Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 March 2016

Public Authority: Commissioner of the Metropolitan Police Service

Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant requested a transcript of the public disciplinary hearing of a dismissed police officer. The Metropolitan Police Service (the "MPS") initially advised that no information was held. Subsequently it refused to provide any information on the grounds of sections 31(1)(g) (law enforcement) and 40(2) (personal information) of the FOIA. During the Commissioner's investigation this was revised to section 40(5), an exclusion to the duty to confirm or deny whether the information is held. The Commissioner's decision is that the MPS cited section 40(5) correctly so it was not obliged to confirm or deny whether the requested information was held. No steps are required.

Background

2. The request can be followed on the "What do they know" website[1].

3. Reference is made to a public disciplinary hearing. Some details regarding this can be found on the MPS website[2].

[1] https://www.whatdotheyknow.com/request/disciplinary_hearing_transcript#outgoing-487375

4. Some helpful information about public disciplinary hearings in general can be found on the Independent Police Complaints Commission website[3].

Request and response

5. On 27 August 2015, the complainant wrote to the MPS and requested information in the following terms:

> *"Please provide me with an electronic copy of the transcript of public disciplinary hearing CM/1686/13 (29th July 2015- 6th August 2015)."*

6. The MPS responded on 22 September 2015. It stated that it had undertaken searches but that no information was held.

7. The complainant asked for an internal review on specifying that it was his understanding that all such hearings would be transcribed in line with Home Office guidance.

8. Following an internal review the MPS wrote to the complainant on 24 October 2015. It revised its position saying that the requested information was held, but that it was exempt by virtue of sections 40(2) and 31(1)(g).

9. During the course of the Commissioner's investigation this position was again revised with the MPS changing the exemption cited to 40(5).

Scope of the case

10. The complainant contacted the Commissioner on 25 October 2015 to complain about the way his request for information had been handled.

[2] http://content.met.police.uk/cs/Satellite?blobcol=urldata&blobheadername1=Content-Type&blobheadername2=Content-Disposition&blobheadervalue1=application%2Fpdf&blobheadervalue2=inline%3B+filename%3D%22711%2F424%2Fchair+outcome+decision+Goodenough+MHU12.pdf%22&blobkey=id&blobtable=MungoBlobs&blobwhere=1284006135768&ssbinary=true

[3] https://www.ipcc.gov.uk/sites/default/files/Documents/guidelines_reports/holding_hearings_in_public.pdf

He asked the Commissioner to consider the application of the exemptions cited.

11. During the Commissioner's investigation the exemptions relied on was changed to 40(5) and the Commissioner contacted the complainant again to allow him to submit any further arguments. The complainant advised:

> *"I still am of the view that the section 40 exemption can't be appropriate. Police disciplinary cases are heard in public. Therefore the fact that an officer may or may not have appealed a finding can't be personal data which it would be unfair to release".*

12. Following the combined cases of the Home Office v Information Commissioner (GIA/2098/2010) and DEFRA v Information Commissioner (GIA/1694/2010) in the Upper Tribunal, a public authority is able to claim a new exemption or exception either before the Commissioner or the First-tier Tribunal and both must consider any such new claims.

13. The analysis below concerns the citing of section 40(5).

Reasons for decision

14. Before considering the application of section 40(5), the Commissioner would like to make it clear that the issue at point in this notice relates to the existence of a transcript of the public hearing referred to in the request. The existence of the hearing itself is not an issue as this information already exists in the public domain.

15. Bearing in mind that the MPS initially advised the complainant that it did not hold a transcript, when asking for an internal review the complainant stated:

> *"Home Office guidance specifies that transcripts should be made of police disciplinary hearings. So either:*
> *— you are mistaken and do in fact hold the information, or*
> *— the hearing was not transcribed in accordance with the guidance, or*
> *— it is currently in the process of being transcribed but the transcript is not yet ready. I would have expected you, under section 16 of the FOIA, to confirm which of these is the case".*

16. It is therefore clear that the complainant believes that a transcript of the hearing will be made as a matter of course. However, during the course of the Commissioner's investigation it became apparent that this is not the case. The MPS therefore advised the complainant as follows:

"Having further researched the processes, the MPS has now determined that whilst hearings are indeed recorded, transcripts are not routinely made. Therefore, although you understood this to be the case I can confirm that it is not. A hearing will generally only be transcribed when an officer wishes to appeal the decision. Accordingly, for the MPS to acknowledge the existence of a transcript for the purpose of this request, this would reveal whether or not the officer concerned has or has not appealed the decision of the misconduct hearing to a Police Appeals Tribunal. Such a disclosure would, the MPS contends, be unfair, and breach the First Data Protection Principle and thereby breach an officers' right to privacy"."

17. Therefore the point being considered here is whether or not the MPS is obliged to confirm if it has been necessary to create a transcript of the hearing in question.

Section 40 – personal information

18. The consequence of section 40(5)(b)(i) is that if a public authority receives a request for information which, if it were held, would be the personal data of a third party (or parties), then it can rely on section 40(5)(b)(i) to refuse to confirm or deny whether or not it holds the requested information.

19. Consideration of section 40(5) involves two steps: first, whether providing the confirmation or denial would involve the disclosure of personal data, and secondly, whether disclosure of that personal data would be in breach of any of the data protection principles.

Is the information personal data?

20. The first step for the Commissioner to determine is whether providing the confirmation or denial would involve a disclosure of personal data, as defined by the Data Protection Act 1998 (the "DPA"). If it would not, then section 40(5) cannot apply.

21. The DPA defines personal data as:

"…data which relate to a living individual who can be identified
a) from those data, or
b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."

22. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

23. The requested information clearly relates to a named police officer. The Commissioner is therefore satisfied that confirmation or denial as to the existence of a transcript would involve a disclosure of his personal data.

Would confirmation or denial breach the first data protection principle?

24. The first data protection principle states -

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

25. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions. If disclosure would fail to satisfy any one of these criteria then the information is exempt from disclosure.

26. The Commissioner has first considered whether disclosure would be fair. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:

- the individual's reasonable expectations of what would happen to their information;
- the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned);
- any legitimate interests in the public having access to the information; and,
- and the balance between these and the rights and freedoms of the individuals who are the data subjects.

27. The Commissioner recognises that an employee will have an instinctive expectation that the MPS, in its role as a responsible data controller, will not disclose certain information about them and that it will respect their confidentiality. In this respect, the MPS would be expected to only process the information in line with their expectations and rights.

28. As to the consequences of disclosure upon a data subject the question – in respect of fairness - is whether disclosure would be likely to result in unwarranted damage or distress to that individual. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the withheld information. He will also take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public at large, without conditions.

29. Given the nature of the request, and the sensitivity of the subject matter, the Commissioner considers that disclosure in this case could lead to an intrusion into the private life of the individual concerned and the consequences of any disclosure could cause damage and distress to the officer because he would not expect the MPS to reveal whether or not he was making an appeal.

30. Notwithstanding a data subject's reasonable expectations or any damage or distress caused, it may still be fair to disclose information, or in this case confirm or deny if information is held, if there is a more compelling public interest in doing so. Therefore the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in confirming or denying if the information is held.

31. The Commissioner would stress that this is a different balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Given the importance of protecting an individual's personal data the Commissioner's 'default position' is in favour of protecting the privacy of the individual. The public interest in confirming if information is held must outweigh the public interest in protecting the rights and freedoms of the data subject if providing confirmation or denial is to be considered fair.

32. The interest in disclosure must be a public interest, not the private interest of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.

33. The Commissioner acknowledges that public hearings in respect of police disciplinary matters is of obvious interest to the wider public as it demonstrates transparency in matters which used to be heard only in private. However, in this case the hearing has now been conducted, interested parties attended the hearing, the findings were made public and the officer was dismissed. The Commissioner therefore considers that the public interest in this matters has already been met. Whilst there may be some further interest in knowing the result of any appeal that may go ahead, whether or not the officer has appealed is only of limited interest as he has already been dismissed.

34. In light of the nature of the information and the reasonable expectations of the individual concerned, the Commissioner is satisfied that confirming or denying if the requested information is held would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the officer. He considers these arguments outweigh any legitimate interest in disclosure. He has therefore concluded that confirmation or denial in this case would breach the first data protection principle. He therefore finds the exemption at section 40(5) is engaged and the duty to confirm or deny did not arise.

35. As the Commissioner has determined that it would be unfair to confirm or deny if the information is held, it has not been necessary to go on to consider whether this is lawful or whether one of the schedule 2 DPA conditions is met.

Right of appeal

36. 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,
    LEICESTER,
    LE1 8DJ

    Tel: 0300 1234504
    Fax: 0870 739 5836
    Email: GRC@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

37. 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.

38. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed ……

Carolyn Howes
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