

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 19 January 2011

Public Authority: Independent Police Complaints Commission (IPCC)
Address: 90 High Holborn
London
WC1V 6BH

Summary

The complainant asked the IPCC (the “public authority”) to provide a full staff list to include the positions held and contact details. The public authority initially sought to provide this information as a personal disclosure only. It later disclosed most of the information but refused to disclose the remainder using the exemptions under sections 40(2) (personal information) and 38 (health and safety) of the Freedom of Information Act 2000 (the “Act”).

The Commissioner’s decision is that the exemption at section 40(2) is engaged and that disclosure would breach the Data Protection Act (the “DPA”) in some cases but not in others. He also finds that the exemption at section 38 is engaged and that the public interest in maintaining the exemption outweighs that in disclosure. The complaint is partially upheld.

The public authority’s handling of the request also resulted in breaches of certain procedural requirements of the Act as identified in this Notice.

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. The Commissioner has published guidance about the release of details about his own staff. This can be found on his website¹.

The request

3. On 23 October 2009 the complainant made the following information request:

"Under the FOIA I request a full staff list of the personnell [sic] working for the IPCC, the positions they hold and their contact details".

4. On 2 November 2009 the public authority responded. It stated:

"My reason for writing to you is in regard to your request which I note that you have made under the Freedom of Information Act (FOIA). As you may already be aware, a disclosure made under the FOIA is one which is made to the general public, and it is for this reason that I would like to ask you to withdraw your FOI request. In withdrawing your request under FOIA we will still process the request and a response will be provided to you in your personal capacity outside of the FOIA.

I would therefore be grateful for confirmation that you would either like to withdraw your FOI request and receive a response in your personal capacity instead, or whether you wish to proceed with your request under the FOIA whereby a formal response will still be provided.

Once you have confirmed how you wish to proceed only then will I process your request accordingly".

5. The complainant was dissatisfied with this response and complained to the public authority.

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http://www.ico.gov.uk/upload/documents/foi_request_responses/information_about_ico_employees.pdf

6. On 1 December 2009 the complainant first contacted the Commissioner. He advised that he believed the public authority had deliberately failed to comply with the Act.
7. On 14 December 2009 the Commissioner wrote to the public authority. He gave advice about its duty to provide a response under the Act and asked it to do so within 10 working days. The Commissioner updated the complainant on the same day.
8. On 16 December 2009 the public authority provided the Commissioner with a copy of a letter it had previously sent to the complainant on 4 December 2009. This letter apologised for the delay in responding and advised that it was undertaking a risk assessment prior to making a disclosure. It also advised the complainant that he would receive a formal response by no later than 29 January 2010.
9. On 29 January 2010 the public authority sent out its response. It advised as follows:

"I am pleased to confirm that the information requested is held by the IPCC. I attach a spreadsheet containing the information requested for your review. Please note that the IPCC reserves all rights over this information.

So as to provide to you as much information as possible, we have decided to provide the attached spreadsheet outside of the FOI Act".
10. On 3 March 2010, following further correspondence, the Commissioner wrote to the public authority and asked that it provide a formal response to the complainant in compliance with the Act.
11. On 29 March 2010 the public authority sent out its formal response. It advised that it would disclose the majority of the information requested by 19 April 2010, but that some would be withheld under the exemptions at sections 40(2) (personal information) and 38 (health and safety).
12. On 19 April 2010 the complainant again contacted the public authority. The public authority treated this as a request for an internal review which it subsequently provided on 12 May 2010.

The investigation

Scope of the case

13. Following receipt of an internal review the complainant contacted the Commissioner on 13 May 2010 raising various complaints about the public authority.
14. On 1 July 2010 and in further correspondence the Commissioner apprised the complainant of those issues which he could consider and asked him to confirm that he was satisfied with this approach. The complainant failed to agree the scope of the Commissioner's proposed investigation, and he also declined to withdraw his complaint. The Commissioner will therefore consider those issues which he believes can be properly dealt with by way of a decision under section 50(1) of the Act.
15. The Commissioner has written to the complainant separately regarding various other allegations; these are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

16. On 8 September 2010 the Commissioner commenced his enquiries with the public authority.
17. During his investigation, the public authority advised the Commissioner that it might be prepared to release further names which had been previously withheld.
18. On 30 November 2010 the public authority provided the Commissioner with details of six members of 'senior' staff which had been previously withheld. It stated that it was now prepared to disclose this information as they had returned to work. However, the Commissioner must consider the facts at the time of the request and he will therefore consider below whether or not they should have been disclosed at that time.

Analysis

Exemptions

19. Most of the requested information has now been disclosed. However, the public authority has cited the exemptions at sections 40(2) and 38 of the Act in relation to a limited number of its staff. The latter exemption has only been relied on in relation to one member of staff.

Section 40 – personal information

20. The public authority originally cited this exemption for members of its staff which it has described as either *“junior staff without public facing roles”* or those *“on long term absence”*. A number of staff in the latter category have job grades which mean that their details would have normally been deemed as suitable for disclosure by the public authority. However, as they were not *in situ* at the time of the request the public authority decided that it would ‘affect their privacy’ and their details were not therefore provided to the complainant. (There is one member of ‘senior’ staff who has been further considered under section 38 below).
21. The Commissioner will consider the release of the remaining withheld information in two separate groups, namely those staff which the public authority classed as being *“junior staff without public facing roles”* and its *“senior staff on long term absence”*.
22. The public authority’s main arguments for non-disclosure of both groups of staff centre on the application of the first data protection principle. This is because it believes that disclosure of the data in question would be unfair and would not satisfy one of the conditions for processing listed in Schedule 2 of the DPA.
23. In analysing the application of section 40(2), the Commissioner therefore considered (a) whether the information in question was personal data, and (b) whether disclosure of the personal data under the Act would contravene the first data protection principle.

Is the information personal data?

24. Personal data is defined in section 1 of DPA as data:

*“which relate to a living individual who can be identified—
(a) from those data, or*

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual".

25. The Commissioner is satisfied that the staff's details are their 'personal data'. This is because they can be readily identified by both the data controller and the public by their name.

Would disclosure contravene the first data protection principle?

26. The first data protection principle has two main components. They are as follows:

- the requirement to process all personal data fairly and lawfully; and,
- the requirement to satisfy at least one DPA Schedule 2 condition for processing of all personal data.

27. Both requirements must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data protection principle.

28. It is important to note that any disclosure under this Act is disclosure to the public at large and not just to the complainant. If the public authority is prepared to disclose the requested information to the complainant under the Act it should be prepared to disclose the same information to any other person who asks for it.

29. The Tribunal in the case of *Guardian & Brooke v The Information Commissioner & the BBC* [EA/2006/0011 and EA/2006/0013] (following *Hogan and Oxford City Council v The Information Commissioner* [EA/2005/0026 and EA/2005/0030]) confirmed that: "*Disclosure under FOIA is effectively an unlimited disclosure to the public as a whole, without conditions*" (paragraph 52)².

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http://www.informationtribunal.gov.uk/Documents/decisions/guardiannews_HBrooke_v_infocomm.pdf

Junior staff without public facing roles

30. The public authority stated the following to the complainant:

"These staff members are junior in position and do not have public facing roles and therefore the information affects their privacy... it would not be fair to process the information in respect of these staff members and none of the DPA Schedule 2 conditions apply. Specifically, I do not believe you have a legitimate interest in the information relating to these staff members".

31. The public authority further advised the Commissioner that:

"The names of staff that have not been disclosed are of low grade and perform non public facing jobs. It is a combination of these two factors ... that lead to the conclusion that their details amount to 'personal data' and that for these members of staff there is an expectation of privacy even in the professional life. It is therefore considered that the processing (in other words the release of their names), would not be fair and that even if it were fair, that none of the conditions in Schedule 2 of the DPA is satisfied. This is because disclosure would not be necessary for the purposes of legitimate interests ...".

The first data protection principle

32. The Commissioner has considered whether or not the disclosure of personal information about "*junior staff without public facing roles*" would be fair and lawful. In doing so he has considered the expectations of the persons and the degree to which the release of the information would infringe on their privacy.

33. When assessing the expectations of the data subjects the Commissioner considers it appropriate to take into account the type of information that is already in the public domain about the parties. He also gives weight to the level of detriment to the privacy of the persons that would arise were the requested information to be released.

34. The Commissioner notes that persons are named in the withheld documentation purely as a result of their professional capacity and there are no 'private' considerations regarding any of these parties. However, he also notes that the public authority has only withheld information about those junior members of staff whose roles are *not* public-facing and whose details cannot be said to already be in the public domain. The Commissioner can therefore understand that such

staff would reasonably expect their details to remain 'private' as they would not anticipate any requirement for them to be made 'public' in order for them to fulfil their occupational role.

35. Whilst the Commissioner believes that senior staff should anticipate that such information is likely to be discloseable, he also believes that more junior staff who do not normally deal directly with the public would not presume to have this information released. In line with the Commissioner's own guidance³, the public authority has determined that its own staff who fall within this category would not anticipate such disclosure.
36. Although the Commissioner considers that this information relates to individuals in a professional capacity rather than a private one, he does not consider that disclosure would be fair as such staff members would not reasonably expect their details to be placed into the public domain. Consequently he considers that it would be unfair to release staff names in these circumstances and that disclosure would breach the first data protection principle. As he finds that disclosure would breach the first data protection principle the Commissioner has not gone on to consider any schedule 2 conditions.

Senior staff on long term absence

37. A total of eleven members of staff fall within this category (information about one of whom is also considered to be exempt by virtue of section 38(1) below).
38. In its refusal the public authority advised the complainant that:

"There is also a small number of staff on long term absence and so I think the information affects their privacy also. I further consider that it would not be fair to process the information in respect of these staff members and that none of the DPA Schedule 2 conditions apply. Specifically, I do not believe you have a legitimate interest in the information relating to these staff members".

The first data protection principle

39. The Commissioner notes that details of staff of grade 10 or above have generally been deemed suitable for disclosure by the public authority.

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http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/public_authority_staff_info_v2.0_final.pdf

The Commissioner therefore concludes that the public authority understands its position with regard to the provision of the type of information requested in relation to its more 'senior' or 'public facing' staff and it has adhered to his guidance in such matters. He therefore assumes that its staff already have a general expectation that this type of information will be released.

40. The Commissioner will therefore consider whether or not there should be any different considerations for senior members of staff who are absent from work when a request for information is received by the public authority.
41. The request only seeks the positions and contact details of the public authority's staff. It does not require details of, or reasons for, any absence of its staff. The Commissioner therefore believes that the public authority could have disclosed the details of all staff falling within this group without any reference as to whether or not they were actually 'working' at the time of the request. The Commissioner presumes that their substantive or temporary job title would be available as would their contact details. He also assumes that, where a member of staff is unavailable for any reason, if someone tried to contact them their enquiry would be diverted elsewhere. Furthermore, if the public authority chose to advise the requester that the party was 'unavailable' then it would be able to do so without any requirement to give a reason for that absence.
42. The Commissioner does not consider the requested information to be of a private nature. He also believes that the public authority must be of the same opinion as it would normally disclose this information. Therefore, in line with its determination that it is ordinarily fair and lawful to disclose the requested information for this group of staff, he concludes that these staff should be treated in the same manner and that disclosure of the requested information about these staff would not breach the first data protection principle.
43. As outlined above, for third party personal data to be disclosed under the Act, disclosure not only has to be fair and lawful but also has to meet one of the conditions for processing in schedule 2 of the DPA. In this case the Commissioner considers that the most relevant condition is Condition 6. 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.”

44. In deciding whether condition 6 would be met in this case the Commissioner has considered the decision of the Information Tribunal in *House of Commons v Information Commissioner & Leapman, Brooke, Thomas* [EA/2007/0060]. In that case the Tribunal established the following three-part test that must be satisfied before the sixth condition will be met:
- there must be legitimate interests in disclosing the information;
 - the disclosure must be necessary for a legitimate interest of the public;
 - even where disclosure is necessary it nevertheless must not cause unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the data subject.
45. Other ‘senior’ staff have all had their names, job titles and contact details provided. The public authority has provided this in line with the Commissioner’s guidance.
46. The Commissioner has not identified any specific harm in releasing the remaining information of staff in this group, and he considers that the release of the withheld information would be fair. The Commissioner considers that – given the benefits of transparency and accountability – a legitimate interest arises from the disclosure on request of information by public bodies. More specifically, there is legitimate interest in the public knowing the details of the public authority’s senior staff. He again notes that the public authority has itself concluded that such information should normally be disclosed.
47. The Commissioner also finds that there is no evidence in this case that there would be unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the senior-level individuals concerned. Had the reasons for any ‘absence’ been required then he may have reached a different conclusion.

Section 38 – health and safety

48. Section 38(1) provides that –

“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.”

49. The public authority did not cite which subsection/s of sections 38 it was relying on. However, it advised the complainant that it believed disclosure of their details:

"would endanger the safety of this particular individual and that there is a legitimate need to protect them from any such danger".

50. Based on this statement, the Commissioner therefore considers that the subsection at 38(1)(b) is the appropriate one. This provides an exemption from disclosure where this would, or would be likely to, endanger safety. Consideration of this exemption is a two-stage process; for information to be withheld the exemption must first be engaged and, secondly, the public interest in the maintenance of the exemption must outweigh the public interest in disclosure.

51. The first steps in considering this exemption are to establish that the arguments advanced by the public authority are relevant to the exemption, and to whom the predicted endangerment would result.

52. The public authority has only applied this exemption to the identity of one individual. However, it did not provide any specific arguments to explain how it had come to this conclusion. It only stated to the complainant that:

"In relation to one member of staff, I have decided that their details are exempt for health and safety reasons ... I am required to consider whether the public interest in maintaining this exemption outweighs the public interest in disclosure. I have taken into account the general public interest of the IPCC being open however, this does not outweigh the fact that disclosure would endanger the safety of this particular individual and that there is a legitimate need to protect them from such danger".

It upheld this position at internal review.

53. The public authority has subsequently provided the Commissioner with further information which satisfies him that the exemption was properly engaged. This is included in a confidential annex (which has not been provided to the complainant).
54. Having considered the arguments provided the Commissioner is further satisfied that disclosure of the information would be likely to endanger the safety of an individual and therefore section 38 is engaged. The Commissioner has therefore gone on to consider the public interest test.

Public interest arguments in favour of disclosing the requested information

55. The only argument provided by the public authority to support disclosure is a general argument of 'openness'.

Public interest arguments in favour of maintaining the exemption

56. The only argument provided by the public authority to support maintaining the exemption is that disclosure would endanger the safety of the individual concerned.
57. Further information was also provided to the Commissioner during his investigation. This was provided to explain its position and it has been included in a confidential annex which has not been provided to the complainant.

Balance of the public interest arguments

58. The Commissioner accepts that there is a general public interest in disclosure and he therefore gives this argument some weight. He also considers that there is a public interest in the openness of an organisation which deals with allegations about the police service. However, the Commissioner notes that the vast majority of the requested information has already been provided to the complainant, and the public authority has only withheld the details of one staff member under this exemption. The Commissioner therefore believes that the public interest in relation to openness has already largely been met.
59. The Commissioner further considers that the public authority has demonstrated that disclosure would pose a risk to the safety of the individual concerned and he has therefore given substantial weight to this argument.
60. The Commissioner does not consider that disclosing the information requested in order to promote further openness would justify the risk to the individual's safety. Therefore, his view in this case is that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Procedural requirements

Section 1(1) and 10(1)

61. 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".*

62. Section 10(1) provides that-

'... 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.'

63. The original information request in this case was made on 23 October 2009. The public authority failed to comply with section 1(1) until 30 March 2010, therefore taking 108 working days. In failing to provide a response compliant with section 1(1), within 20 working days of receipt of the request, the public authority breached section 10(1).

64. As the Commissioner has concluded that the public authority should have disclosed the details of those 'senior' members of staff who were on 'long term absence' there were further breaches of sections 1(1)(b) and 10(1) for failing to provide this to the complainant within the statutory time limit.

Section 17(1)

65. Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,*
- (b) specifies the exemption in question, and*

(c) states (if that would not otherwise be apparent) why the exemption applies."

66. In this case the public authority issued its refusal notice later than the 20 working day limit. Accordingly, the Commissioner finds a breach of section 17(1).
67. The public authority failed at any time to state which subsection/s of section 38 it was relying on. In doing so it breached section 17(1)(b). It also failed to provide an adequate public interest test in respect of the exemption at section 38, breaching section 17(3)(a).

The Decision

68. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act.
- It properly withheld 'junior' staff details under the exemption in sections 40(2).
 - It properly withheld one 'senior' member of staff's details under the exemption in section 38(1).
69. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act.
- It failed to respond under the Act within 20 working days thereby breaching sections 10(1) and 17(1).
 - It failed to cite which subsection of section 38 it was relying on thereby breaching 17(1)(b).
 - It failed to provide an adequate public interest test in respect of the exemption at section 38, again breaching section 17(3)(a).
 - It failed to disclosed details of 'senior' members of staff thereby breaching sections 1(1)(b) and 10(1).

Steps required

70. The Commissioner requires the public authority to release the details of the ten members of senior staff which were withheld due to 'long term absence'.

Failure to comply

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

Other matters

72. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following.
73. The complainant believes that the public authority has deliberately withheld staff names from him and he provided examples of two names as well as a Unit where one of these members of staff worked. The public authority subsequently provided satisfactory reasons to the Commissioner for these omissions. The Commissioner also notes that, in any event, these names were actually provided to the complainant in its first formal response under the Act. The Commissioner therefore accepts that there was no deliberate attempt to conceal data, but rather a simple human error.
74. The Commissioner also notes that it is likely that, in an organisation of over 400 staff, staff details may change on a daily basis and any 'lists' are only ever likely to be accurate for a small window of time.

Right of Appeal

75. 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 19th day of January 2011

Signed

**Jon Manners
Group Manager**

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

Legal annex

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

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.