

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 June 2010

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

Summary

The complainant made two requests to the Police Service of Northern Ireland (PSNI) for information relating to travel arrangements made by or on behalf of the son of the then Chief Constable. The PSNI refused to confirm or deny whether it held the requested information, citing the exemption at section 40(5) (third party personal data). The Commissioner considers that section 40(5) has been incorrectly applied in this instance and the PSNI is required to confirm or deny whether it holds information relating to the first request and to consider the second request accordingly.

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 (the PSNI):
 - "1. Was any flight (to any destination) arranged or booked by PSNI or its travel agent for [the then Chief Constable]'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 [the then Chief Constable]'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 [the then Chief Constable]'s son and
 - (d) whether such reimbursement was made and, if so, when."
3. On 6 March 2008 the PSNI responded to the complainant. The PSNI refused to confirm or deny whether it held information relevant to the first request, in reliance on the exemption at section 40(5) of the Act and by implication didn't provide a response to the second request.
4. On 10 April 2008 the complainant requested an internal review of the PSNI's response to his request.
5. On 20 May 2008 the PSNI wrote to the complainant. The PSNI stated that it was upholding the refusal on the basis of section 40(5) and was also applying the exemption at section 38 of the Act (health and safety) in respect of the second request.

The Investigation

Scope of the case

6. On 26 May 2008 the complainant contacted the Commissioner to complain about the way his requests for information had been handled. The complainant advised the Commissioner that he was not satisfied with the reasons given by the PSNI for refusing to provide him with the information he requested. Given that the response to the second request is dependent upon the PSNI's confirmation or denial about whether it holds information in relation to the first request, the

Commissioner has only dealt with the first request in his investigation and analysis. As section 38 was only cited in relation to the second request the Commissioner has not considered it further in this decision notice. His analysis has focused on section 40(5) and whether confirmation or denial of whether information relevant to the first request was held would have breached the first or second data protection principles. However, in view of his conclusions regarding the first request, the Commissioner has ordered steps in relation to the second at the end of this Notice.

Chronology

7. Regrettably there was a substantial delay prior to the case being allocated for investigation due to a backlog of complaints at the Information Commissioner's Office. However PSNI was contacted on 8 May 2009 in order to discuss its handling of the complainant's first request.
8. In an exchange of email correspondence between 18 and 30 September 2009 the PSNI replied to the Commissioner providing its submissions in support of its decision to refuse to confirm or deny whether information relevant to the first request was held.
9. Following a change in the Commissioner's staff the Commissioner contacted the PSNI on 13 April 2010 to clarify some additional issues. The PSNI replied on 29 April 2010.

Analysis

Exemptions

Section 40(5)(b)(i) – personal data and the exclusion from the duty to confirm or deny

10. Section 40 provides an exemption from the right of access for 'personal data' in certain circumstances. In relation to a request for personal data of an individual other than the applicant, section 40(5)(b)(i) excludes a public authority from complying with the duty to confirm or deny whether it holds the requested information in particular circumstances.
11. A full text of section 40 of the Act is available in the Legal Annex at the end of this Notice. Section 40(5)(b)(i) states:

“The duty to confirm or deny –

(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 1(1)(a) would (apart from this Act) contravene any of the data protection principles...”

12. Therefore, in this case the Commissioner must consider two issues. Firstly if confirming or denying whether the information is held would disclose the personal data of an individual other than the applicant (third party personal data). If this is the case, the Commissioner must then consider if confirming or denying whether the information is held would contravene any of the data protection principles.

Would the information in question be third party personal data?

13. Personal data is defined at section 1(1) of the Data Protection Act (DPA) as:

“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”.

14. The Commissioner notes that the complainant requested information relating to flights made by the son of the then Chief Constable of the PSNI. Confirming or denying whether information was held would in itself reveal information to the public about that individual and therefore the Commissioner is satisfied that it would result in the disclosure of his personal data. Furthermore, whether information exists is likely to depend upon terms associated with the Chief Constable’s employment and therefore the Commissioner is satisfied that confirmation or denial in this case would also result in disclosure of his personal data. The Commissioner therefore considers that the first test set out in paragraph 12 above is satisfied.

Would confirming or denying whether the information is held contravene any of the data protection principles?

15. The PSNI stated that the first and second data protection principles would be breached by confirming or denying whether the requested information was held.
16. The first data protection principle states that personal data shall be processed fairly and lawfully, and in this sense processing includes confirming or denying whether relevant information is held. In order to comply with the first data protection principle the confirmation or denial must also meet one of the conditions in Schedule 2 of the DPA.

Fairness

17. When considering if the confirmation or denial would be unfair and therefore breach the first data protection principle the Commissioner has considered the following factors:
 - The reasonable expectations of the individual(s) in terms of whether the public authority would confirm or deny. Such expectations could be shaped by:
 - o what, if anything, the public authority may have told them about how any information that may be held about them would be handled
 - o their general expectations of privacy, including the effect of Article 8 European Convention on Human Rights (ECHR);
 - o the nature of the information that the public would glean if the public authority were to confirm or deny;
 - o particular circumstances of the case, e.g. established custom or practice within the public authority; and
 - o whether the individual(s) have consented to the confirmation or denial or conversely whether they have explicitly refused.
 - The consequences of disclosure, i.e. what damage or distress the individual(s) would suffer if the public authority was to confirm or deny whether information was held?
18. Furthermore, notwithstanding a data subject's reasonable expectations or any damage or distress caused to them by confirmation or denial, the Commissioner believes that it may still be fair to confirm or deny 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 confirming whether the requested information is held.

Reasonable expectations of the data subjects

19. A data subject's general expectations are likely, in part, to be influenced by generally accepted principles of interaction and social norms, such as the right to privacy, as enshrined in Article 8 of the ECHR. However, transparency and openness in relation to disclosure of information is also an inherent part of today's society and culture. Therefore, an individual's expectation of privacy must be balanced against that culture of openness and transparency.

20. 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 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).

21. The requested information relates to travel arrangements of the then Chief Constable's son. The Commissioner considers that the Chief Constable's son is a private individual, not an employee of the PSNI, and as such he does have some right to keep his private life private and not subject to public scrutiny. Furthermore, the Commissioner accepts that the Chief Constable has some rights to private family life. However, these rights must be balanced against the fact that, confirmation or denial would reveal information about 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 confirmation or denial are relevant.

22. The Commissioner notes that the then Chief Constable does not wish the PSNI to confirm or deny whether it holds information relevant to the complainant's request. 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 the confirmation or denial. Therefore the Commissioner does not know the views of one of the data subjects regarding potential disclosure of his personal data.

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

23. In cases where the consent of the data subject(s) to disclosure of his or her personal data has been refused, the Commissioner will take into account their views. The Commissioner considers these views to be reflective of the expectations of the data subject(s) in relation to the information, however refusal of consent is not absolutely determinative in the Commissioner's decision as to whether or not that information should be disclosed.
24. It is the Commissioner's view that, given that the request relates to information regarding the PSNI's potential use of public resources to arrange 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 considers 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 that the public authority to confirm or deny whether information was held in the circumstances.
25. The public authority has also suggested that whether information was held would likely be dependent upon terms associated with the Chief Constable's employment which would have been negotiated privately. Furthermore the Chief Constable would not expect the public authority to confirm or deny whether information was held if to do so may reveal the details of any such terms. Whilst the Commissioner accepts that this may be a legitimate expectation regarding confirmation or denial relating to some information, in his view it would not reasonably extend to circumstances where the confirmation or denial would reveal details related to the use of public resources as specified in the request. This is particularly the case given the increased expectation amongst the public regarding the level of transparency that is needed surrounding public expenditure and the application of public resources following the Act's implementation and the experience of its first three years of being in force.

Consequences of disclosure –damage or distress to the data subject

26. The Commissioner has considered the potential damage or distress to the Chief Constable and his son if the public authority were to confirm or deny whether it holds information relevant to the first request. He acknowledges that this would reveal some information about the Chief Constable's family life and may provide limited information about the terms on which he was employed. However this would be limited in

terms of detail with the focus primarily on the way in which public resources have been used. In the Commissioner's view revealing such information would result in very limited, if any, damage or distress to either the Chief Constable or his son.

Legitimate interests of the public

27. Notwithstanding the expectation of the data subjects regarding confirmation or denial, the Commissioner must look at whether there is a legitimate interest in the public knowing whether relevant information is held. He must balance this against the impact that confirmation or denial would have on the data subjects and determine whether it would cause an unwarranted intrusion into their lives.
28. Whilst the Commissioner accepts that the information that could be gleaned from the confirmation or denial in this case may be somewhat limited, he nevertheless considers that it would further the accountability and transparency of PSNI in relation to its use of resources. In his view the legitimate interest in the public having access to such information in this case is significant. Greater transparency in this regard furthers public confidence in, and understanding of, the decisions taken by public authorities. The confirmation or denial would simply reveal whether or not the Chief Constable's son, possibly as a result of his father's terms of employment, had benefited from public resources by having his travel arrangements organised by PSNI. Though this may result in some limited intrusion of privacy, given the link to the use of public resources, the Commissioner does not consider that this would be unwarranted in this case.

Schedule 2 Condition 6

29. As explained above, in order to comply with the first data protection principle, personal data cannot be processed unless one of the conditions in Schedule 2 of the DPA is satisfied. In this case the Commissioner considers the sixth condition to be relevant. This states that the processing must be:

"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 the legitimate interests of the data subjects".

30. The Commissioner considers that his comments above regarding the legitimate interests of the public balanced against any unwarranted

interference to the data subjects deal with the first and last parts of the test in the sixth condition. Therefore he has considered whether it is necessary to confirm or deny in this case when considering the sixth condition.

31. The Commissioner accepts that the then Chief Constable's son is not a public figure, nor is he employed by the PSNI. He notes that the Chief Constable's expenses have been disclosed to the public to assure them of his personal probity and to further transparency and accountability for public expenditure. However, the Commissioner nevertheless considers that there is a legitimate interest in greater transparency about possible use of public resources to benefit the Chief Constable's family for the reasons given above. He is unaware of any information that has been made available to the public to satisfy those legitimate interests to date. In his view, the need for openness and greater transparency to ensure public confidence is such that the confirmation or denial in this case is necessary.
32. In view of the above, the Commissioner is satisfied that confirming or denying in this case would meet the sixth condition in schedule 2 of the DPA.

Lawfulness

33. As mentioned above, the first data protection principle also requires that personal data is processed lawfully. Although not defined in the DPA, the Commissioner's Guide to Data Protection (http://www.ico.gov.uk/for_organisations/data_protection_guide/principle_1_processing_personal_data_fairly_and_lawfully.aspx) states that the term 'lawful' refers to statute and to common law, whether criminal or civil. In this case the Commissioner has not been provided with any information, nor has he identified any evidence, to demonstrate that confirmation or denial in this case would be unlawful. In particular the public authority has not provided evidence to illustrate that confirmation or denial would breach any statutory bar, a general duty of confidence or that it would breach an enforceable contractual agreement. Therefore, on the basis of the information available, the Commissioner has concluded that confirmation or denial in this instance would be lawful.

The second data protection principle

34. The second data protection principles states that personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

35. The PSNI has cited the second data protection principle when communicating to the complainant the result of its internal review. However, it has not advanced any arguments to the Commissioner in relation to that principle.
36. The Commissioner, being mindful of his responsibilities as a Data Protection regulator, has considered whether there is any clear evidence that confirmation or denial by the PSNI would breach the second data protection principle. He has found no such evidence and has therefore not further considered the second principle further in this case.

Conclusion

37. In light of all of the above the Commissioner has concluded that the PSNI could have confirmed or denied whether it holds information relevant to the first request without breaching the first or second data protection principles. Therefore he considers that the PSNI has incorrectly applied the exemption at section 40(5)(b)(i) in refusing to confirm or deny whether information relevant to the first request is held.

Procedural breaches

38. In failing to confirm or deny whether information relevant to the first request was held within twenty working days of the request the public authority breached sections 1(1)(a) and 10(1) of the Act.

The Decision

39. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act. It incorrectly applied the exemption in section 40(5)(b)(i). In failing to confirm or deny whether information relevant to the first request was held the public authority breached sections 1(1)(a) and 10(1) of the Act.

Steps Required

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

- Confirm or deny whether or not it holds information in relation to the first request.
 - If PSNI confirms that it does hold such information, the Commissioner requires it to consider the second request (having regard to the circumstances which existed at the time it was originally made on 2 February 2008) and either disclose any relevant information or issue a refusal notice in accordance with section 17 of the Act.
41. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

42. 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.

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 29th day of June 2010

Signed

**Jo Pedder
Group Manager**

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

Legal Annex

Freedom of Information Act 2000

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

Part I

1) In this Act, unless the context otherwise requires—

“personal data” means 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;

Schedule 1

The first principle states that:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

The second principle states that:

Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any many incompatible with that purpose or those purposes.

Schedule 2

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

1. The data subject has given his consent to the processing.
2. The processing is necessary— (a) for the performance of a contract to which the data subject is a party, or (b) for the taking of steps at the request of the data subject with a view to entering into a contract.
3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.
4. The processing is necessary in order to protect the vital interests of the data subject.
5. The processing is necessary—
 - (a) for the administration of justice
 - (b) for the exercise of any functions conferred on any person by or under any enactment
 - (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department
 - (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.
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.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.

European Convention on Human Rights

Article 8

Article 8(1) states that:

“Everyone has the right to respect for his private and family life, his home and his correspondence.”