



**Tribunals Service**  
Information Tribunal

**Information Tribunal Appeal Number: EA/2007/118**  
**Information Commissioner's Ref: FS50162201**

**Heard at 45 Bedford Square, London WC1B 3DN**  
**On 25 July 2008**

**Decision Promulgated**  
**5 August 2008**

**BEFORE**

**CHAIRMAN**

**Murray Shanks**

**and**

**LAY MEMBERS**

**Henry Fitzhugh and Ivan Wilson**

**Appeal no EA/2007/118**  
**Between**

**STAFFORD FREEBORN**

**Appellant**

**and**

**INFORMATION COMMISSIONER**

**Respondent**

**and**

**SUSSEX POLICE**

**Additional Party**

**Representation:**

For the Appellant: in person  
For the Respondent: Holly Stout  
For the Sussex Police: Michael Gleeson

**Decision**

The Tribunal allows the appeal in part and substitutes the following decision notice in place of the decision notice dated 16 October 2007:

**Information Tribunal**

**Appeal Number: EA/2007/118**

**SUBSTITUTED DECISION NOTICE**

**Dated 5 August 2008**

**Public authority: Sussex Police**

**Address of Public authority: Police Headquarters, Malling House, Church Lane,  
Lewes, East Sussex BN7 2DZ**

**Name of Complainant: Stafford Freeborn**

**The Substituted Decision**

For the reasons set out in the Tribunal's determination, the substituted decision is as follows:

- (1) In relation to the first request, there was no information held by the Sussex Police of the description specified in the request and the Sussex Police therefore dealt with it in accordance with Part I of the Freedom of Information Act 2000;
- (2) In relation to the second request, the Sussex Police held information of the description specified in the request, in particular relating to the complaint made by Mr Freeborn in 2003 but, in view of the undertaking set out below, no determination is made as to whether or not that information is exempt information by virtue of section 40(1) of the Act;

- (3) In relation to fifth request, the Sussex Police held information of the description specified in the request, namely the contents of the Major Incident Register relating to Mr Freeborn's case, and they failed to deal with the request in accordance with Part I of the Act by failing to provide him with a reasonable opportunity to inspect that Register.

### **Action Required**

On the undertaking of the Sussex Police to supply Mr Freeborn with copies of any files which are found as a result of the searches mentioned at (a) and (b) below as soon as possible, they are required to take only the following steps:

- (a) to make all reasonable searches with a view to finding the paper file relating to Mr Freeborn's complaint logged on the Centurion system under reference MI47/03;
- (b) to make a reasonable search in the office of the Chief Constable to find that or any other file containing information of the description specified in Mr Freeborn's second request;
- (c) to supply Mr Freeborn with a copy of the Major Incident Register relating to his case redacted only so as to exclude information which their Information Compliance Manager reasonably concludes to be exempt by virtue of section 40(2) of the Act.

Those steps are to be taken by 4.00 pm on 5 September 2008.

Dated this 5<sup>th</sup> day of August 2008

Murray Shanks  
Deputy Chairman, Information Tribunal

## **Reasons for Decision**

### **Introduction**

1. On 28 November 1998 Mr Freeborn was convicted of wounding with intent following an incident which took place on 10 December 1997 at a house in Brighton and was sentenced to seven years imprisonment. He contends that he was wrongly convicted in that he was acting in self-defence and he complains bitterly about the way the Sussex Police conducted the case and have continued to behave. He says, in particular, that they interfered in some way with a tape of a 999 call made by a witness to the incident which was a crucial piece of evidence at trial. As a consequence he has since 2000 made many complaints to the Sussex Police and the Police Complaints Authority (CPA) and, since 2005, he has also made many requests for information from the Sussex Police, relating in particular to the 999 tape and the way his complaints have been handled.

2. Mr Freeborn complained to the Information Commissioner under section 50 of the Freedom of Information Act 2000 that five such requests for information which the Sussex Police had not complied with had not been dealt with in accordance with Part I of the 2000. By a decision notice dated 16 October 2007 the Information Commissioner decided that, in so far as the information requested was held by the Sussex Police, it was all “personal data” of which Mr Freeborn was the data subject and thus exempt under section 40(1). Mr Freeborn appealed to this Tribunal against that decision notice on the grounds that the information requested was not his “personal information”. At a preliminary hearing held on 1 February 2008 Mr Freeborn agreed that his third and fourth requests for information (as identified in the decision notice) were not worth pursuing and they no longer feature in the appeal but the appeal has proceeded to a full hearing in relation to the first, second and fifth requests.

3. The Commissioner’s decision that all the information requested was exempt under section 40(1) was unsatisfactory in our view for the following reasons:

- (1) the Sussex Police had not themselves relied on that particular exemption (at least in relation to the three requests we are now concerned with) and were not obliged to rely on it;

(2) the Commissioner made no investigation or findings as to what information was held by the Sussex Police coming within the requests although it was by no means clear from the requests themselves that the information requested was necessarily going to constitute Mr Freeborn's personal data;

(3) the Commissioner made no findings in relation to other exemptions which had been relied on by the Sussex Police.

4. Ms Stout fairly accepted on behalf of the Commissioner that the decision was flawed at least to the extent that reliance should not have been placed on section 40(1) without the Commissioner having first established what information coming within the terms of each request was in fact held. She accordingly invited the Tribunal to consider that question first and then to consider the question of whether any exemptions applied in the light of the answer and we propose to follow that approach in relation to each of the three outstanding requests in turn.

#### **First request**

5. This request was contained in a letter dated 10 January 2005. The letter stated that Mr Freeborn's solicitor, Stephanie Dale, had been told in 2000 that the sealed copy of the tape of the 999 call had been removed from the police's evidence stores and destroyed. Mr Freeborn asked to be informed who had removed and destroyed the tape, when it had been destroyed and the name and rank of the officer who authorized the destruction. It was common ground at the hearing that the tape being referred to by Mr Freeborn in this request was the sealed "master copy" on cassette, which would have been recorded from the original reel-to-reel tape made by the police of all 999 calls and retained in the police's media registry, as opposed to the "working copy" of the reel-to-reel tape which is used for the purposes of the criminal investigation and trial.

6. The factual premise on which this request is based is obviously that the sealed copy of the tape had in fact been destroyed by the Sussex Police before 2000. The only evidence in support of that proposition produced by Mr Freeborn was a letter dated 13 August 2002 from Ms Dale to the Criminal Case Review Commission (CCRC) in which she stated that she had consulted her archived file which contained a note of a telephone conversation she had had with a police officer (Ken Probert) on 5 May 2000 in which she had written "master tapes-no longer exist". She also stated in the letter that she had a

vague recollection that she was told on another occasion that the original tapes had been destroyed; she had not made a note of this conversation although she thought it had happened on 12 June 2000 at Brighton Police Station when she was shown the copy tapes by Officer Probert. This evidence in our view is far too thin to be the basis for a finding that the police had destroyed the master copy of the 999 tape (let alone that they would have had recorded information about that destruction), particularly in view of the evidence from Mr Burtenshaw (the Sussex Police's Information Compliance Officer) to the effect that the original reel-to-reel tape of all 999 calls would have been recorded over shortly after the relevant parts had been recorded onto cassette, which may have led to confusion in Ms Dale's mind as to what she was being told.

7. Any residual doubt we may have had about this matter was removed when Mr Freeborn produced in the course of the hearing a picture of a cassette tape which he had taken while it was in the CCRC's possession some time after they became involved in his case in September 2004. Mr Burtenshaw told us that he was quite sure that this was a picture of the master copy of the 999 tape. Mr Freeborn did not really dispute that evidence and we are satisfied that it is correct. The consequence must be that there was in fact no basis for his first request and that the information he was seeking can never have been held by the Sussex Police.

8. We note that the Sussex Police's letter in response to the first request (which was dated 11 February 2005 following a letter of clarification from Mr Freeborn received on 8 February 2005) stated that the "original copy of [the 999] tape is currently in the possession of the [CCRC]". This is precisely the position as we have found it to be: the information requested was never held by the Sussex Police. There was therefore never any reason for the Commissioner to introduce section 40(1) into the debate but, since he did so, we should say that we cannot see how the information requested could possibly have constituted Mr Freeborn's personal data (as that expression is construed in *Durant v FSA* [2003] EWCA Civ 1746) and we are satisfied that the Commissioner was wrong on any view to cite section 40(1). This is simply because we cannot see that information about the destruction by the Police of a tape of a 999 call about an incident in which Mr Freeborn was involved can be said to be "biographical" in any significant sense or sufficiently focussed on Mr Freeborn to constitute his personal data.

## Second request

9. By letter dated 28 April 2005 Mr Freeborn sought copies of all documents relating to the investigation of three complaints he had made about the Sussex Police to the CPA and the reasons given by the Sussex Police justifying the failure to record those complaints. Two of the complaints were made in 2000 and one in 2003 and the letter identifies the complaints by the reference numbers D2000/135/100081, D2000/135/100938 and D2003/102167; Mr Freeborn clarified before the Tribunal that these reference numbers were provided by the PCA rather than the Sussex Police. We accept, and it does not appear ever to have been disputed, that Mr Freeborn made those complaints to the CPA and that there must have been some written communication between the CPA and the Sussex Police arising out of them.

10. The Sussex Police's response to this request contained in a letter dated 31 May 2005 was that they were not obliged to supply the information by virtue of sections 30(1) and (2), 38, 40(2) and 41 of the Act. It was not suggested that they did not hold the information requested. As we have already indicated the Commissioner's decision notice makes no finding as to what information covered by the request was in fact held at the time of the request and the Tribunal must therefore address this matter first.

11. As we have already indicated, we are satisfied that there must once have been information held by the Sussex Police coming within the terms of the request relating to all three complaints. However, Mr Burtenshaw's evidence (at para 22 of his statement dated 28 April 2008) was that no information coming within the request is now held: the computer data base on which complaints are logged (known as Centurion) had been searched and (apart from two later irrelevant complaints) the only reference to Mr Freeborn was a miscellaneous entry in 2000; there was no entry relating to 2003 and any files relating to miscellaneous entries are normally destroyed after three years.

12. We accept Mr Burtenshaw's evidence that files relating to such miscellaneous entries are normally destroyed after three years (though we must express some surprise at the shortness of the period they are kept): it follows from this that we find that by 2005 the Sussex Police may well have destroyed any records of information coming within the terms of the request relating to the two complaints made in 2000.

13. That would not apply to the complaint made in 2003, however, and there was a significant development in the course of the hearing relating to this complaint. Mr Freeborn produced a copy of a letter written to him by a Chief Superintendent Pople of the Professional Standards Department of the Sussex Police during 2004 which he said (and there was no reason to doubt) had been written in response to the 2003 complaint. Although this letter should have been attached to Mr Freeborn's witness statement in accordance with the directions the Tribunal issued in February 2008, in view of its significance and the fact that Mr Freeborn is unrepresented and had referred to the letter at an earlier stage in the proceedings, we allowed him to put it in evidence. The letter bore a Sussex Police reference "030047MI" and Mr Burtenshaw was able to ask by phone for a further search to be carried out of the Centurion system by reference to that number (he told us it should have been "MI47/03" and that it clearly related to a complaint made in 2003). That search revealed that there was indeed an entry relating to the 2003 complaint on the Centurion system which had been missed on the previous search, and, more importantly, that the paper file relating to the complaint had been sent to the Information Compliance Manager's office (albeit while his predecessor was in post).

14. In light of this development Mr Burtenshaw undertook to carry out a detailed search of his office in order to find this file and to supply a copy to Mr Freeborn under the Data Protection Act 1998 (but waiving any fee); it follows that he would not seek to rely on any of the sections of the Freedom of Information Act 2000 originally relied on by the Sussex Police to which we refer in para 10 above but does maintain that the exemption in section 40(1) of the 2000 Act would apply, which position the Information Commissioner also maintained. At the invitation of the Tribunal he also undertook to make reasonable inquiries of the Chief Constable's office to see if any relevant files were held there, a step which had yet to be taken, and (by inference) to supply Mr Freeborn with copies of anything found on the same basis. Although the Tribunal has obviously not seen any files produced as a result of Mr Burtenshaw's further searches and cannot therefore make any finding at this stage as to whether the contents are in fact exempt information under section 40(1) of the 2000 Act, we are content to dispose of the appeal on the basis proposed which is reflected in our substituted decision notice.



## **Fifth request**

15. This request was made by letter dated 11 January 2007; in it Mr Freeborn explained that he was seeking the exact details and provenance of a cassette tape which was an exhibit in his criminal case and bore the reference FA/216/97 and that there were two bound books held by the police which he understood would contain such details, namely the “Major Incident Register” and the “G-83 Book”. The letter ended by stating that he would be grateful for arrangements to be made for him to come and inspect these records. It is clear from the correspondence that the Sussex Police were confused as to exactly what information Mr Freeborn was requesting (and the confusion has continued throughout the appeal) but it seems to us that a fair reading of the request was that, in so far as they contained anything relevant to exhibit FA/216/97, he wanted to inspect the books themselves, something which is expressly provided for by section 11(1)(b) of the 2000 Act.

16. The initial response to this request from the Sussex Police dated 22 March 2007 stated that any G-83 Book was no longer held by them as such books are routinely destroyed after one year for found property and seven years for seized property and that, in any event, exhibits in major crime enquiries are logged in the Major Incident Register and not the G-83 Book. The Police’s letter went on to refer to two entries in the Major Incident Register relating to FA/216/97 and then to refer to the tape itself and then again to the exemptions provided by sections 30(1) and (2), 38, 40(2) and 41 of the 2000 Act. One way or another, Mr Freeborn was not offered the opportunity to inspect either of the books referred to in his request.

17. Mr Burtenshaw’s statement dated 28 April 2008 at para 14 confirmed that the G-83 book would not have contained any entry relevant to the exhibits in Mr Freeborn’s criminal case. Mr Freeborn did not dispute that and we find it to be the case: in the circumstances, it is clear that that book did not contain any relevant information and there was no basis for Mr Freeborn being entitled to inspect it.

18. As for the Major Incident Register, following a request by the Tribunal at Mr Freeborn’s behest the original was brought to the Tribunal hearing by the Sussex Police and the Tribunal members were able to inspect it for themselves. It in fact consisted of three slim orange coloured books in which a record was made of every item of property seized or created in connection with the investigation and it included two entries (of which

Mr Freeborn had already seen copies) relating to FA/216/97. At our invitation Mr Freeborn was also given this original Register to inspect in the course of the hearing and it was apparent that some of his frequently expressed suspicions concerning the entries he knew about (which we need not go into) were to an extent alleviated by that brief inspection.

19. The Tribunal invited the Sussex Police to make a copy of the whole of the Register and send it to Mr Freeborn so that he could inspect the copy at leisure. The Sussex Police's response to this was that they formally maintain that the information in the Register is exempt under section 40(1) as personal data of which Mr Freeborn is the data subject but that they would be prepared to supply such a copy subject to considering the effect of sections 40(2) and 30 of the Act and making any redactions appropriate. Having viewed the Register itself the Tribunal is not convinced that it contained any information constituting Mr Freeborn's personal data (as that expression is properly construed: see para 8 above) and we do not therefore think that the section 40(1) exemption applies. The Register clearly comes within section 30(1) of the Act; however, in our view the public interest balancing exercise required by section 2 of the Act clearly comes down in favour of disclosure given that the investigation in question ended in a conviction ten years ago, the information should have been disclosed in the course of the court proceedings in any event and Mr Freeborn has been complaining that he was wrongly convicted for many years. That leaves section 40(2) of the Act which exempts personal data relating to others in certain circumstances: on the basis of our brief look we are rather sceptical that there is anything in the Register which is exempt by virtue of section 40(2) but out of deference to Mr Burtenshaw's important responsibilities in relation data protection we think it right to give him the opportunity to consider this exemption in more detail and make any redactions which he thinks fit in the light of this decision before supplying Mr Freeborn with a copy of the Register. Our substituted decision notice reflects these conclusions.

### **Final comments**

20. It will be apparent from what is said above that there have been some unsatisfactory features in the way the Sussex Police have dealt with Mr Freeborn's requests for information: we note for example the very late discovery of the reference to the 2003 complaint (see para 13 above) and the initial reliance on a series of sections of the Act which have not featured at all since (see paras 10 and 16 above). It was also unsatisfactory that their initial approach to this appeal was simply to support the

Commissioner's reliance on section 40(1) in order not to supply any further information when they had not previously relied on that exemption and when section 7 of the Data Protection Act 1998 generally (it is of course subject to exemptions) gives a right to information covered by section 40(1). Although we acknowledge that Mr Freeborn's requests may have been confusing at times and that the approach taken by the Commissioner did not help matters, and although we make no personal criticism of Mr Burtenshaw who has assisted the Tribunal greatly, we have formed the general impression that Sussex Police's approach has been to seek to supply as little information as possible rather than acting in the co-operative and helpful spirit exhorted by section 16 of the Act. We would urge them to adopt a more co-operative and helpful approach to future requests for information.

21. We would also invite them to review the three year policy which we mention at para 12 above.

22. Our decision is unanimous.

Murray Shanks  
Deputy Chairman  
Date 5 August 2008