

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 25 August 2009**

**Public Authority:** Chief Constable of Devon and Cornwall Constabulary  
**Address:** Force Headquarters  
Middlemoor  
Exeter  
EX2 7HQ

### Summary

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The complainant asked for the numbers of teaching staff who had been investigated in connection with offences under section 16 of the Sexual Offences Act 2003 and for details of the outcome of these investigations. The public authority refused to confirm or deny whether it held information falling within the scope of this request and cited the exemptions provided by sections 30(3) (investigations), 38(2) (health and safety) and 40(5) (personal information). The Commissioner finds that the public interest in the maintenance of the exemption provided by section 30(3) does not outweigh the public interest in confirmation or denial and also finds that the exemptions provided by section 38(2) and 40(5) are not engaged. Therefore, the public authority breached sections 1(1)(a) and 10(1) in failing to provide the confirmation or denial within 20 working days of receipt of the request. The Commissioner further finds that the public authority failed to comply with the procedural requirements of sections 17(1) and 17(3)(a) in its handling of the request. The public authority is required to provide to the complainant confirmation or denial of whether the information requested is held. For any information that is held, the public authority is required to either disclose this to the complainant, or to provide a refusal notice valid for the purposes of section 17 of the Act.

### 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.

### The Request

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2. On 26 November 2007 the complainant requested the following information:

*“1. How many teaching staff have Devon & Cornwall police investigated under section 16 of the Sexual Offences Act 2003 from Torbay schools and colleges in the period January 2005 to date, November 2007?  
2. How many of those were cautioned? How many were charged? How many were no further actions?  
3. How many teaching staff have Devon and Cornwall police investigated under section 16 of the Sexual Offences Act 2003 from Teignbridge schools and colleges in the period January 2005 to date, November 2007?  
4. How many of those were cautioned? How many were charged? How many were no further actions?  
5. How many teaching staff have Devon and Cornwall police investigated under section 16 of the Sexual Offences Act 2003 from South Hams schools and colleges in the period January 2005 to date, November 2007?  
6. How many of those were cautioned? How many were charged? How many were no further actions?”*

3. The public authority responded on 5 December 2007 and refused to confirm or deny whether it held information falling within the scope of the request. The public authority cited the exemptions provided by sections 30(3) (investigations), 38(2) (endangerment to health and safety) and 40(5) (personal information) as grounds for the refusal. The public authority provided little explanation of its reasoning for why it believed that these exemptions were engaged, indicating only that it believed that the information in question could be linked to individuals and that the policy of the Association of Chief Police Officers (ACPO) was that information of this level of detail should not be disclosed. The public interest in connection with sections 30(3) and 38(2) was not addressed. The public authority did refer to section 17(4) in this response. The public authority referred the complainant to the Multi Agency Public Protection Arrangement (MAPPA) report, which it stated included some information of relevance to the request.
4. The complainant responded on 17 December 2007 and requested that the public authority carry out an internal review of its handling of the request. The public authority responded with the outcome to the review on 21 January 2008. The refusal was upheld. No reasoning for this decision was given.

## The Investigation

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### Scope of the case

5. The complainant contacted the Commissioner initially on 1 February 2008. She did not agree with the exemptions cited by the public authority. The complainant also stated specifically that the information provided in the MAPPA report did not satisfy her request and that citing the policy of ACPO is not a valid basis on which to refuse a request. The Commissioner comments on the citing of ACPO policy in the Other Matters section below.

## Chronology

6. The Commissioner contacted the public authority initially on 30 March 2009. The background to the complaint was set out and the public authority was asked to provide further explanation of its reasoning for its decision. Specifically, the public authority was asked to address why each exemption cited was believed to be engaged and, in connection with sections 30(3) and 38(2), why the public interest favoured the maintenance of these exemptions. The public authority was also asked to provide to the Commissioner confirmation of whether it did hold information falling within the scope of the request.
7. It was noted that the public authority has provided no full explanation as to why the exemptions were engaged or, where relevant, why the public interest favoured the maintenance of these exemptions, but had referred to section 17(4) in the refusal notice. The public authority was asked to confirm if its position was that section 17(4) did apply in this case and, if so, to explain why it believed that providing explanations as to why the exemptions were engaged and about the balance of the public interest would involve the disclosure of exempt information.
8. The public authority responded on 22 May 2009. It stated that it did believe that section 17(4) applied as to explain why the exemptions were cited and why the public interest favoured the maintenance of sections 30(3) and 38(2) would involve confirming or denying whether it held the information requested. It did however provide the Commissioner with an explanation of its stance on these matters.

## Findings of fact

9. Section 16 of the Sexual Offences Act 2003 provides that:

*“16 Abuse of position of trust: sexual activity with a child*

*(1) A person aged 18 or over (A) commits an offence if—*

*(a) he intentionally touches another person (B),*

*(b) the touching is sexual,*

*(c) A is in a position of trust in relation to B,*

*(d) where subsection (2) applies, A knows or could reasonably be expected to know of the circumstances by virtue of which he is in a position of trust in relation to B, and*

*(e) either—*

*(i) B is under 18 and A does not reasonably believe that B is 18 or over, or*

*(ii) B is under 13.”*

## Analysis

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### Procedural matters

#### Section 17

10. The stance of the public authority was that section 17(4) applied, as to provide an explanation of why the exemptions cited were engaged and why the public interest favoured the maintenance of sections 30(3) and 38(2) would not be possible without disclosing exempt information. The explanation provided by the public authority of its reasoning here was not convincing. Rather than describing why it believed that providing the explanations required by sections 17(1) and 17(3)(a) would not be possible without confirming or denying whether information falling within the scope of the request was held, the public authority appeared to believe that section 17(4) would apply in any case where exemptions from the duty to confirm or deny are cited. The Commissioner would stress that this is not the case and that in general it should be possible to comply with sections 17(1) and 17(3) without revealing exempt information. This includes where exemptions from the duty to confirm or deny have been cited.
11. In the absence of any convincing explanation on this point from the public authority, the Commissioner does not agree that it was not possible for the public authority to comply with sections 17(1) and 17(3)(a) without disclosing exempt information. Therefore, in failing to provide these explanations, the public authority breached the requirements of sections 17(1) and 17(3)(a). These sections are set out in full in the attached legal annex, as are all other sections of the Act referred to in this Notice.

#### Exemptions

12. Although the Commissioner has found that section 17(4) did not apply in this case, in order to afford to the public authority the possibility of a meaningful appeal against this finding, the Commissioner's analysis on sections 30(3), 38(2) and 40(5) has been placed in a confidential annex. This confidential annex will be provided only to the public authority initially. If the Commissioner has not been informed of an appeal to the Information Tribunal about his finding on section 17(4) within 15 working days of the expiration of the appeal period, the confidential annex will be supplied to the complainant. If the public authority does appeal the Commissioner's finding on section 17(4), the confidential annex will not be disclosed pending the outcome of the appeal.

#### The Decision

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13. The Commissioner's decision is that the public authority did not deal with the request in accordance with sections 1(1)(a) and 10(1) of the Act in that it refused to provide confirmation or denial of whether the information requested by the complainant was held on the basis of the exemptions provided by sections 30(3),

38(2) and 40(5), none of which the Commissioner concludes should be upheld. The Commissioner also finds that the public authority failed to handle the request in accordance with the procedural requirements of sections 17(1) and 17(3)(a) as covered above at paragraphs 10 and 11.

## Steps Required

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14. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
  - Provide to the complainant confirmation or denial of whether information falling within the scope of his request is held, and
  - for any information that is held, either disclose this to the complainant, or provide a refusal notice valid for the purposes of section 17 of the Act setting out why this information will not be disclosed.
15. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## Other matters

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16. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
17. Within the rationale offered by the public authority for its refusal of the request was that disclosure of the information requested was counter to ACPO policy. The Commissioner would stress to all police forces that citing ACPO policy is not a valid argument when refusing a request; any arguments advanced should be relevant to the provision in the Act that is cited as grounds for the refusal. The Commissioner would also stress that each police force, not ACPO, is responsible for its own compliance with the Act. Any steps the Commissioner requires taken to remedy a failure to comply with the Act will be required of the relevant police force, not of ACPO.
18. As referred to above at paragraph 4, when giving the outcome to the internal review, the public authority gave little explanation for concluding that the refusal of the request should be upheld. Paragraph 39 of the section 45 Code of Practice states the following:

*“The complaints procedure should provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue.”*
19. The internal review response from the public authority did not reflect that a

reconsideration of the request conforming to the description above took place. The Commissioner would advise the public authority that a response giving the outcome to an internal review should state the reasoning for why the initial refusal was upheld and should reflect that there has been a genuine reconsideration of the request.

## **Failure to comply**

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20. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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21. 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.

22. 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 25<sup>th</sup> day of August 2009**

**Signed .....**

**Lisa Adshead  
Senior FOI Policy Manager**

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

## **Legal Annex**

### **Section 17**

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(3) provides that -

“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.”

Section 17(4) provides that -

“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.”

### **Section 30**

Section 30(1) provides that –

“Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

- (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-



- (i) whether a person should be charged with an offence, or
  - (ii) whether a person charged with an offence is guilty of it,
- (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or
- (c) any criminal proceedings which the authority has power to conduct.”

Section 30(2) provides that –

“Information held by a public authority is exempt information if-

- (a) it was obtained or recorded by the authority for the purposes of its functions relating to-
  - (i) investigations falling within subsection (1)(a) or (b),
  - (ii) criminal proceedings which the authority has power to conduct,
  - (iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or
  - (iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and
- (b) it relates to the obtaining of information from confidential sources.”

Section 30(3) provides that –

“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) or (2).”

## **Section 38**

Section 38(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to-

- (a) endanger the physical or mental health of any individual, or
- (b) endanger the safety of any individual.”

Section 38(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, have either of the effects mentioned in subsection (1).”

## Section 40

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).”