioner asked the public authority to provide further information about the dates of the complainant's various requests and its responses. This was in order to improve his understanding of which documents related to the complaint with which he was dealing and to understand the public authority's reference numbers. On 16 June 2008 the public authority provided a detailed explanation of the system of correspondence handling as it was at the

time of the request and an outline of all the correspondence it had had with the complainant.

10. On 19 June 2008 the public authority provided additional information in response to the Commissioner's letter dated 25 April 2008.
11. On 20 June 2008 the Commissioner asked the Independent Police Complaints Commission [IPCC] about what the expectations of an officer would be regarding the disclosure of any information if they were subject to an investigation. On 1 July 2008 the Commissioner received a response from the IPCC to his enquiries.
12. On 27 June 2008 the Commissioner made additional enquiries to the public authority and received a response from it dated 8 July 2008.

Findings of fact

13. The Police Reform Act 2002 and the Police (Complaint and Misconduct) Regulations 2004 contains provisions for some parties to access disciplinary information, where appropriate. This is part of the process and ensures that if a complaint is made, the people that are a party to it are aware of its outcome. This alternative access regime is explained in greater detail in paragraph 37 below.
14. The relevant disciplinary process for the rank of officer at the date of the request was dictated by the 'Home Office Guidance on Police Unsatisfactory Performance, Complaints and Misconduct Procedures' and the 'MPS Misconduct Investigation Guide 2007.' The Commissioner has examined the process in order to understand what the expectations of the officer would be in the circumstances, whether there was or was not recorded information held.
15. The Commissioner has also considered the internal processes that the public authority has for disclosing information of this type, if it is held. The detail of these processes can be found in the 'MPS Media Relations Standard Operating Procedures' and the 'DPS [Directorate of Professional Standards] Media and Communications Strategy Including DPA [Directorate of Public Affairs] Guidelines.'

Analysis

Section 17(1)

16. 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.”

17. The time for complying with section 1(1) is contained within section 10(1) and states:

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

18. A response may take the form of the supply of the requested information, confirmation that the information is not held, a formal refusal or an indication that additional time is required to consider the public interest in relation to specific exemptions.

19. The complainant made the request which is the subject of this decision notice by post on 12 April 2007. The public authority has acknowledged to the Commissioner that it did not open the letter containing the request until 30 April 2007. Furthermore, it did not issue its refusal notice to the complainant until 7 June 2007.

20. In *Bowbrick v Information Commissioner* [EA/2005/2006] at paragraph 69, the Tribunal confirmed that failing to issue a refusal notice within twenty working days is a breach of s17(1) of the Act. It stated in relation to the case it was looking at that:

“...the Council failed to identify within 20 working days of the request the exemptions upon which it relied in respect of certain documents falling within the scope of [the] request. It therefore failed to comply within its duty under s17(1) of FOIA within the time limit prescribed by that section.”

21. In this case the public authority took over 40 working days to respond to the information request. The Commissioner therefore finds that, in exceeding the statutory time limit for responding to the request, the public authority breached section 17(1) of the Act.

22. The Commissioner also notes that the public authority failed to cite the exemption that it chose to rely on fully. It should have stated that it was excluded from the duty imposed on it by the provisions of section (1)(1)(a) by virtue of the provision of section 40(5)(b)(i). In failing to cite the exemption that it was relying upon fully it has also breached section 17(1)(b) of the Act.

23. The full text of section 17 can be found in the Legal Annex at the end of this Notice.

Exemptions

Section 40(5)(b)(i) – Personal Information and the exclusion for the duty to confirm or deny

24. The information was requested in the belief by the complainant (and it is irrelevant whether this was right or wrong) that **[named officer]** had been the subject of a disciplinary hearing. In confirming whether or not information is held in relation to this request the public authority would have been exposing to the public whether or not **[named officer]** was subject to a disciplinary hearing. The public authority has informed the Commissioner that this is the reason that it chose to rely on 40(5) in this case. Its exact position therefore is that it is excluded from the duty imposed on it by the provisions of section (1)(1)(a) by virtue of the provisions of section 40(5)(b)(i).
25. From the outset it is important to point out that, apart from in very few scenarios (none of which are applicable in this case), the Act is applicant blind. In other words, a disclosure made under the Act is in effect to the world at large, as every other applicant would be entitled to that information upon request. Therefore in reaching a view on this case the Commissioner cannot take into account the identity of the complainant.
26. Generally, the provisions of section 40(1) to (4) exempt 'personal data' from disclosure under the Act. In relation to a request which constitutes the personal data of individual(s) other than that of 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 ('DPA') or would do so if the exemptions in section 33A(1) of that Act were disregarded.
27. The full text of section 40 can be found in the Legal Annex at the end of this Notice.
28. 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 section 1(1)(a) would (apart from this Act) contravene any of the data protection principles..."*
29. In order for section 40(5)(b)(i) to be correctly applied the public authority must establish the following two elements:

- (1) That confirming whether or not information is held by the public authority would reveal the personal data of a data subject as defined by section 1(1) of the DPA.
- (2) That to confirm whether or not information is held would contravene one of the data protection principles.

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

30. The Commissioner has considered whether to confirm or deny whether [named officer] was the subject of a disciplinary hearing would be [named officer]'s personal data.

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

“personal data” means 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”.

32. The public authority informed the Commissioner that through confirming or denying that the information requested was held it would expose to the public whether the named officer was or was not the subject of a disciplinary hearing. This would be the personal information of the officer involved. The Commissioner agrees with the public authority that whether someone was subject to a disciplinary hearing would fall under the definition of personal data in the DPA.

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

33. The Commissioner must then go on to look at whether the release of the personal information of the third party would contravene any of the data protection principles of the Act. The Commissioner notes in considering whether the exclusion applies, he must consider what information is in the public domain as opposed to what information the particular applicant may be aware of.

34. The Commissioner agrees with the public authority that the relevant principle in relation to this request is the first data protection principle. It has two components, which need to be satisfied together for the principle not to be contravened. These are outlined below:

1. The personal data should be processed fairly and lawfully, and
2. One of the conditions in Schedule 2 of the DPA must be met.

35. The public authority argued that the disclosure of whether or not a particular officer had been subject to a disciplinary hearing would be unfair. It informed the Commissioner that this was its general policy and it would never routinely confirm or deny whether an officer was subject to a disciplinary hearing, as to do so would be contrary to that individual's expectations that such information would remain private.
36. The Commissioner finds this argument persuasive. He believes that generally an employee would expect that their disciplinary record would remain private between them and their employer. In addition he notes that the officer in question in this case does not hold a very senior grade. Therefore he believes that the individual would be less likely than a more senior officer to have any expectation that the public would be told whether or not they had been the subject of disciplinary action.
37. When considering the reasonable expectations of the officer in this case the Commissioner has also taken into account the Police Reform Act 2002 and the Police (Complaint and Misconduct) Regulations 2004.
38. Section 11(7) of the Regulations states:
- “As soon as practicable after any misconduct hearing or other action that is taken in respect of the matters dealt with in any report submitted under paragraph 22 of Schedule 3 of the 2002 Act, the Independent Police Complaints Commission or, as the case may be, an appropriate authority shall notify any complainant and interested person of the outcome of that hearing or action, including the fact and outcome of any appeal against the findings of or sanctions imposed by such a hearing.”*
39. In view of the above, the Commissioner has considered whether police officers should, irrespective of their seniority, reasonably expect that information about disciplinary records will be made available to others. However, any disclosure under the above Regulations is likely to be to parties who are already aware that disciplinary action is being considered. The Commissioner does not consider that the possibility of disclosures to certain limited parties in that context means that officers should reasonably expect that the public will be informed about whether or not they have been the subject of any action.
40. The Commissioner does not believe that there is any information presently in the public domain which would confirm whether or not the named officer had been subject to disciplinary action. There is some information about accusations made in court but the Commissioner does not consider that this information is adequate to determine whether or not the officer was the subject of a disciplinary case. He has based this determination on the answers he has received from the MPS Professional Standards Directorate about its policy in this matter. Due to the nature of these answers the Commissioner does not consider it would be appropriate to provide any further detail in this notice.

41. The Commissioner has also asked the Independent Police Complaints Commission (IPCC) about its general policies of disclosure in relation to findings in disciplinary hearings given that it is the other body that is often engaged in managing such investigations, should they occur. It informed the Commissioner that in practice its policy is to name officers in reports that are published (this includes disclosing them to interested parties) unless there is a reason under section 20 of the Police Reform Act 2002 and the Police (Complaints and Misconduct) Regulations 2004 why they should not be named. The Commissioner is satisfied that this policy would ensure that the correct parties are aware of this information and that any potential harm is considered rigorously at this point. The Commissioner considers that the expectations of the data subject would be that this sort of information would only be released through the correct process and to release it outside of this process would be unfair.
42. While the Commissioner accepts that there may be a legitimate interest in the general public knowing whether officers who are unfit to police are disciplined appropriately. He considers that the provisions of the Police Reform Act satisfy this interest and that disclosure under the Act is not appropriate in this case.
43. The complainant has argued to the Commissioner that as the named officer is performing a public role this information should be disclosed. However, after considering the circumstances of this case, and particularly in view of the ranking of the named officer, the Commissioner does not consider that this would make confirming or denying the existence of this information fair.
44. The Commissioner has also considered conversely whether to confirm that a particular officer was not the subject of a disciplinary hearing would also be unfair. In this case the Commissioner believes that the approach needs to be uniform for any other approach would indirectly expose those that had been subject to a disciplinary hearing. The Commissioner therefore feels that to confirm or deny whether there was not a disciplinary hearing would also be unfair.
45. Therefore the Commissioner believes that confirming or denying whether the requested information was or was not held would be unfair and in breach of the first data protection principle. Therefore he is of the view that the public authority is exempt from the duty to confirm or deny whether it holds the requested information (as set out in section 1(1)(a)) by virtue of section 40(5)(b)(i).
46. As the Commissioner has concluded that confirming or denying the existence of the information would breach the first data protection principle because it would be unfair, he has not deemed it necessary to consider whether complying with section 1(1)(a) would be lawful or would meet any of the conditions in Schedule 2 of the DPA.

The Decision

47. 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:

The public authority correctly relied upon section 40(5)(b)(i) to refuse to confirm or deny whether it held the requested information.

48. However, the Commissioner has also found that the public authority did not meet the requirements of section 17(1), in that it did not issue a valid refusal notice to the complainant within twenty working days as is required by the Act and did not meet the requirements of section 17(1)(b) in failing to fully site section 40(5)(b)(i), which it was relying on.

Steps Required

49. The Commissioner requires no steps to be taken.

Other matters

50. Although it does not form part of this Decision Notice the Commissioner wishes to highlight the following matter of concern. The Commissioner was concerned that the public authority had a backlog of mail and therefore failed to provide a response to the complainant's request for information within the statutory time limits. The public authority has informed the Commissioner that it has subsequently improved its processes in this regard.

Right of Appeal

51. 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 16th day of February 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

General right of access to information held by public authorities

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.”

Time for compliance with request

Section 10 provides that-

(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

...

Refusal of request

Section 17 provides that -

(1) 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.

(2) Where—

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—

(i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

(6) Subsection (5) does not apply where—

(a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

(7) A notice under subsection (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.

Personal information

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) he 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).”