

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 24 June 2009

Public Authority: Chief Constable of Kent Police
Address: Kent Police Headquarters
Sutton Road
Maidstone
Kent
ME15 9BZ

Summary

The complainant requested the details of complaints made about two named police officers. The public authority refused to confirm or deny whether it held information falling within the scope of this request and cited the exemption provided by section 40(5)(b)(i). The Commissioner finds that confirmation or denial would disclose personal data and that the disclosure of this personal data would be in breach of the first data protection principle. The exemption provided by section 40(5)(b)(i) is, therefore, engaged and the public authority is not required to take any steps.

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's request was dated 11 April 2008 and was worded as follows:
*"I would like to know of any and all complaints made against the following officers:
[two names redacted]
during their time with Kent County Constabulary or any other force they may have previously served with."*

3. The public authority responded by letter dated 25 April 2008, although it later acknowledged that this response had been sent on 28 April 2008. The public authority refused to confirm or deny whether it held information falling within the scope of the request and cited the exemption provided by section 40(2). As the public authority neither confirmed nor denied whether information was held, it appears that it intended to cite section 40(5). The public authority also cited section 17(4) as it believed that to provide an explanation as to why the exemption was engaged would, in itself, reveal exempt information.
4. The complainant requested an internal review on 19 May 2008 and the public authority responded with the outcome to this review on 19 June 2008. The refusal of the request was upheld. Little further explanation of the reasoning for the refusal was given.

The Investigation

Scope of the case

5. The complainant contacted the Commissioner initially on 6 August 2008 and stated that he did not agree with the exemption cited by the public authority. During an exchange of correspondence between the complainant and the Commissioner's office the complainant was made aware of the precedent set by the Commissioner previously that, where details of complaints made about named employees of a public authority have been requested, the exemption provided by section 40(5)(b)(i) would be engaged. The complainant confirmed that he nevertheless wished to continue with this case.
6. The public authority contacted the Commissioner on 4 December 2008 and advised that it wished to withdraw the previous reasoning for the refusal of the request and that its stance was now that the request was vexatious and should have been refused under section 14(1) of the Act. However, the Commissioner considers it appropriate to focus on the stance of the public authority at the time of the refusal and this notice does not cover the later citing of section 14(1).

Chronology

7. Following the receipt of the complaint, the Commissioner contacted the public authority to make it aware that this complaint had been made. As referred to above, the public authority responded to this and stated that it now wished to cite section 14(1).
8. As also referred to above, an exchange of correspondence between the Commissioner and the complainant took place and the complainant was made aware of a previous Decision Notice where details of complaints about a named employee of a public authority had been requested. The complainant confirmed that he wished to continue with this case.

Analysis

Procedural matters

Section 17

9. The public authority failed to cite the correct subsection (40(5)(b)(i)) at either the refusal notice or internal review stage. In so doing, the public authority did not comply with the requirement of section 17(1)(b) of the Act. This section of the Act is set out in full in the attached Legal Annex, as are all other sections of the Act referred to in this notice.
10. In the refusal notice the public authority cited section 17(4) as it believed that to explain why the exemption cited was engaged would reveal exempt information. The Commissioner does not accept that an explanation of the neither confirm nor deny response would have involved the disclosure of exempt information. Therefore, in failing to provide an adequate explanation at either the refusal notice or internal review stage for why the exemption provided by section 40(5)(b)(i) was engaged, the public authority did not comply with the requirement of section 17(1)(c).

Exemption

Section 40(5)(b)(i)

11. Section 40(5)(b)(i) provides that a public authority is not obliged to confirm or deny whether requested information is held if to do so would:
 - constitute a disclosure of personal data, and
 - this disclosure would breach any of the data protection principles or section 10 of the DPA. The first data protection principle, which requires that personal data be processed fairly and lawfully, is the relevant principle in this case.
12. The Commissioner's analysis of whether the above criteria would be fulfilled follows.

Would confirming or denying that the requested information is held constitute a disclosure of personal data?

13. The complainant has requested information relating to complaints made about specific, named, individuals within the public authority. The stance of the public authority is that confirming or denying whether information falling within the scope of the request is held would disclose whether complaints had been made about these individuals. The public authority further argues that this would constitute a disclosure of personal data relating to these individuals.
14. The Commissioner agrees that confirming or denying whether the requested information is held would constitute a disclosure of personal data. Confirming or denying would unavoidably disclose whether complaints had been made about

the individuals named in the request. As this information would clearly relate to identifiable individuals, the Commissioner accepts that this information would constitute personal data.

Would disclosure of this personal data be unfair and in breach of the first data protection principle?

15. The personal data that would potentially be disclosed here would most likely relate to the named individuals in a professional capacity. This is significant in that the Commissioner has made a clear distinction when issuing decisions about requests for information relating solely to professional matters and information relating to an individual outside their professional capacity. The Commissioner's position has been that he considers it far less likely that disclosure of personal data relating to professional matters would be unfair than disclosure of information relating to an individual in a non-professional capacity.
16. It is important to consider what expectation of disclosure the individuals would hold. The Commissioner would consider it reasonable that employees of the public authority would have an expectation that information about complaints made against them individually, including whether or not any complaints have been made, would not be disclosed, even without any specific notification of this.
17. The Annual Report of the public authority provides statistical information about complaints made to the public authority broken down to regions within its area of responsibility. The Commissioner considers this significant as it demonstrates that the public authority has attempted to be open and accountable about the issue of complaints made about its service, within the restriction of not wishing to disclose details of complaints made about individual employees. It can be argued, therefore, that a disclosure of the number of complaints made against individual employees of the public authority would not be necessary in order to enhance the openness and accountability of the public authority, which has already been demonstrated through the disclosure of statistical information about complaints.
18. The potential for detriment to the named individuals through disclosure of information relating to complaints made against them is a significant issue here. The Commissioner's previous Decision Notice FS50086498 includes this argument about the issue of detriment:

"To release the fact that a complaint has been made against an employee may lead to assumptions being made about that employee's competence. However, the complaint may be unsubstantiated or malicious, or certain employees may be involved more frequently with difficult decisions that are more likely to result in dissatisfaction. Therefore, releasing this information does not aid transparency or accountability but could be misleading and unfair to particular employees."
19. This argument also applies in this case. A counter argument that an employee of a public authority, particularly a police officer, should have an expectation of accountability could be made, but the public authority has demonstrated its commitment to openness and accountability through disclosing statistical information about complaints. Any enhancement to the openness and

accountability of the public authority or to the accountability of individual officers brought about by further disclosure of information concerning complaints made against individual employees would be lessened by the previous disclosure of this statistical information. The Commissioner also notes that oversight of the public authority, including oversight of police officers, is provided by its own Professional Standards Department and by Kent Police Authority.

Conclusion

20. As mentioned previously, the Commissioner has taken a clear line that disclosure of personal information relating solely to an individual in a professional capacity would be less likely to be considered unfair than disclosing information about an individual's private life. It can also be argued that employees of public authorities, particularly police officers, should have an expectation that they will be accountable.
21. However, the Commissioner has also previously concluded that disclosure of information about complaints made against individual employees would be unfair, as the employees would have a reasonable expectation that such information would not be disclosed, and because of the potential detriment that could result from disclosure of information of this kind. It is also of significance that the public authority has demonstrated transparency through disclosure of statistical information about complaints.
22. The conclusion of the Commissioner is that the exemption from the duty to confirm or deny provided by section 40(5)(b)(i) is engaged. In making this decision the Commissioner has first concluded that confirming or denying that the requested information is held would constitute a disclosure of personal data. The Commissioner considers that it is clear that confirming or denying whether the requested information is held would disclose information that could be linked to identifiable individuals.
23. Secondly, the Commissioner concludes that disclosure of this personal data would be unfair and thus would be in breach of the first data protection principle. In making this decision, the Commissioner has taken into account the lack of expectation on the part of the individuals named in the request that this information would be disclosed, the potential for detriment as a result of disclosure and that the public authority has disclosed statistical complaint information.

The Decision

24. The Commissioner's decision is that the public authority responded to the request for information in accordance with the Act in that the exemption from the duty to confirm or deny provided by section 40(5)(b)(i) is engaged. However, the Commissioner also finds that the public authority failed to comply with the procedural requirements of sections 17(1)(b) and 17(1)(c) as covered above at paragraphs 9 and 10.

Steps Required

25. The Commissioner requires no steps to be taken.

Right of Appeal

26. 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

27. 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 24th day of June 2009

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

Freedom of Information Act 2000

Section 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 40

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(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).”

Data Protection Act 1998

Section 1(1) provides 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.”

The first data protection principle provides that –

“Personal data shall be processed fairly and lawfully...”