

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 6 October 2010

Public Authority: Cheshire Constabulary
Address: Cheshire Constabulary HQ
Clemonds Hey
Oakmere Road
Winsford
Cheshire
CW7 2UA

Summary

The complainant requested video footage taken from the mobile phones of three defendants who were convicted, in 2008, of the murder of Garry Newlove. Cheshire Police originally applied sections 44 (prohibitions on disclosure), 40(2) (personal data), 30(1) (investigations and proceedings) and 31(1) (law enforcement). As the Commissioner has decided that the information requested is exempt from disclosure under section 40(2) of the Act he has not considered the other exemptions. He requires no remedial steps to be taken in this case.

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.

Background

2. Mr Newlove was attacked outside his home in August 2007. Three youths were convicted of his murder in 2008 and jailed for life.

3. The requested material did not form part of the evidence put before the jury. However, the Commissioner understands that the judge, during his sentencing remarks, ruled that the video footage should be retained and made available for any future parole board hearing regarding the youths.

The Request

4. On 25 February 2008 the complainant wrote to the public authority with the following request:

"I write to request footage featuring scenes of violence taken from the camera phones of the defendants (names redacted) who were convicted of the murder of Garry Newlove at Chester Crown Court. To clarify, the footage I request was mentioned at various points in the trial and specifically referred to by Judge Andrew Smith during sentencing".

5. Cheshire Constabulary responded on 19 March 2008. In this correspondence, it told the complainant that the information was exempt from disclosure by virtue of sections 44 (prohibitions on disclosure), 40(2) (personal data), 30(1)(a), (b), (c), 30(2)(a)(i) and (ii) (investigations and proceedings), and section 31(1)(a) (law enforcement).
6. The Commissioner understands that the complainant delayed making his request for an internal review in this case pending the outcome of related legal proceedings. It was therefore not until 4 December 2008 that the complainant requested an internal review.
7. Cheshire Constabulary upheld its decision to withhold the requested information in its internal review response which was eventually provided to the complainant on 14 August 2009.

The Investigation

Scope of the case

8. On 23 September 2009, the complainant contacted the Commissioner to complain about the way his request for information had been handled.

9. Taking account of developments during his investigation, the focus of the Commissioner's investigation has been to determine whether or not Cheshire Constabulary was correct to withhold the requested information.

Chronology

10. Unfortunately, due to a backlog of complaints at the Commissioner's office about compliance with the Act, there was a delay of several months before his investigation into this complaint got underway.
11. The Commissioner wrote to Cheshire Constabulary on 2 March 2010 asking for further explanation of its reasons for citing sections 30, 31, 40 and 44 in relation to the request, including, where applicable, its reasons for concluding that the public interest in maintaining the exemption outweighs the public interest in disclosure of the information requested.
12. Cheshire Constabulary provided a comprehensive response on 19 March 2010. In its correspondence, it told the Commissioner that its initial response had included section 30(2) in error. It also clarified that, in relation to section 31, it was relying on subsection (c) and not (a). It additionally cited section 38(1)(a) (health and safety).

Analysis

Exemptions

Section 40 Personal Data

13. The Commissioner has first considered Cheshire Constabulary's citing of the exemption at section 40.
14. 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."

15. Section 40(2) of the Act is an absolute exemption which relates to the personal information of persons other than the requestor.
16. Section 40(2) together with the condition in section 40(3)(a)(i) or 40(3)(b) provides an absolute exemption if disclosure of information falling within the definition of personal data contained in section 1(1) of the Data Protection Act 1998 (the DPA) would breach any of the data protection principles. A full copy of the section can be found in the Legal Annex at the end of this Decision Notice.
17. In order to reach a view on Cheshire Constabulary's arguments in relation to this exemption, the Commissioner has first considered whether the withheld information is the personal data of one or more third parties.

Is the information personal data?

18. 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 intention of the data controller or any other person in respect of the individual."

19. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way. The information can be in any form, including electronic data, images and paper files or documents.
20. In this case, the requested information is the video footage taken from the camera phones of the three defendants named in the request (the defendants). Having viewed the withheld information, the

Commissioner notes that, perhaps due to the fact that it was originally recorded or stored on the defendant's mobile phones, some parts of the footage are clearer than others.

21. Due to the nature of the withheld information, in determining whether or not the information constitutes personal information the Commissioner has considered some of the arguments within a Confidential Annex, the contents of which will be provided to the public authority only.
22. Having considered the withheld information, the Commissioner is satisfied that the footage constitutes information that falls within the definition of 'personal data' as set out in section 1(1) of the Data Protection Act 1998 as it comprises personal data relating to the defendants. He has come to this conclusion on the basis that:
 - it is linked to them as the owners of the mobile phones from which it was recovered;
 - it says something about their propensity to esteem crime of a violent nature; and
 - the information was requested by reference to the defendants' names and therefore disclosure of the requested information would inevitably link them with the information.
23. The Commissioner is therefore satisfied, in the first instance, that the requested information is the personal information of the defendants. He has next gone on to consider whether it also constitutes the personal information of other individuals.
24. In correspondence with the complainant, Cheshire Constabulary told him:

"Video footage of individuals would clearly fall within the meaning of personal data under the Data Protection Act 1998 and to disclose would breach the principles of the Act".
25. In support of his argument for disclosure of the requested information the complainant told the Commissioner:

"The force argues the footage is personal information. However, it has previously admitted those in the footage cannot be identified so it cannot constitute personal information".
26. The Commissioner understands that this reference is in relation to correspondence from Cheshire Constabulary in which it told the complainant *"the identity of the individuals could not be clarified"*.

27. The Commissioner addresses the question of identifiability in his Technical Guidance "*Determining what is personal data*". In this, he considers that while a name is the most common means of identifying someone, simply because the name of an individual is not known does not mean that that individual cannot be identified. To illustrate this, he gives the example that, while many of us do not know the names of all our neighbours, we are still able to identify them.

28. However, he acknowledges that sometimes it is not immediately obvious whether an individual can be identified or not. In this respect, he refers to Recital 26 of the European Data Protection Directive 95/46/EC which states that whether or not the individual is identifiable will depend on:

"all the means likely reasonably to be used either by the controller or by any other person to identify the said person".

29. When considering identifiability, the Commissioner, in his guidance, argues that:

"it should be assumed that you are not looking just at the means reasonably likely to be used by the ordinary man in the street, but also the means that are likely to be used by a determined person with a particular reason to want to identify individuals".

30. In this case, the Commissioner is satisfied that, despite the quality of some of the images, it is plausible that the individuals depicted in the mobile phone footage would be able to identify themselves as data subject(s). He also considers it plausible for those who have some knowledge of the individuals to recognise them either directly or indirectly as a result of the information and the context in which the footage was filmed.

31. As he has concluded that the identity of the data subjects could be established, the Commissioner is satisfied that the requested information constitutes the personal information of a living individual other than the applicant.

Is the information sensitive personal data?

32. Sensitive personal data is defined in section 2 of the DPA. It is personal data which falls into one of the categories set out in section 2 of the DPA, ie personal data consisting of information as to:

(e) " his physical or mental health or condition;

(g) the commission or alleged commission by him of any offence”.

A full definition of the section can be found in the Legal Annex.

33. Although not in relation to its citing of section 40, Cheshire Constabulary told the complainant that the judge’s purpose in directing that the footage should be retained was to allow any future parole board *“to take into account the mental state of these youths”*.
34. For completeness, the Commissioner has considered whether the withheld information constitutes the sensitive personal data of the defendants. However, having considered the wording of section 2(e), he does not consider it meets the threshold.
35. Where the footage depicts the alleged commission of an act of violence which is potentially, or is likely to constitute, a criminal offence, the Commissioner is satisfied that, given the nature of the apparent incidents, the requested information satisfies the definition of sensitive personal data under section 2(g) in relation to the assailant(s).
36. Having accepted that the information requested constitutes the personal data, and in some cases the sensitive personal data, of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles.

Will disclosure breach one of the Data Protection principles?

37. The Commissioner has considered whether disclosure of the requested information would breach any of the data protection principles as set out in schedule 1 of the Data Protection Act (DPA). He considers the most relevant principle in this case is the first principle which 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”.*

Would it be fair to disclose the requested information?

38. In correspondence with the Commissioner, the complainant argued that:

"whether or not the footage features the defendants themselves, the publication of this material would add to the sum of the public knowledge about apparently casual attitudes to violence demonstrated by [the defendants] during the murder and numerous previous incidents which were detailed in the trial".

39. In considering this argument, the Commissioner accepts that to some extent the defendant's propensity to esteem violence was put in the public domain as a result of them being charged and found guilty at trial of committing a violent crime. In this respect, he notes the media coverage of the trial and subsequent appeals.
40. In answering the question of fairness, the Commissioner recognises the importance of considering whether the data subjects have consented to the disclosure and/or whether the data subjects have actively put some or all of the requested information into the public domain.
41. With respect to the matter of consent, the Commissioner is not aware of anything to suggest that consent has been given for disclosure of the requested information. He has next considered the extent to which the information is, or remains, in the public domain. In this case, Cheshire Constabulary described the requested information as *"evidence not already in the public domain"*. It told the complainant that *"the jury did not see these videos"*.
42. The Commissioner also considers it appropriate to consider the consequences of any disclosure and the reasonable expectations of the data subjects.

Consequences of disclosure

43. In looking at the consequences of disclosure on the data subjects, the Commissioner has considered what those consequences might be. In doing so, he has considered the nature of the information itself and the climate in which the information would be disclosed.
44. Mindful of the fact that disclosure under the Act is disclosure to the world at large, the Commissioner considers that, in this case, members of other gangs of youths, as well as the data subjects' friends and families, are amongst the general public to whom any disclosure is made.
45. As disclosure of this type of information is likely to have a detrimental or distressing effect on the data subjects, the Commissioner considers that it would be unfair to disclose it.

46. With respect to the sensitive personal data contained within the withheld information, the Commissioner notes that some of this information falls under section 2(g) of the Data Protection Act 1998 as it relates to an individual's commission or alleged commission of offences.
47. In the Commissioner's view, in most cases, the very nature of sensitive personal data means it is more likely that disclosing it will be unfair. The reasonable expectation of the data subject is that such information would not be disclosed and that the consequences of any disclosure could be damaging or distressing to them.
48. Where the information constitutes the personal information of, as yet, unidentified individuals, the Commissioner considers it would not be fair to disclose the information due to the plausible risk that they can be identified. In reaching this decision, he has taken into account the fact that disclosure may lead to the identification of members of gangs / victims of violence which may lead to those individuals being subject to threats, bullying or harassment. In his view, it would be unfair to disclose information where the distress or damage as a consequence of disclosure is obvious.

Reasonable expectations of the data subjects

49. The Commissioner accepts that every individual has the right to some degree of privacy. Indeed, this right is enshrined in Article 8 of the European Convention on Human Rights which protects the right to a private and family life. The Commissioner also acknowledges that expectations are shaped by society where personal information is often shared freely and widely for example on social networking sites. The transparency and presumption in favour of disclosure of the Freedom of Information Act is also part of today's culture.
50. The complainant has argued:

"The defendants were responsible for kicking Mr Newlove to death and I don't believe it is difficult to justify the release of material which either will illustrate their own violent behaviour or at the very least betray their attitudes towards violence because they were willing to have such material on their phones. It is therefore in the public interest for it to be released".
51. In considering the expectations of the data subjects at the time of the request, the Commissioner will have regard to the extent to which the information is, or remains, in the public domain, factors he considers would shape a data subject's reasonable expectations.

The defendants

52. The Commissioner recognises that the requested information in this case was obtained as part of a high profile murder investigation. The fact that it was not shown to the jury is, in his view, likely to contribute to the data subjects' expectations at the time of the request that, having not been made public at the time of the trial, it would not be made public in the future.

Other individuals

53. Given the manner in which the requested information exists, namely images stored on the mobile phones of the three defendants, the Commissioner considers it likely that individuals in the footage may not be aware that their details are contained therein.
54. The Commissioner considers the nature of the information itself and the consequences of it being released are factors which will help shape the expectations of the data subject as to whether their personal data would be disclosed to the public. In this case, the Commissioner considers their expectation would be that it would not be disclosed to the world at large.

Conclusion

55. The complainant has argued that:

"The scenes of violence captured on the mobile phones of the main protagonists would help the public and, I would argue, the remaining Newlove family, understand better the minds of those who took his life".

56. In taking into account all the circumstances of the case, the Commissioner notes that Cheshire Constabulary has told him that any request from the bereaved family to see the footage would be treated sympathetically and outside of the Act.
57. Having considered all the circumstances of the case, the Commissioner has concluded that it would be unfair to the individuals concerned to disclose the withheld information to the world at large and to do so would contravene the first principle of the DPA. As disclosure would not be fair, the Commissioner has not gone on to consider whether disclosure is lawful or whether one of the Schedule 2 DPA conditions is met. However, his initial view is that no Schedule 2 condition would be met.

58. Since section 40(2) is an absolute exemption no public interest test applies, and the Commissioner has therefore concluded that it was appropriate for Cheshire Constabulary to have withheld the requested information.

Other exemptions

59. As the Commissioner has found that it would be unfair to disclose the requested information, he has not gone on to consider the other exemptions cited by the Cheshire Constabulary in this case.

The Decision

60. The Commissioner's decision is that the public authority dealt with the request in accordance with the requirements of the Act.

Steps Required

61. The Commissioner requires no steps to be taken.

Other matters

62. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.

63. The Commissioner is concerned to note that the internal review took approximately 170 working days to complete. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. In this case the authority exceeded the timescale

recommended by the Commissioner by a considerable margin. The Commissioner does however note that the authority has apologised for the delay and assured the complainant that future requests for review will be dealt with in a timely manner.

Right of Appeal

64. 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

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 sent.

Dated the 6th day of October 2010

Signed

**Jon Manners
Group Manager**

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

Legal Annex

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.”

DPA

Section 2 - Sensitive personal data

“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 [1992 c. 52.] 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”.