

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 26 August 2009

Public Authority: Cambridgeshire Constabulary
Address: Hinchingsbrooke Park
Huntingdon
Cambridgeshire
PE29 6NP

Summary

In September 2005 the complainant made a request for information under the Freedom of Information Act ("the Act"). The request was refused by Cambridgeshire Constabulary ("the public authority") under section 30(1) (investigations and proceedings). In subsequent refusals it also referred to section 40(1) and (2) (personal information). When originally commencing his investigation the Commissioner advised the complainant that he considered the entire information to be her 'personal data' under the terms of the Data Protection Act ("the DPA"). He advised the complainant that he would assess it under the terms of the DPA and, accordingly, closed her complaint under the Act.

The public authority made a disclosure under the terms of the DPA which the Commissioner subsequently assessed. He was satisfied with the outcome.

The complainant again wrote to the Commissioner and sought a decision under the terms of the Act. The Commissioner has maintained that the information is exempt under section 40(5) 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 original request was for a copy of an Investigating Officer's Report. This Report was the result of an enquiry into a criminal investigation undertaken by the public authority. The enquiry was instigated because of various concerns the

complainant had raised relating to the way the public authority had investigated the crime.

The Investigation

Scope of the case

3. The complainant originally wrote to the Commissioner on 19 October 2006. On 5 June 2008 the Commissioner wrote to her to advise as follows:

“Having now viewed the Investigating Officer’s Report which you are seeking access to we are now of the opinion that it is in fact your ‘personal data’. Information is exempt from disclosure under the FOIA if it is the personal data of the person who has asked for it.”

“Whilst you will not be entitled to this information under the FOIA, you may still be entitled to it under the DPA. Section 7 of the DPA says that individuals can ask any organisation for a copy of the information they are holding as personal data about them. These rights are known as ‘subject access’ rights.”

“A new case has now been set up for consideration by my data protection colleagues and I have advised Cambridgeshire Police accordingly.”

4. The complainant was advised that her complaint under the Act was now closed.
5. Further work was undertaken by the Commissioner and the public authority under the terms of the DPA. As a result the public authority disclosed some information to the complainant.
6. The Commissioner then made a separate assessment of this disclosure, by virtue of his powers under the DPA. On 31 March 2009 he advised the complainant:

“My conclusion is that I consider all of the information included in the report you have sought access to be personal data relating to you. You made the complaints that were investigated and significant contact was had with you about the report, including you being visited and its conclusions explained to you. I have therefore progressed your complaint on this basis with Cambridgeshire Constabulary.”

“You should understand however that this does not however mean you will be entitled to the entirety of the report involved. The DPA includes various exemptions from the subject access rights. Exemptions include confidential information regarding third parties, information likely to prejudice the prevention and detection of crime or apprehension and prosecution of offenders, information subject to legal professional privilege, as well as various others as listed in the DPA and its accompanying regulations. There is no obligation under the DPA for the force to explain what information they have withheld or their basis for withholding that information.”

7. Following the above assessment the complainant again contacted the Commissioner. She stated:

"We require a decision notice as we wish to appeal to the Information Tribunal against the decision that the entire contents of the Police report are our personal data and therefore exempt from the [Freedom of information] Act".

8. This Notice will therefore address only the issue as to whether or not the requested information is the complainant's personal data.

Analysis

9. A full legal annex is appended to this Notice.

Exemption

Section 40 – personal information

10. Under section 40(1), information that is requested that constitutes the applicant's 'personal data' is exempt information. This exemption is absolute and requires no public interest test to be conducted. In relation to such information, the provisions of section 40(5) mean that the public authority may have to refuse to confirm or deny holding the requested information, since a confirm or deny response may itself reveal personal data of the requester. Therefore, where section 40(5) applies, the public authority is not obliged to comply with its duty under section 1(1)(a) to confirm or deny holding the requested information.
11. The complainant has requested a copy of an Investigating Officer's Report. This report, and the entire background enquiry, was only undertaken as a result of complaints she made about how the police had handled an earlier criminal investigation. According to the Commissioner's guidance on personal data¹:
"... data may be personal data because it is clearly 'linked to' an individual because it is about his activities and is processed with the purpose of determining or influencing the way in which that person is treated".
12. The Commissioner believes that the report has clearly been created to determine or influence the issues raised by the complainant. Its purpose is to serve the interests of the complainant. It only exists as a result of her allegations and the outcome of the enquiry has a direct impact on her as an individual.
13. The Commissioner accepts that the contents of the Report do not all refer to the complainant directly and it includes third party data and background information about the substantive criminal investigation. Nonetheless, the information has only been collated or created to resolve issues that the complainant herself has

1

http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf

raised. It has been written to address her personal concerns. In fact, the complainant has already been personally apprised of the outcome of the enquiry because of her direct involvement. It is highly likely that she would be the only person who is aware of the Report's existence other than those parties directly concerned.

14. After careful consideration of the withheld information, the Commissioner is satisfied that the complainant is the subject of all of the information requested. The information is linked to her and relates to issues involving her interaction with the police. It is created as a result of her personal concerns and interests. The Commissioner considers that the complainant is the 'data subject' within the meaning of the section 40(1) exemption and that the information is therefore her 'personal data'. Furthermore, as section 40(1) is engaged, the public authority is not required to comply with the duty to confirm or deny that the information is held by virtue of s40(5)(a).

The Decision

15. The Commissioner's decision is that the complainant is the 'data subject' of the information requested and it is therefore exempt from disclosure in accordance with section 40(1) of the Act. Further, the public authority was not in fact required to comply with section 1(1)(a) of the Act because section 40(5) also applied.

Steps Required

16. The Commissioner requires no steps to be taken.

Other matters

17. Although they do not form part of this Decision Notice the Commissioner wishes to make the following comments.
18. Whilst he is sympathetic towards the complainant's particular circumstances and understands her reasons for wanting a copy of the withheld information, he believes it is important to stress that if a 'data subject' is not able to access their 'personal data' via the DPA then they cannot access it via the Act as an alternative because it is absolutely exempt.
19. In any case, the exemptions in the Act are generally drawn more widely than those in the DPA. Even if the Commissioner were wrong, and some or all of the information that might have been withheld from the complainant by the public authority is not her personal data, it is more than likely that the public authority would still be justified in withholding the information if access were considered under the freedom of information regime.

20. Furthermore, if a data subject disagrees with an assessment made by the Commissioner under the DPA then they are not bound by this and they have a right to ask for a separate assessment to be undertaken by the County Court. Details on how to do this can be found on the Commissioner's website².

²http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/taking_a_case_to_court.pdf

Right of Appeal

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.
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 26th day of August 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 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.”

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(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)”.

Data Protection Act 1998

‘Data subject’ is defined in section 1(1) of the DPA as:

“... an individual who is the subject of personal data”

‘Personal data’ is defined in section 1(1) of the DPA 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,

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”