

## **Melling, Carl**

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**From:** Melling, Carl  
**Sent:** 07 March 2012 14:31  
**To:** 'casework@ico.gsi.gov.uk'  
**Subject:** RE: FOI complaint[Ref. FS50425760] [PROTECT -MANAGEMENT]

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Dear Sarah

### **FOIA 2000 : Section 50 Complaint Mr Martin McGartland**

I refer to your email dated 6<sup>th</sup> February in respect of the above.

I apologise for the delay in responding. I am conscious that time is moving on and I am and facing a number of demands on my time, so whilst I hope I have covered things sufficiently, please do not hesitate to come back to me if necessary.

#### **Internal Review**

The Constabulary decided to change its position with regard to reliance on Section 14 in light of the decision notices issued by the Commissioner that were published relating to the use of Section 14 by other public bodies, following the original response being provided and prior to consideration of the internal review request.

The Constabulary was also mindful of the time and effort required when seeking to satisfy the Commissioner that a request is indeed vexatious; which can be disproportionate, especially when little or no information is held. I would specifically draw upon recent experience relating to such application (EAs 2011/0278 and 2011/0015 refer). Whilst there may have been elements of the request which might have lead the Constabulary to consider that the request could be deemed vexatious, on this occasion, and in light of the above and the fact that it was understood that no information was held relevant to the request, it was considered appropriate to consider Sections 1(1)(a) and (b).

Mindful of the fact that the requestor was well known to other Forces, and the Police Service, the change in position was discussed with the ACPO Central Referral Team.

A draft response was prepared by myself. A copy was forwarded to the Chief Constable's Office.

In accordance with the Constabulary's FOIA complaints procedure a Panel was convened, which consisted of myself and Jayne Thompson, Information Compliance Manager. The response was agreed and sent.

#### **Information not held**

With regards to the first part of the request, whilst broad in scope, it would essentially constitute information held by this office in dealing with FOIA requests, or the Chief Constable's office should the Chief Constable, Steve Finnigan, have had any dealing with Sue Simm. This office had not had any contact with Northumbria Police. The Chief Constable's Office also confirmed that the Chief Constable had had no dealings with Sue Simm.

## Section 40(5)(a)(i)

The request had sought information concerning any relationship, either professional or personal, between Steve Finnigan and Sue Simm.

In light of the enquiries made with the Chief Constable's office, it was confirmed that no information was held, relating to either a professional or personal relationship. If information had been held concerning a personal relationship, then it is likely that the Constabulary would have considered reliance upon Section 40(2). The Constabulary would consider that to release any information held by the organisation about a relationship that may have existed in a social capacity between two former colleagues could be misleading and would be unfair. In particular, the Constabulary was mindful of the unfounded insuations contained within the request made by the applicant. As you will appreciate the Chief Constable fulfils a role in public office, but in considering any request it is necessary to differentiate between that role and their personal life. Even if information was held concerning his personal appointments or engagements it does not follow that his should be disclosed. In order to comply with the first principle of the Data Protection Act, it is necessary to meet a schedule 2 condition and on the face of it there would not appear to be any legitimate public interest in disclosure of the 'personal' information requested. Even if such information was held, and it was considered necessary to pursue a legitimate interest, I'd suggest that it may still have been unwarranted due to it being disproportionate and detrimental to the rights and interests of the individual. Further, this would potentially have been a breach of HRA Article 8(1).

With regards to the second principle, Constabulary policy allows for limited and reasonable use of email for personal use. Should any personal emails have been received/ sent by the Chief Constable, the subsequent processing of such would be incompatible with purposes notified for the collection and processing of personal data by Lancashire Constabulary

However, the Constabulary notes that the Commissioner has previously found that public authorities should look at whether Section 40(5)(1) should be considered and it is incorrect to refuse to supply information under Section 40(2) rather than refusing to confirm or deny (FS50197501). Accordingly, whilst no information was held, Section 40(5) was cited.

The views of the individuals were not sought, in relation to confirmation or denial. To have sought such would have delayed the response provided.

I hope this is helpful.

Regards  
Carl

**Carl Melling** LLM MBA ACIS

**Data Protection and Information Manager**  
**Lancashire Constabulary**

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**From:** casework@ico.gsi.gov.uk [mailto:casework@ico.gsi.gov.uk]  
**Sent:** 06 February 2012 10:50  
**To:** Melling, Carl  
**Subject:** FOI complaint[Ref. FS50425760]

6 February 2012

Dear Mr Melling

**Freedom of Information Act 2000**  
**Section 50 complaint from Mr Martin McGartland**  
**Your ref: 3363/11**

I am writing to advise that I have been allocated this complaint for investigation.

**The request**

The complainant made an information request to Lancashire Constabulary on 20 August 2011 via the WhatDoTheyKnow website.

On 14 October 2011 the Constabulary refused the request under section 14 of the Act. Following an internal review the Constabulary withdrew reliance on section 14. The Constabulary advised that it did not hold some of the requested information, and refused to confirm or deny whether it held the remainder of the requested information. The Constabulary cited the exemption at section 40(5) in relation to its refusal to confirm or deny whether it held information. The outcome of the internal review was communicated to the complainant on 23 November 2011.

**Scope of the investigation**

The complainant has asked the Commissioner to consider whether the Constabulary has correctly refused his request, first under section 14 and subsequently under section 40(5). In order to investigate this complaint I will require further information, which I have set out below.

**Time for response**

As you know section 10(1) provides that the statutory time for responding to a request is twenty working days. In this case the Constabulary took 38 working days to respond, which clearly exceeds the statutory time limit. I appreciate that the Constabulary explained the reasons for the delay to the complainant and I mention it only because it will need to be noted as a technical breach if a Decision Notice is issued in this case.

**Internal review**

The internal review letter of 23 November 2011 is brief, particularly in comparison to the refusal notice. It does not explain why the Constabulary decided to withdraw reliance on section 14 to refuse the request, so I would be grateful if you could provide me with full details of how the internal review was carried out, and provide copies of any documentation or notes of the decision making process.

**Information not held**

The Constabulary advised that it did not hold any information in relation to part 1 of the request. I would be grateful if you could provide me with full details of the

searches carried out which led the Constabulary to conclude that it did not hold relevant information.

### **Section 40(5)(a)(i)**

The internal review letter explains that confirming or denying whether relevant information is held would

*"The disclosure of personal information to a third party would always be considered unfair to the data subject, and is beyond the purposes for which this information would be held by the Constabulary".*

The Commissioner believes that that in many cases it will be appropriate to confirm or deny whether third party personal data is held by a public authority. The Commissioner has also produced guidance on disclosing information about public authority employees:

[http://www.ico.gov.uk/for\\_organisations/sector\\_guides/~media/documents/library/Data\\_Protection/Detailed\\_specialist\\_guides/PUBLIC\\_AUTHORITY\\_STAFF\\_INFO\\_V2.aspx](http://www.ico.gov.uk/for_organisations/sector_guides/~media/documents/library/Data_Protection/Detailed_specialist_guides/PUBLIC_AUTHORITY_STAFF_INFO_V2.aspx)

The Constabulary stated that confirming or denying whether information was held would breach the first and second data protection principles, and I will require further explanation from the Constabulary on these points.

In considering the first data protection principle the Commissioner generally focuses on fairness, with regard to the reasonable expectations of the individual(s) in terms of whether the public authority would confirm or deny that information is held. Such expectations could be influenced by:

- What, if anything, the public authority may have told them about how any information that may be held about them would be handled
- Their general expectations of privacy, including the effect of Article 8 European Convention on Human Rights (ECHR);
- The nature of the information that the public would ascertain if the public authority were to confirm or deny;
- The particular circumstances of the case, e.g. established custom or practice within the public authority; and
- Whether the individual(s) have consented to the confirmation or denial or conversely whether they have explicitly refused.

The Commissioner also considers 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?

In addition the internal review letter does not explain how the Constabulary concluded that confirmation or denial would breach the second data protection principle. The Commissioner is aware that the second data protection principle relates to the business purposes for which a data controller intends to process personal data. Public authorities do not collect personal data in order to respond to information requests and therefore there is no need for them to specify such disclosures as a purpose for which they are processing the data.

In light of the above I will need you to explain clearly how the first and second data protection principles would be contravened by confirmation or denial that information is held. Please bear in mind that I am not considering whether any information, if held, should be disclosed; I am focusing on whether or not the Constabulary ought to confirm or deny that it holds information relevant to the request. In addition, I would remind you that the test is whether confirmation or denial “would”, rather than “would be likely to” contravene any of the principles.

I would also be grateful if you could confirm whether or not you have sought consent from the individuals who may be affected by confirmation or denial. If so, please provide full details of their views, and if not, please explain why you did not seek consent.

### **Deadline for response**

I would appreciate a response as soon as possible and no later than 20 working days from the date of this letter. If the Constabulary can provide sufficiently detailed arguments then it may not be necessary for the Constabulary to confirm or deny to the Commissioner whether it holds relevant information at this stage. In the meantime, please feel free to contact me directly should you have any questions or concerns.

Many thanks for your assistance in this matter.

Regards

Sarah

**Sarah O'Cathain**          Senior Case Officer

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