

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 2 February 2011

Public Authority: Chief Officer of West Yorkshire Police
Address: PO Box 9
Laburnum Road
Wakefield
WF1 3QP

Summary

The complainant made a request for the name and number of a police officer who had parked a police vehicle on the pavement outside a police station. The Constabulary were unable to identify any single officer as the driver of the vehicle in respect of the times specified by the complainant. The Constabulary identified two officers who may have been responsible for the vehicle concerned. The Constabulary therefore considered the request in terms of both officers. The Commissioner finds that the exemption in section 40(2) (third party personal data) was engaged and was correctly applied by the Constabulary. The Commissioner does, however, find the Constabulary to have breached sections 10(1) and 17(1). He requires no further 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. The complainant made the following request on 06 April 2010 to West Yorkshire Police (the Constabulary):

'The issue of Police cars driving onto pavements and parking police vehicles is still going on. I now formally request the name and number of the officer that left the following police vehicle on the pavement outside Normanton police station around 03-30hrs till 04-45hrs today the 6th April 2010, the vehicle being an Astra reg number [number redacted].'

3. The Constabulary responded on 22 July 2010, in which it refused to release the requested information. It cited the exemption found in section 40(2) of the Act (see the Legal Annex for full definitions of all cited legislation), believing the information to be third party personal data.
4. The complainant requested an internal review of the initial decision on 22 July 2010 on the basis that the information should be provided to him and the exemption should not have been cited.
5. The Constabulary provided the decision of its internal review to the complainant on 17 August 2010. In this, it upheld its original decision, stating that section 40(2) had been correctly applied and the requested information was exempt from disclosure. The Constabulary explained that two officers had been logged to the car and neither officer could recall who the driver was. The Constabulary therefore argued that since neither officer could be identified (and both having been spoken to by a higher ranking officer regarding this behaviour), the officers had their individual right to privacy and a reasonable expectation '*...that a complaint against them would not be subject to public disclosure...*'

The Investigation

Scope of the case

6. On 08 September 2010 the complainant contacted the Commissioner to complain about the way that his request for information had been handled. He confirmed that his complaint regarded the non-disclosure of the requested information (and therefore the citing of the exemption) and a refusal notice not being issued within the required 20 working days under section 10(1) of the Act.

Chronology

7. The Commissioner contacted the complainant on 30 November 2010 to confirm the scope of his investigation. This being whether or not the Constabulary was correct in applying section 40(2) of the Act to the requested information. The complainant agreed to this in an email of 07 December 2010 in which he also raised further points, which he considered pertinent, to support his belief that the information should be released.
8. The Commissioner also contacted the Constabulary on 30 November 2010. He outlined the complaint made to him and asked a series of questions regarding the Constabulary's decision to apply section 40(2) to the requested information. The questions he asked related to the rank of the identified officers, whether any offence had been committed and whether any disciplinary action had been taken against the identified officers.
9. The Constabulary provided a response to the questions posed, in an email of 17 January 2011. In this it outlined the surrounding evidence mentioned above and provided further explanation of the application of section 40(2) to the request.

Analysis

Substantive Procedural Matters

Section 10(1) - Time for compliance

10. Section 10(1) provides that:

"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."

11. 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."

12. As mentioned above, the complainant made his request on 06 April 2010 and received a response via a refusal notice on 22 July 2010. The Constabulary have explained that the response was delayed due to the fact that the Information Officer handling the request was unable to return to the UK due to the volcanic ash cloud of April 2010. Further to this, the Constabulary issued a letter to the complainant to apologise for the delay on 14 June 2010.
13. However, the Constabulary itself acknowledges (in its internal review) that it was in breach of section 10(1) of the Act, in not responding to the request in time. Specifically, in relation to section 1(1)(a), the Commissioner finds that the Constabulary breached section 10(1) by failing to inform the complainant whether or not it held the requested information within 20 working days of the request.

Section 17(1) - Refusal of request

14. Section 17(1) of the Act 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."

15. In failing to provide a valid refusal notice within the statutory time limit, the Constabulary breached section 17(1).

Exemption

Section 40(2) - Personal Information

16. 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.'

17. The exemption provided by section 40(2) is an absolute exemption in combination with section 40(3)(a)(i) or 40(3)(b). This is where disclosure of information which falls under the definition of personal data contained in section 1(1) of the Data Protection Act 1998 (DPA) would breach any of the data protection principles.

18. In order to decide whether or not this exemption is engaged, the Commissioner shall consider whether the requested information is the personal data of one or more third parties, whether it can be considered sensitive personal data under the Act and whether the release of this information would be fair and lawful.

Is the information personal data?

19. Section 1(1) of the DPA defines personal data as:

'...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,'

20. In order for data to be considered personal it must therefore relate to a living person and this person must be identifiable. Here the requested data is the names and numbers of two police officers. The Commissioner considers it clear that the names of data subjects and their number (in relation to their employment) relate to living individuals and can easily be used to identify them.

Is the information sensitive personal data?

21. Section 2 of the DPA defines sensitive personal data as data which consists of information relating to one or more of the 8 different subsections ((2)(a) – (h)) found within that section. The pertinent subsection in this case being 2(g):

'(g) the commission or alleged commission by him [the data subject] of any offence...'
22. In order for this subsection to be applicable, the Commissioner understands that either the Constabulary consider that an offence has been committed or that the complainant has alleged that an offence has been committed by the two police officers in question.
23. The Constabulary responded, when questioned by the Commissioner, as to whether or not any law or procedure had been breached by the actions of the officers (in parking on the pavement). It explained that there were laws which could be considered relevant. Some required a level of intent that the Constabulary did not believe was present in the officers' actions for those offences to be relevant. The only offence which the Constabulary felt could be relevant would, in its view, provide a weak case. It explained that if such an offence had been committed by a member of the public, the Constabulary would not have prosecuted. The Commissioner therefore considers there to at least be the potential for an allegation of an offence from this evidence.
24. The complainant himself has stated that he considers the officer(s) to have committed an offence. In an email of 17 January 2011 to the Commissioner, he referred to the actions of the officers as an 'offence' and in an email to the Commissioner of 06 November 2010 the complainant stated, '*...I should have reported the issue to the council who could have prosecuted the offending officers for damage to the pavements.*' The Commissioner considers the above to represent an allegation of the commission of an offence.
25. Given the evidence of the Constabulary with regards to possible offences which may (or may not) have been committed by the officers and the evidence to show the complainant's allegation, the Commissioner considers subsection 2(g) of the DPA to have been engaged and therefore the requested information would constitute sensitive personal data.

Would disclosure of the exempted information breach one of the data protection principles?

26. Having concluded that the exempted information is the sensitive personal data of the two data subjects, the Commissioner must now consider whether its disclosure would breach one of the data protection principles.
27. The first data protection principle states 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 of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'
28. In considering whether it would be fair, under the first principle of the DPA, to disclose the requested information, the Commissioner believes it necessary to balance the consequences of any disclosure and the reasonable expectations of the data subjects against the general principles of accountability and transparency.
29. When considering the consequences of disclosure on data subjects the Commissioner has taken into account the rank of the officers and the advice that has been given to the officers already regarding their behaviour, amongst others.
30. The Commissioner considers that as the release of the information would be to the world at large, it would be information that both the public and work colleagues could become aware of. This could therefore have a detrimental effect on both their working lives and their private lives. This would be exacerbated by the fact that the actual officer who was driving cannot be identified and as such this information would go against both officers' names, where logically only one could have been the driver.
31. The Constabulary has confirmed that both officers are of a junior rank. The Commissioner generally considers it unfair that data subjects at the beginning of their careers should be held publicly accountable for potential offences, particularly when both have already been spoken to with regards to this

behaviour by a higher ranking person and have accepted the advice.

32. When considering whether the release of data subjects' personal information is fair, the Commissioner also considers it relevant to assess whether the data subjects have reasonable expectations that their personal data will not be released. The Commissioner believes that this is information that junior police officers would not reasonably expect to have placed in the public domain. Indeed, this is one of the arguments cited by the Constabulary as to its application of section 40(2).
33. The above has to be balanced against the principles of accountability and transparency. Where offences have been committed and gone unpunished, the Commissioner agrees that these are matters for which the Constabulary should be held accountable. The complainant clearly considers this to be a matter of local concern and is legitimately trying to pursue it. Furthermore, the disclosure of such information would instil in the public a greater level of confidence in the Constabulary and support a policy of openness.
34. However, it has not been definitively shown that any offence has been committed (although two officers have been spoken to about their actions) and as such it cannot be said that this is something for which the officers need to be held publicly accountable. Furthermore, the Constabulary have confirmed that the officers have accepted the words of advice given to them. Therefore although disclosure of this information would improve transparency and accountability in relation to the Constabulary, in the Commissioner's opinion this is outweighed by the consequences of disclosure in respect of the detriment to those officers and the reasonable expectation of the officers that this information would not be disclosed.
35. Having considered the foregoing arguments, the Commissioner considers that disclosure of the requested information would be unfair to the two identified officers and would therefore breach the first data protection principle. Given that disclosure is unfair, the Commissioner has not gone on to consider whether disclosure would be lawful or whether one of the Schedule 2 DPA, or in the case of sensitive personal data Schedule 3 DPA, conditions is met. The Commissioner therefore concludes that the information is exempt from disclosure under the exemption contained in section 40(2) by virtue of section 40(3)(a)(i).

The Decision

36. 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 correctly withheld the information under the exemption at section 40(2) of the Act.
37. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The Constabulary breached section 10(1) by failing to inform the complainant whether or not it held the requested information within 20 working days of the request; and
 - It breached section 17(1) by failing to issue a valid refusal notice within the statutory time limit.

Steps Required

38. The Commissioner requires no steps to be taken.

Right of Appeal

39. 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

40. 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.
41. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 2nd day of February 2011

Signed

**Alexander Ganotis
Group Manager – Complaints Resolution
Information Commissioner’s Office
Wycliffe House
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Cheshire
SK9 5AF**

Legal Annex

Freedom of Information Act 2000

Time for Compliance

Section 10(1) provides that –
“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(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.”

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."

Data Protection Act 1998

Basic interpretative provisions

Section 1(1) provides that-

- (1) In this Act, unless the context otherwise requires—
- "data" means information which—
 - (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
 - (b) is recorded with the intention that it should be processed by means of such equipment,

(c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system,

(d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68; or

(e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d);

- “data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;
- “data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;
- “data subject” means an individual who is the subject of personal data;
- “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;

Sensitive personal data

Section 2 provides that-

In this Act "sensitive personal data" means personal data consisting of information as to—

- (a) the racial or ethnic origin of the data subject,
- (b) his political opinions,
- (c) his religious beliefs or other beliefs of a similar nature,
- (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
- (e) his physical or mental health or condition,
- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence, or
- (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.