

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 13 December 2010

Public Authority: Police Service of Northern Ireland
Address: PSNI Police Headquarters
65 Knock Road
Belfast
BT5 6LE

Summary

The complainant made a request to the Police Service of Northern Ireland ("PSNI") for information pertaining to travel arrangements made by or on behalf of the son of the PSNI's former Chief Constable. The request consisted of 2 parts. The PSNI refused to confirm or deny whether it held the information as requested in Part 1 of the request, citing section 40(5) of the Act (where the information is third party personal data and confirmation or denial would contravene the data protection principles). The Commissioner considered that section 40(5) had not been correctly applied in that instance and ordered the PSNI to confirm or deny whether it held the information in Part 1 of the request and to consider disclosing the information in Part 2. The PSNI confirmed that it did hold the information in Part 1 of the request, however it refused to disclose the information in Part 2, citing the exemptions under sections 38(1)(a) and (b) (health and safety) and 40(2) of the Act by virtue of section 40(3)(a)(i) (third party personal data). The Commissioner considers that the PSNI applied section 40(2) correctly to part of the withheld information and has therefore not considered section 38. However, he does not consider that either section 40(2) or section 38 apply to the remainder of the withheld information and has ordered disclosure of that information.

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. On 6 February 2008, the complainant made the following request to the Police Service of Northern Ireland ("PSNI"):-
 1. "Was any flight (to any destination) arranged or booked by PSNI or its travel agent for Hugh Orde's son (regardless of whether payment was made by PSNI or otherwise?)"
 2. "If the answer to Question 1 is "yes":-
 - 2.1 Please provide full details of the flight(s) as arranged/booked.
 - 2.2 State whether the flights were arranged/booked in connection with official PSNI business involving Sir Hugh Orde's son.
 - 2.3 If the flight was arranged/booked for reasons other than official PSNI business please provide full details of the payment arrangements including:-
 - (a) whether the flight was charged to PSNI's account
 - (b) whether it was paid for by PSNI
 - (c) whether any arrangement was made for reimbursement of the flight cost by or on behalf of Sir Hugh Orde's son and
 - (d) whether such reimbursement was made and, if so, when."
3. The PSNI responded stating that section 40(5) of the Act applied to the requested information and still maintained this stance upon internal review. The Commissioner did not consider that section 40(5) of the Act had been correctly applied to the requested information. He issued a Decision Notice ordering the PSNI to either confirm or deny whether it held the information in Part 1 of the request and to consider Part 2 of the request accordingly.
4. The PSNI has confirmed that it holds information relating to Part 1 of the request, however it still refuses to disclose the information sought in Part 2 of the request ("the withheld information") as it considers the exemptions under sections 38(1) (a) and (b) and 40(2)(a) and (b) by virtue of section 40(3)(a)(i) of the Act to be engaged. The complainant notified the Commissioner of this and the Commissioner is treating that notification as a new complaint.

The Investigation

Scope of the case

5. On 29 July 2010 the complainant contacted the Commissioner to ask him to investigate the new complaint. The complainant specifically asked the Commissioner to consider the following points:
 - The PSNI's application of the exemption in sections 38(1)(a) and (b) of the Act.
 - The PSNI's application of the exemption in sections 40(2)(a) and (b) by virtue of section 40(3)(a)(i) of the Act.

Chronology

6. The Commissioner contacted the PSNI on 1 September 2010 in order to ascertain whether the PSNI had any further detailed submissions to add to those it had previously provided in relation to Part 2 of the request. The PSNI replied on the same date to state that it had nothing further to add to its previous representations to the Commissioner.

Analysis

Substantive Procedural Matters

Exemptions

Section 40(2)(a) and (b) –personal data of third parties

Third party data

7. Generally, the provisions of section 40-subsections 1 to 4- exempt 'personal data' from disclosure under the Act. A full text of section 40 of the Act is available in the Legal Annex at the end of this Notice.
8. Personal data is defined by section 1(1) of the DPA. It states that –
"personal data means data which relate to a living individual who can be identified -
 - (a) from those data,

- (b) from those data and other information which is in the possession of, or 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.
9. Personal data is exempt from disclosure if either of the conditions set out in section 40(3) or 40(4) are met. The relevant condition in this case is at section 40(3)(a)(i), where disclosure would breach any of the data protection principles as set out in Schedule 1 to the DPA.
10. The PSNI applied the exemption under section 40(2) to the withheld information, which was information relating to the travel arrangements of the former Chief Constable's son.
11. The Commissioner is satisfied that all of the withheld information falls within the definition of personal data as set out in the DPA. It contains information about living individuals who it would be possible for the public to directly identify from those data. The information concerns, as stated in paragraph 10 above, travel arrangements of the former Chief Constable's son. Since the information directly relates to Hugh Orde's son, that individual could be identified from the information. The first data protection principle states in part that:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met, and in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

Would disclosure of the information breach the first data protection principle?

12. The PSNI stated that the first and second data protection principles would be breached by disclosing the information requested in Part 2 of the complainant's request.

Would disclosure of the information be fair?

13. The Commissioner's guidance on section 40 suggests a number of issues that should be considered when assessing whether disclosure of information would be fair, namely:
- the individuals' reasonable expectations of what would happen to their personal data;
 - the seniority of any staff;

- whether the individuals specifically refused to consent to the disclosure of their personal data;
 - whether disclosure would cause any unnecessary or unjustified distress or damage to the individuals;
 - the legitimate interests in the public knowing the requested information weighed against the effects of disclosure on the individuals.
14. Furthermore, the Commissioner's guidance suggests that when assessing fairness, it is also relevant to consider whether the information relates to the public or private lives of the individuals. The guidance suggests that:
"Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned."
15. Furthermore, notwithstanding a data subject's reasonable expectations or any damage or distress caused to them by disclosure of their personal information, the Commissioner believes that it may still be fair to disclose that information if it can be argued that there is a compelling public interest in doing so. Therefore, when assessing fairness under the first data protection principle and conditions, the Commissioner will balance the rights and freedoms of the data subjects with the legitimate interests in disclosure of the withheld information.

Reasonable expectations of the data subject

16. A data subject's general expectations are likely, in part, to be influenced by generally accepted principles of interaction and social norms as well as by legal rights, such as the right to respect for private life as enshrined in Article 8 of the ECHR. However, transparency and openness in relation to disclosure of public information is also an inherent part of today's society and culture. Therefore, an individual's expectation of privacy will be influenced by that culture of openness and transparency.
17. The Information Tribunal in the Norman Baker¹ case commented on the distinction between a data subject's private and public life, observing that:-
"...where data subjects carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would be the case in

¹The Corporate Officer of the House of Commons v IC (additional party Norman Baker) (EA/2006/0015 and 0016)

respect of their private lives..." (para 78) and further that "... the interests of data subjects....are not necessarily the first and paramount consideration where the personal data being processed relate to their public lives" (para 79).

18. The withheld information relates to travel arrangements of the then Chief Constable's son. The Commissioner notes that the Chief Constable's son is a private individual, not an employee of the PSNI, and as such he does have a reasonable expectation that he can keep his private life private and not subject to public scrutiny. Furthermore, the Commissioner accepts that the Chief Constable will have a reasonable expectation that he can keep his family life private. However, these expectations must take into account the fact that disclosure of the withheld information would reveal whether public resources (essentially, the expenditure of public funds) had been used by PSNI in relation to the Chief Constable's son. The expectations of both parties regarding disclosure of the withheld information are relevant.
19. The Commissioner notes that the then Chief Constable does not wish the PSNI to disclose the withheld information. The PSNI has not indicated to the Commissioner whether or not it sought the consent of the Chief Constable's son himself with regard to disclosure. Therefore the Commissioner does not know the views of one of the data subjects regarding potential disclosure of his personal data.
20. In cases where the consent of the data subject(s) to disclosure of his or her or their personal data has been refused, the Commissioner will take this into account. The Commissioner considers these views to be reflective of the expectations of the data subject(s) in relation to the withheld information. However, refusal of consent is not absolutely determinative in the Commissioner's decision as to whether or not that information should be disclosed.
21. It was the Commissioner's view that, given that the request relates to information regarding the PSNI's potential use of public resources to make travel arrangements on behalf of the former Chief Constable's son, it was not reasonable for the former Chief Constable to expect the PSNI not to confirm or deny whether it held that information. Whilst acknowledging the expectations surrounding the right to a private family life, the Commissioner nevertheless considered that there is a significant expectation amongst the public regarding transparency about the use of public resources. In the Commissioner's view it would have been reasonable to expect that the Chief Constable and his son would have recognised this fact and expected the public authority to confirm or deny whether information was held in the circumstances.

Therefore, the Commissioner ordered the PSNI to confirm or deny whether it held information in relation to Part 1 of the complainant's request. (Ref: FS50202772).

22. In relation to Part 2.1 of the complainant's request, regarding details of flights which may have been arranged/booked on behalf of the former Chief Constable's son, the Commissioner considers that the public's expectation regarding transparency, as outlined above, would have been met in part by the PSNI's confirmation that it does hold information relating to Part 1 of the request. It is his view that it is reasonable for the former Chief Constable and his son to expect that any details held about the son's private journeys would be kept private. Therefore, they would not expect disclosure of the information in Part 2.1 of the complainant's request.
23. However, in relation to Parts 2.2 and 2.3 of the complainant's request, which relates to the financing of any flights which were booked and whether they were for the purpose of official PSNI business, the Commissioner considers that both the former Chief Constable and his son should have expected that these details may be disclosed, as it is a question essentially regarding whether public resources have been used to fund flights for private activities, i.e. not for official PSNI business.

Seniority of staff

24. Although Sir Hugh Orde, at the time of the request, was the most senior member of staff at the PSNI and the nature of the request necessarily involves his personal data as well as that of his son, the specifics of the request relate primarily to his son who the Commissioner considers to be a private individual. He is not an employee of the PSNI, nor is he involved in any public or official roles for the PSNI. His sole association with the PSNI is that he is the son of the man who was the Chief Constable at the time of the request. Therefore the seniority of his father, who is a public figure, is irrelevant in this instance.

Distress or damage to the data subject

25. The Commissioner's Awareness Guidance 1 covering Section 40 Personal Information, states that public authorities should take into account the potential harm or distress that may be caused by the disclosure. The Guidance states that, "For example, there may be particular distress caused by the release of private information about family life. Some disclosures could also risk the fraudulent use of the disclosed information (e.g. addresses, work locations or travel plans

where there is a risk of harassment or other credible threat to the individual), which is unlikely to be warranted. However, the focus should be on harm or distress in a personal capacity. A risk of embarrassment or public criticism over administrative decisions, or the interests of the public authority itself rather than the individual concerned, should not be taken into account.”

26. The Commissioner considers that disclosure of the information in Part 2.1 of the complainant’s request could cause damage or distress to the data subject as he would not expect the public to become aware of the details of private flight arrangements. As stated by the PSNI, the Chief Constable’s son has no public profile. Disclosure of the withheld information into the public domain would reveal more detailed information about him which has the potential to impact on his private life in an adverse manner. It is the view of the PSNI that revealing the withheld information would cause incalculable damage and distress to him and therefore in turn will also cause damage and distress to the former Chief Constable and other family members. The Commissioner agrees in principle with this view even though he considers that the potential for distress or damage might have been overstated by the PSNI. However, whilst he agrees that disclosure of the information in Parts 2.2 and 2.3 of the complainant’s request could cause some distress or damage to the Chief Constable’s son and other family members, he accepts that this must be balanced against any legitimate interest there may be in disclosure of that information to the public.

Legitimate interests

27. The Commissioner recognises that there is a general interest in accountability and transparency, especially relating to the possible use of public funds. The complainant has essentially enquired as to whether the funds of a public authority were being used to finance the travel arrangements of a private individual travelling in an unofficial capacity. The Commissioner therefore accepts that disclosure of the withheld information could go some way to meet the legitimate interests of the public as it would inform the public whether public funds had in fact been used in this way.
28. The data subject is not a high profile figure, nor employed by the PSNI. His father’s expenses have always been readily available to be examined by the public to assure them of his personal probity. Nevertheless, the Commissioner considers that there may still be a legitimate interest to the public in knowing whether public resources had been used to fund travel arrangements for an individual which were not for official PSNI business.

29. Having investigated the complaint, the Commissioner considers that disclosure of the information requested in Part 2.1 of the complainant's request would not significantly assist the public in being informed whether public funds had been used to fund private travel arrangements.
30. The Commissioner considers that any legitimate interest in disclosure of the information in Part 2.1 of the complainant's request is outweighed by the expectations of the data subjects and the likely effect of disclosure on them. The Commissioner therefore considers that it would be unfair for the PSNI to disclose the personal information in Part 2.1 of the request when there is no evidence that the data subject would consent to such disclosure.
31. However, in relation to the information in Parts 2.2 and 2.3 of the complainant's request, the Commissioner considers that the balance is different and that it would not be unfair to the data subjects to disclose the information. The reasoning behind this is further developed in paragraphs 34-36 below. The Commissioner has therefore gone on to consider whether a condition for disclosure of that information exists under Schedule 2 Condition 6 of the Data Protection Act 1998.

Schedule 2, Condition 6

32. Schedule 2, paragraph 6(1) provides a condition for processing personal data where;

"The processing is necessary for the purposes of the legitimate interests pursued by the data controller or by a 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."

33. In the case of *House of Commons v ICO & Leapman, Brooke, Thomas* (EA/2007/0060 etc) the Tribunal took the approach that the first thing to do when applying the sixth condition was to establish whether the disclosure was **necessary** for the legitimate purposes of the recipient (the public) and then to go on to consider whether, even if the disclosure was necessary, it would nevertheless cause unwarranted prejudice to the rights and freedoms of the data subjects.
34. The Commissioner considers that in order to determine if disclosure of the information is necessary to meet the legitimate interest of the public he must balance this with the impact of disclosure such as whether it would cause an unwarranted intrusion into the private lives of the individuals.

35. The information in this case would add to public knowledge and understanding about the PSNI's use of public resources and whether there is any arrangement whereby these are being or have been used to fund the private travel arrangements of family members of senior PSNI staff. As the PSNI is accountable to the public, the Commissioner believes that any disclosure of information that increases public knowledge and understanding regarding the PSNI's use of public funds is in the public interest.
36. The Commissioner is satisfied that this legitimate public interest cannot be met by means that involve less interference and that the disclosure would not have an excessive or disproportionate adverse effect on the legitimate interests of the data subjects. He has reached this finding on the basis of the nature of the information and reasonable expectations of the data subject. He has concluded that the sixth condition of Schedule 2 of the Data Protection Act 1998 is satisfied. The Commissioner has also concluded that this processing would not be unfair. Disclosure of the personal data requested in Parts 2.2 and 2.3 of the complainant's request would constitute processing of personal data that is compliant with the first data protection principle and does not engage section 40(2).

Section 38 – Health and Safety

37. Since the Commissioner is satisfied that section 40(2) by virtue of section 40(3)(a)(i) is engaged in relation to Part 2.1 of the complainant's request he has not gone on to consider whether the PSNI was correct in its application of the section 38 exemption to that part of the request. The PSNI did not seek to apply that exemption to Parts 2.2 and 2.3 of the request.

Procedural Requirements

38. Section 1 – General right of access

Section 1 of the FOIA provides:

- “(1) 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 the information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.”

Since the PSNI did not provide the information in Parts 2.2 and 2.3 of the complainant's request to the complainant the Commissioner finds that the PSNI is in breach of section 1(1)(b) of the Act.

Section 10 –Time for compliance with request

39. Section 10 of the FOIA provides:

(1) 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.

Since the PSNI did not provide the complainant with the information in Parts 2.2 and 2.3 of his request within the requisite 20 working day time limit, the Commissioner finds that the PSNI was in breach of section 10(1) of the Act.

The Decision

40. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act in the following respects:

- The PSNI wrongly applied the exemption at section 40(2) to some of the withheld information
- The PSNI breached sections 1(1)(b) and 10(1) in its handling of the request.

Steps Required

41. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- To disclose the information in Parts 2.2 and 2.3 of the complainant's request to the complainant

42. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Right of Appeal

43. 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 13th day of December 2010

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 – General right of access to information held by public authorities

(1) 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 10 - Time for compliance with request

(1) 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.

Section 38 -Health and safety

(1) Information is exempt information if its disclosure under this Act would, or would be likely to—

(a) endanger the physical or mental health of any individual, or

(b) endanger the safety of any individual.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, have either of the effects mentioned in subsection (1).

Section 40 -Personal information

(1) 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.

(2) 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.

(3) 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 [1998 c. 29.] 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 [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] 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).

(5) 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) the 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 [1998 c. 29.] 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 [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

Data Protection Act 1998

Schedule 2 Conditions relevant for purposes of the first principle: processing of any personal data

6(1) 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.
