

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 7 November 2007**

**Public Authority:** Devon and Cornwall Constabulary  
**Address:** Police Headquarters,  
Middlemoor,  
Exeter,  
Devon, EX2 7HQ

### Summary

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The complainant requested six pieces of information connected with the investigation of a serious allegation that was made against him. The public authority refused to provide this information citing Section 30(1) (Information obtained during an investigation), Section 38 (Health and Safety), Section 40(1) (Personal Data relating to the applicant) and Section 40(2) (Unfair Disclosure of Personal Data).

In relation to the withheld information, the Commissioner has decided that the names of the accusers and the officers involved in the investigation, arrest and detention of the complainant constitutes his personal data and that DCC appropriately cited section 40(1) in relation to this information. However the Commissioner is also of the view that Section 40(5) should have also been claimed over this information and that the public authority therefore was not compelled to comply with section 1(1)(a) and confirm or deny if this information was held.

The Commissioner was advised that a considerable amount of information within the scope of the request had already been disclosed to the complainant under the Data Protection Act 1998 ('the DPA') during 2002. The Commissioner has identified a limited amount of additional information that constitutes the complainant's personal data that was not disclosed to him at that time. He will now make a separate assessment under section 42 of the DPA in respect of that information.

DCC breached section 1(1)(a) in failing to inform the complainant that the whereabouts of the accusers was not held.

DCC appropriately cited section 40(2) in relation to information about the complainant's wife and son and to information about the whereabouts of officers who dealt with him who had retired at the stage the request was received.

However, the Commissioner has decided that DCC inappropriately refused to provide information about which station serving officers involved with the complainant were assigned to at the time of the request on the basis that section 40(2) applied. He has further determined that section 30(1) was inappropriately applied to that information. He has therefore ordered DCC to release the station addresses of serving officers who dealt with the complainant.

## 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. The complainant wrote to the Devon and Cornwall Police Authority on 14 February 2005 asking for information. In his letter the complainant referred to previous requests for information to the Professional Standards Unit of the Devon and Cornwall Constabulary (DCC).
3. The information that he sought was:
  1. *The names and current whereabouts of my accusers.*
  2. *The names and current whereabouts of all officers concerned in my arrest and detention in police custody on [date removed] and the details on which they based their judgement to arrest me.*
  3. *The names and current whereabouts of the forensic search team attending my home on the morning in question.*
  4. *The names and current whereabouts of the officers (one male and one female) who interviewed my wife and son on the morning in question.*
  5. *The names and current whereabouts of the officers on duty in the custodial reception centre and in particular the civilian officer (male) who searched me and I quote said 'to see if you have any guns' and civilian officer (female) who escorted me to the toilet and observed me 'on orders'.*
  6. *The names of all the officers, and their current whereabouts, who carried out a detailed search of my office, filing cabinets and desk on the evening prior to my arrest, such search conducted without my knowledge.*
4. This request was forwarded by the Police Authority to DCC on 6 May 2005. The complaint that the Commissioner has received is about the way in which DCC handled the request that was transferred to it.

Therefore this notice is served against DCC and for the purposes of his investigation the Commissioner has treated the date that the request was received by DCC as 7 May 2005.

**The DCC Refusal Notice:**

5. DCC responded on 17 June 2005, refusing access to all of the information requested. In doing so it refused to confirm or deny that it held the information requested. In its Refusal Notice, DCC cited section 30(1) for each item requested and sections 41 and 38 for the information about the accusers. It also cited section 40(1) for items 2,3,5 and 6 as well as 40(2) for items 1,2 and 4. In its refusal notice DCC also stated that the complainant should not take its response as confirmation or denial that it held the requested information.
6. Regarding section 38, DCC cited the harm test, which was used to refuse access to information regarding the complainant's accusers. DCC considered that harm may come to individuals who had provided information leading to a criminal investigation if their names were made known and that the confidence of the community may be undermined if they did not feel they could trust the police when they provided information. They stated that as the Police were reliant on information from members of the community, that release of information about those people would harm the flow of information to the Police and harm the effectiveness of their service. Flows of information to the Police relied on the trust of the public, which could be eroded by disclosure in a matter such as this one. In their view, the factors weighing against disclosure were therefore stronger than those weighing for disclosure.
7. The public interest test was also applied to section 30. DCC considered that the process must be applicant blind, and that if information was released to one person it must be released to all. It felt that information relating to criminal investigations should rarely be disclosed, and only when there was a strong public interest consideration favouring disclosure. The investigations in question in this matter were related to a highly sensitive operation and therefore they did not feel there was a public interest in releasing details about this case.
8. DCC also stated that third party interests may be jeopardised by the release of information relating to the personal information of third parties, such as the complainant's wife and son; and that they had a duty to protect that information.
9. In addition, DCC stated that the material sought contained information relating to the complainant, which was therefore exempt from disclosure under the Freedom of Information Act ('the Act'). The complainant was advised to make a subject access request for this information.

**Internal review:**

10. The complainant requested an internal review of the decision on 28 June 2005. In his letter seeking review he stated that:
  - The investigation had revealed that there was no evidence against him, and that this had been conveyed to him in writing when he made a subject access request on 10 June 2002; and that he was no longer under investigation.
  - That he felt the harm test protected individuals who had provided false information to the police, rather than protecting innocent victims of false accusations, and that the police support the false accusers in order to criminalise the innocent.
  - That he could not see why the information contained in Questions 2-6 of his request was being withheld, and that he sought the names of all officers concerned in his case so he could subpoena them to court for any future hearing.
  - That he felt that making allegations was risk free for the person making them.
11. DCC reviewed its decision and communicated this to the complainant on 25 October 2005, upholding the Refusal Notice and the exemptions applied.
12. The complainant contacted the Commissioner to complain about the way his request for information was being dealt with on 28 June 2005. However as his internal review had not taken place at that stage the Commissioner was not able to take action. In his letter the complainant stated that he was not seeking details about the enquiry and, 'I am not concerned that the disclosure would not be in the public interest. It is in my interest - the innocent victim, and I feel I am entitled to an open response'.
13. After completion of DCC's internal review, the complainant wrote to the Information Commissioner on 9 November 2005 seeking review of DCC's Refusal Notice. He also complained about the amount of time taken by DCC to respond to his requests for information, and that they had not responded as per the requirements of the Act. He also stated that he felt that an independent review had not taken place.
14. In his letter, the complainant requested the Commissioner's assistance to seek access to the six items originally requested by him on 14 February 2005.

## The Investigation

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### Scope of the case

15. In relation to the majority of the requested information, the Commissioner has first considered the extent to which it constitutes the complainant's personal data. Under the Act, the complainant's personal data is subject to an absolute exemption under section 40(1). Section 40(5) holds that if Section 40(1) would be applicable to the withheld information, the public authority is not compelled under the Act to confirm or deny if the information is held. The Commissioner has therefore considered whether Sections 40(1) and (5) can be applied to the withheld information in this matter.
16. In relation to the information about the complainant's wife and son, the Commissioner has considered whether or not DCC appropriately cited section 40 (2) when refusing to provide that material to the complainant. However he would point out that the complainant has been informed that his wife and son could also make subject access requests under the DPA for information held by the public authority about them.

### Chronology

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#### Background

17. The information the complainant is seeking relates to documents associated with his arrest on 16 February 2000. The complainant was arrested, detained and questioned as part of an operation into historical child abuse in residential establishments.
18. The complainant's wife and son were also questioned as witnesses and the complainant's house was searched by a forensic team of DCC.
19. Ultimately the complainant was not charged with any offence and the investigation of him was marked as 'no further action due to lack of evidence'. However, the complainant remains very distressed about the circumstances of his arrest and detention, and the ongoing effects on him and his family.
20. The Commissioner wrote to DCC on 23 November 2006 asking for any information held relating to the complainant's request. DCC was also asked for submissions about:
  - a. Which exemption was being applied to each part of the material?

- b. To confirm whether the complainant had made a subject access request, and if so what had been disclosed to him?
    - c. The statement in the refusal notice that the response could not be taken as a confirmation or denial that material was held by DCC.
  21. On 19 January 2007 DCC confirmed that the complainant had made a subject access request on 10 June 2002 and that the complainant's custody record had been provided to him in response to that request in July 2002. The Commissioner understands that no further subject access request was made by the complainant once he had received DCC's refusal notice of 17 June 2005 advising him to do so.
  22. A case officer wrote to DCC on 5 February 2007, asking whether the complainant's wife and son had made subject access requests for information about the officers who had interviewed them.
  23. DCC responded on 9 February 2007 and explained that records regarding data protection requests are held by DCC for two years, 'unless there is a need to retain individual requests for a further period of time'. There was no record of a subject access request being made by either person in the previous two years and the Data Protection Officer had no memory of a request being made before this time. DCC said that if a subject access request was made, the names of the interviewing officers would be disclosed to the relevant individual. The Police Headquarters address would be provided as a contact point for serving officers. The whereabouts of retired officers would not be disclosed.
  24. DCC's position in relation to each piece of requested information, as communicated to the Commissioner, can be summarised as follows:
  25. **Item 1:** DCC provided the Commissioner with the information it held regarding Item 1 of the request. It explained its position that all of this information was exempt under sections 30(1) and 40(1). It also considered some sections of the information to be exempt by virtue of sections 38; 40(2) and 41.
  26. **Item 2:** DCC stated that the complainant's custody record was previously provided to him when he made his subject access request in 2002. This document named three officers involved in his arrest and custody. DCC's position is that the only information it holds about the officers concerned in the arrest and detention of the complainant on 16 February 2000 is contained in this document, which the complainant already has. It considered this information to be exempt under section 40(1) and section 30(1).
- Item 3:** DCC provided the Commissioner with the information it held about this item, and the names of the officers recorded as attending the

complainant's house. DCC's position is that the information requested in this item is exempt under Sections 40(1): 40(2) and 30(1).

27. **Item 4:** DCC provided the Commissioner with the information held about this item and explained that it was considered exempt under sections 30(1) and 40(2) and certain elements under 40(1).
28. **Item 5:** DCC provided the Commissioner with all the information it holds regarding the complainant's detention. Included in this information was a copy of the complainant's custody record, which as already mentioned, was provided to him under his subject access request. DCC's position is that the complainant has had, "access to requested information in Item 2 and 5 under the Data Protection Act and has already received that information under a subject access request".
29. **Item 6:** DCC stated that it holds no information relevant to this aspect of the request. It stated on 19 January 2007 that if this information had been held, that it would have released it under a subject access request to the complainant.
30. Overall, DCC stated that they routinely make disclosures that include the names of officers and that they, '*believe that in the interests of accountability and openness any police officer or member of staff acting in their official capacity should be named unless the employee can demonstrate that the disclosure is truly personal information or that it is damaging to him*' and that they, '*consider officers' names that are part of a custody record or an interview to be part of the sensitive personal information of the individual involved*'.
31. The Commissioner wrote to the complainant on 29 January 2007, asking him to clarify what he meant by 'current whereabouts' in his request; and asking for his feedback about DCC's position that he had received a copy of his custody record as part of his subject access request. The Commissioner also reminded the complainant that the test for disclosure of material was whether it should be released to the public in general, rather than just to him as an interested party.
32. The complainant responded on 5 February 2007, however he did not define what he meant by 'current whereabouts' and stated that there were 8+ officers present inside and outside his house on the date in question and therefore he did not feel that Item 3 had been answered in full. He also referred to a letter sent to him by DCC's Superintendent P.H Davies on 24 March 2004, regarding his subject access request which says (regarding the personnel present): 'I am unable to identify other personnel who were present in a support role'. In that same letter the names of four officers recorded as being present at the search were provided to the complainant.

33. After another email sent by the Commissioner to the complainant on 5 February 2007, he responded on 8 February 2007 saying that he required 'names, ranks, and addresses where the serving officers may be contacted (i.e. their current base station) and a contactable address where the retired officers can be traced'.
34. The Commissioner emailed the complainant on 14 February 2007, advising him that it would not be investigating the current ranks of the officers involved as this did not constitute part of his original request for information. The complainant was advised to make a fresh request if he continued to seek this information.
35. In a telephone call with the FOI officer on 6 March 2007, the case officer pointed out that there were two names of officers contained in the information provided to the Commissioner which did not appear to have been provided to the complainant to date. The FOI Officer at DCC agreed that this was correct.

## Analysis

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### Section 1- General right of access

37. DCC cited section 40(1) in relation to the names and current whereabouts of the complainant's accusers. However, in the course of the investigation DCC explained that it does not in fact hold information about the current whereabouts of the complainant's accusers. The Commissioner does not consider that the information about the current whereabouts of the complainant's accusers would constitute his personal data. Therefore he is not satisfied that this information would be exempt by virtue of section 40(1). He has considered whether or not this information is in fact held by DCC. He has not been provided with any evidence to demonstrate why this information would be held by DCC. Further, he notes that the investigation was carried out a number of years ago and that no action was taken. There would therefore be no apparent reason why the public authority would maintain contact with the accusers or retain a record of their whereabouts. Therefore he is satisfied that this information is not held by DCC.
38. One of the officers involved in the investigation, arrest and detention of the complainant is now deceased. The name of that officer was provided to the complainant when he made his subject access request during 2002. The complainant has also been informed that this particular officer is now deceased. The Commissioner is satisfied that DCC does not hold information about the current whereabouts of this officer and therefore he has not considered this point further.



## Exemptions

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### Section 40 Personal data:

39. The exemption contained in Section 40 of the Act has been claimed for each of the requested items of information by the DCC. The Commissioner has therefore considered its application to each piece of information sought. The full text of Section 40 is in the legal annex to this notice.

### Section 40(1) - Personal data of the complainant.

40. The Commissioner is satisfied that with the exception of information relating to item 4 and the whereabouts of the accusers and officers, all pieces of information sought by the complainant have him as the focus because it is information related to the investigation into him, the allegations against him and his arrest and detention. He is satisfied that this information is the complainant's personal data and therefore where it is held the public authority has appropriately cited section 40(1). For example the names of officers involved in the complainant's detention are recorded in his custody record. As this exemption is an absolute exemption, no consideration of the public interest or the data protection principles needs to be undertaken.
41. The Commissioner then considered whether the exemption contained at Section 40(5) was also applicable to the information in question. Where the public authority has claimed that information is held and it is exempt under section 40(1) the Commissioner is satisfied that section 40(5) would also apply. In addition, where the public authority has claimed that it does not in fact have a record of some of the officers that were involved with the complainant, the Commissioner is satisfied that if this information were held section 40(1) would apply. Therefore, the public authority was not obliged to comply with section 1(1)(a) in relation to this information by virtue of section 40(5).
42. In the course of the investigation it became apparent that all names of officers sought by the complainant had been provided to him via his earlier subject access request, with the exception of the names of two officers present at the search of his house. However, this information is also exempt under section 40(1) and (5). As previously mentioned the Commissioner will make a separate assessment under section 42 of the DPA in relation to this information.

### Section 40(2)- personal data of third parties

43. The Commissioner is satisfied that the remaining information within the scope of the request constitutes third party personal data. This is information about the whereabouts of particular police officers as well as the material about the complainant's wife and son. Therefore he has

considered whether releasing this information would breach any of the data protection principles.

44. The ICO's Awareness Guidance about requests for Third Party Data contains questions which the ICO asks when deciding if release of third party data is fair or unfair. In summary those questions are:
  - Would the disclosure cause unnecessary or unjustified distress or damage to the person who the information is about?
  - Would the third party expect that his or her information might be disclosed to others?
  - Had the person been led to believe that his or her information would be kept secret?
  - Has the third party expressly refused consent to disclosure of the information?
45. The Guidance also states that whether the information is connected to an individual's personal or private life is also a significant factor when deciding whether disclosure of information relating to them is fair or not.
46. In the decision of House of Commons and the Information Commissioner and Baker EA/2006/0015 and 0016, the Information Tribunal looked at the issue of whether release of the information sought breached the data protection principles and whether it would be fair to release the information in that matter. The Tribunal said in this matter that to determine fairness a balancing of the legitimate interests of the public against the prejudice that could affect the rights, freedoms and legitimate interests of the data subjects had to take place.
47. At Paragraph 77 of that decision the Tribunal stated that, 'we accept the approach of the Commissioner's Guidance which recognises that in determining fair processing regard can be had as to whether the personal data relates to the private or public life of the data subject to whom it relates'.

**The whereabouts of particular officers:**

48. The Commissioner is aware that some of the officers involved in the complainant's case are still serving officers with DCC. However, at the time of the request two of the officers had retired from service. The Commissioner has given separate consideration to whether material about serving and retired officers should be released. The stations that officers were assigned to at the time of the request are personal data about those officers. In considering whether or not it would be fair to release information about the officers the Commissioner has taken into account the questions mentioned above.

## Serving officers

49. DCC explained that the Police Headquarters would be given to the complainant under a subject access request as a contact for the serving officers. However, it would not be prepared to disclose the current whereabouts of those officers. The Commissioner is satisfied that DCC holds information relevant to this aspect of the request. This is on the basis that the request would be satisfied by the provision of a contact address of the station at which the serving officers were posted at the time of the request. This information would be required by DCC in order to operate and to keep track of where different members of staff are stationed.
50. In its correspondence with the ICO, DCC indicated that it could see no public interest in disclosing the names of police officers in isolation from other information. The Commissioner has already indicated that he considers the names of the officers requested to be exempt under section 40(1). This is on the basis that they form part of the material DCC holds about the investigation, arrest and detention of the complainant. However, he does not consider the current whereabouts of those officers constitutes the complainant's personal data. Therefore consideration must be given to whether this information can be disclosed under the Act.
51. The station that a particular officer is assigned to is personal information about their professional life as a public sector employee. DCC has not specified what damage or distress the serving officers are likely to suffer if the information were made available to the public. The Commissioner does not consider that releasing the requested information would result in any significant damage to the officers.
52. The Commissioner also notes that some information about which stations particular officers serve at is made available on DCC's website. Details about neighbourhood police are provided together with station information and photographs. An example can be viewed at the following link <http://www.devon-cornwall.police.uk/v3/about/neighpol/nedevon/torridge/index.htm>. The Commissioner recognises that this information relates specifically to officers involved in neighbourhood policing where arguably part of the role is to be visible within the community. However, DCC has not provided any arguments about why the officers in this case would have a different expectation about their information being disclosed or why they may suffer detriment that other officers would not. He considers that it would be reasonable for police officers to expect that in the interests of openness and transparency information about where they are stationed and carry out their public function will be released. However he acknowledges that there may be instances where particular officers may suffer distress or damage, for example if they are stationed somewhere on a covert operation and this would need to

be considered on a case by case basis. He does not believe this to be the case in this instance.

53. The Commissioner is not aware that the serving officers have been consulted and have refused consent to the information being released, nor has he been supplied with evidence to show that they were led to believe that such information would not be released.
54. In order to comply with the first data protection principle it is necessary to satisfy one of the conditions for processing in schedule 2 of the DPA. In this case the Commissioner is satisfied that condition 6 is satisfied. This states that,

“the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject”.
55. In the House of Commons v Baker case mentioned above the Tribunal considered the application of condition 6. It found that it “...involves a balance between competing interests broadly comparable, but not identical, to the balance that applies under the public interest test for qualified exemptions...” (para 90).
56. The balance is between “...:(i) the legitimate interests of those to whom the data would be disclosed which in this context are members of the public\*...and (ii) prejudice to the rights, freedoms and legitimate interests of the data subjects which in this case are MPs.” (para 90).
57. It went on to state that “...because the processing must be ‘necessary’ for the legitimate interests of members of the public to apply we find that only where (i) outweighs or is greater than (ii) should personal data be disclosed.” This reverses the burden of proof built into the public interest test that is applied to qualified exemptions.
58. The Tribunal’s approach to condition 6 has influenced the Commissioner’s view in this case. When assessing the balance the Commissioner has also been mindful of the nature of the prejudice to the rights, freedoms and legitimate interests of the data subjects. In relation to serving officers, as mentioned above, he does not consider that releasing where they were stationed at the time of the request would constitute a significant prejudice to their privacy rights. The information relates to their professional and public life and any infringement of privacy would be limited. Further the Commissioner is satisfied that there is a legitimate interest in openness and transparency which outweighs any infringement that may arise as a result of disclosure in this case. Therefore he has concluded that it would not breach the data protection principles to release the

addresses of the stations that the serving officers relevant to this case were assigned to at the time of the request.

### **Retired officers**

59. DCC has confirmed that it holds addresses for the officers involved in the complainant's arrest who had retired at the time of the request for information. This also constitutes personal data of those former officers. However, in contrast to the information about the serving officers, it relates to the former officers personal and private lives.
60. The Commissioner is satisfied that the former officers would have a reasonable expectation that information about where they live that was provided to their former employer for administrative purposes would not be disclosed to the general public. Further, he accepts that releasing this information would prejudice the privacy rights of those individuals. The Commissioner is not aware that DCC has consulted the officers to seek consent to the disclosure. This is one of the conditions for processing specified in schedule 2 of the DPA. However, given the private nature of the information sought he does not consider that it would have been reasonable to expect DCC to seek that consent. He is satisfied that DCC could reasonably assume that the officers would not consent to the disclosure of that information.
61. The Commissioner has again considered condition 6 of Schedule 2 of the DPA in relation to this information. He is mindful that the information about the retired officers does not relate to their professional life or a public function. He does not consider that the arguments regarding transparency and openness that apply in relation to serving officers are therefore relevant. He also considers that if information about the private lives of former officers were released they are likely to suffer a greater infringement of their privacy and more damage and distress. It is also likely that other family members residing at the same address would suffer distress if the material were released. There is no sufficient legitimate interest in the public having access to this information to outweigh the prejudice to the rights of the retired officers.
62. In view of the above the Commissioner's view is that releasing this information would breach the first data protection principle. This is on the basis that disclosure would be unfair to the retired officers. Therefore DCC were correct to refuse to release this information citing section 40(2).

### **Personal Data of the complainant's wife and son:**

63. The complainant's wife and son are the primary focus of item 4 and therefore the information is their personal data. As above the Commissioner considers it appropriate to consider the first data protection principle in relation to this material.

64. In this matter, the information sought relates to the interview of the complainant's wife and son. This information is about the personal lives of his wife and son, and is connected to their private family life.
65. In considering the points noted above, the Commissioner's position is that:
- If the information sought in item 4 was released to the world at large, it would become public knowledge that the complainant's wife and son were interviewed by DCC. Such a public disclosure is likely to cause them unnecessary and unjustified distress and could lead to them being identified as witnesses who gave evidence regarding the complainant during the investigation.
  - The complainant's wife and son would have a reasonable expectation that information divulged to the police about the complainant would not be released to the general public. In this case the Commissioner notes the particularly sensitivity of the topic under discussion and he considers that this gives even greater weight to the expectation of confidentiality.
  - The complainant's wife and son would not have expected that their interview would have entered the public domain unless the matter came to court as a prosecution. As this did not occur in this matter, they would have a reasonable expectation that their identities and statements would remain confidential.
  - Whilst the complainant's wife and son have not expressly refused consent to disclosure of their identities, the Commissioner also notes that they have not made subject access requests (unlike the complainant) and that they have not expressly consented to information about them being released either.
66. The Commissioner recognises the argument that the public has a legitimate interest in ensuring that a thorough investigation was conducted and in understanding how operations are carried out. To some extent the information relating to the complainant's wife and son may assist in this regard. It may also be legitimate for the wider public to gain a better understanding of why no action was taken against the complainant in this instance. However, the Commissioner does not consider that these arguments are sufficient to outweigh the prejudice to the rights and freedoms of the complainant's wife and son if the information were released.
67. The Commissioner also notes the comments of DCC that the names of the officers who interviewed the complainant's wife and son would be available to them in the event that they made subject access requests. The Commissioner believes that this is the correct approach for access to this information, rather than under the FOIA.

## **Section 30(1) – Investigations**

68. The full text of Section 30 (1) is in the Legal Annex to this decision.
69. The Commissioner notes that DCC stated that the information about the names and whereabouts of the police officers involved with the complainant's case were exempt under section 30(1). The Commissioner has not given further consideration to the names of the officers as he has already determined that the section 40(1) and (5) exemptions cover this information.
70. However, as he has determined that it would not breach the data protection principles to release the whereabouts of serving officers at the time of the request, the Commissioner is required to consider whether the exemption in section 30(1) would apply to this information.
71. The Commissioner understands that information about the whereabouts of serving officers at the time of the request, i.e. which station they were assigned to was recorded as part of their individual personnel records. The Commissioner does not consider that this information was held by DCC for the purposes of an investigation and therefore he does not consider that section 30(1) applies.

## **Procedural matters**

72. DCC clarified that the statement about confirmation or denial in the Refusal Notice was taken from a standard template used when responding to early requests under the Act. This template has now been amended to ensure compliance with section 1 of the Act. The Commissioner notes that in citing the exemptions it did within the Refusal Notice, DCC was in effect confirming that it held information relevant to the request.
73. However regarding the whereabouts of the accusers in Item 1 the Commissioner has not been provided with any material which indicates that the complainant was told that this information was not held by the public authority. In failing to notify the complainant of this, the public authority breached section 1(1)(a). The full text of section 1 (1)(a) in the Legal Annex to this decision.
74. The complainant's original request for information is dated 14 February 2005 and is addressed to the Devon and Cornwall Police Authority. There appears to have been a series of letters which preceded that correspondence. The 14 February letter was responded to by the Devon and Cornwall Constabulary on 17 June 2005, with it stating that it received the request from the Authority on 6 May 2005. The Commissioner notes that the Authority is a separate entity to the Constabulary and that the information the complainant was seeking was actually held by the Constabulary.

75. The complainant has said that he feels the public authority did not deal with his request in a timely manner. Upon receipt of the request from the Authority, the Constabulary responded to it on the 29<sup>th</sup> working day. In failing to respond within 20 working days of receiving the request DCC breached section 10 of the Act.

## The Decision

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76. 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:
- DCC correctly applied Section 40(1) to the names of the accusers and the names of officers that dealt with the complainant.
  - DCC also correctly applied section 40(2) to the information requested in item 4 about the complainant's wife and son and to the current whereabouts of officers involved in the investigation, arrest and detention of the complainant who have subsequently retired.
77. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- In failing to advise the complainant that it did not hold information about the current whereabouts of the complainant's accusers DCC contravened Section(1)(1)(a) of the Act.
  - Where information about officers who allegedly dealt with the complainant was not held, DCC was not obliged to confirm or deny this by virtue of section 40(5). This is because if this information were held it would constitute the complainant's personal data. In failing to apply Section 40(5) and to advise the complainant of this DCC breached section 17(1).
  - The Commissioner has also concluded that DCC incorrectly refused to disclose information about the whereabouts of officers who dealt with the complainant and who were still serving at the time of the request on the basis that section 40(2) applies. Though the Commissioner accepts that this information constitutes personal data about those officers, he does not consider that it would breach the data protection principles to release that information.
  - DCC also inappropriately cited section 30(1) in relation to the whereabouts of serving police officers. In failing to release this information DCC also breached section 1 of the Act.



## Steps Required

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78. The Commissioner requires DCC to release the station address where each of the serving officers were assigned to at the time of the request.

## Other matters

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79. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
80. Section 7 of the DPA gives an individual the right to request copies of personal data held about them. Therefore, the Commissioner will go on to make an assessment under section 42 of the DPA in relation to information that is, or if it were held would be, personal data of the complainant. However, this assessment will be dealt with separately and will not form part of this Decision Notice, because an assessment under section 42 of the DPA is a separate legal process from the consideration of a complaint under section 50 of the FOI Act.
81. The review, which was requested on 28 June 2005, was provided on 9 November 2005. The Commissioner understands the complainant's frustration at the amount of time this review took which was longer than the estimate provided by the Constabulary.
82. The Commissioner's Good Practice Guidance No.5 dated 22 February 2007 and available on his website, states that he would normally expect internal reviews to be completed within 20 working days of receipt of the request for a review. Although the guidance recognises that there may be exceptional cases where a review is likely to take longer, it also states that no review should take in excess of 40 working days. The Commissioner acknowledges however, that the request that is the subject of this decision notice was made during the relatively early stages of the Act's implementation and prior to the publication of his guidance on the matter.

## Failure to comply

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

## Right of Appeal

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84. 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)

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 7<sup>th</sup> day of November 2007**

**Signed .....**

**Jane Durkin  
Assistant Commissioner**

**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.”

**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.”

**Section 40(4)** provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

**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)."

**Section 40(6)** provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

**Section 40(7)** provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;  
"data subject" has the same meaning as in section 1(1) of that Act;  
"personal data" has the same meaning as in section 1(1) of that Act.

### **Investigations and proceedings conducted by public authorities**

**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.”

## **General Right of Access**

**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.”