

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 November 2016

Public Authority: Chief Constable of Hertfordshire Constabulary
Police Headquarters
Stanborough Road
Welwyn Garden City
Hertfordshire
AL8 6XF

Decision (including any steps ordered)

1. The complainant has requested information relating to an alleged complaint made by a third party, from Hertfordshire Constabulary ("the Constabulary"). The Constabulary would neither confirm nor deny ("NCND") holding the requested information and cited sections 31(3) (law enforcement) and 40(5)(b)(i) (personal information) of the FOIA as its basis for doing so; during the Commissioner's investigation this was revised to 40(5)(b)(i) only.
2. The Commissioner's decision is that section 40(5)(b)(i) is engaged. No steps are required.

Request and response

3. On 19 January 2016 the complainant wrote to the Constabulary and requested information in the following terms:

"I would like to request some detail regarding a complaint made by one of the victims of PC [name removed]."

On sentencing, Judge [name removed] at [location removed] Crown Court said referring to victim '[name removed]' "although this female did complain and the complaint reached an Inspector it

seems nothing was done about it. The inspector informed you of the complaint yet the misconduct continued."

This woman [name and details removed].

I would like information on the nature of [name removed]'s complaint, whether a record of it was kept, and what was done about it. Was [name removed] issued with an official warning?"

4. The Constabulary responded on 11 February 2016. It would NCND holding the requested information, and cited sections 31(3) and 40(5)(b)(i) as its basis for doing so.
5. Following an internal review the Constabulary wrote to the complainant on 18 March 2016. It maintained its position.
6. During the Commissioner's investigation the Constabulary confirmed that it was relying only on section 40(5)(b)(i).

Scope of the case

7. The complainant contacted the Commissioner on 22 July 2016 to complain about the way her request for information had been handled. She asked the Commissioner to consider the citing of exemptions saying: *"I strongly believe this information to be in the public interest. The public have a right to know whether a complaint about serious misconduct of an officer was acted on."*
8. The Commissioner will consider whether the Constabulary was entitled to NCND holding the requested information by virtue of section 40(5)(b)(i) of the FOIA.
9. It is also important to note that a request under the FOIA must be considered at the time it was made, as per section 1(4). Therefore , although the complainant advised the Commissioner that she had met the alleged victim in May 2016 and gathered further information from her, this cannot be taken into account as this was not the position at the time the request was made. Any circumstances that may have changed since that point cannot be taken into account in this investigation.

Reasons for decision

Section 40 – personal information

10. The analysis below considers section 40(5)(b)(i) FOIA. 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 NCND whether or not it holds the requested information.
11. Consideration of section 40(5) involves two steps: firstly, 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?

12. The first step for the Commissioner to determine is whether the requested information, if held, constitutes personal data, as defined by the Data Protection Act 1998 (“the DPA”). If it is not personal data, then section 40 cannot apply.
13. 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.”*
14. 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.
15. The Constabulary told the Commissioner that it considers that the information relates to both the named police officer and the alleged victim. The officer is clearly named so he is readily identifiable. The alleged victim is referred to only by her initials, and, at the time of the request, may therefore not have been identifiable.
16. In such cases, a test used by both the Commissioner and the First-tier tribunal is to assess whether a “motivated intruder” would be able to

recognise an individual if he or she was intent on doing so. The "motivated intruder" is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of re-identification of an individual from information which, on the face of it, appears anonymised.

17. The ICO's Code of Practice on Anonymisation¹ notes that:

"The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA".

18. In summary, the motivated intruder test is that if the risk of identification is *reasonably likely* the information should be regarded as personal data.
19. The requested information in this case relates to the initials of an alleged victim associated with a Court case. The Commissioner notes that the complainant subsequently met and spoke with the alleged victim about her involvement and the Commissioner is therefore satisfied that the complainant was suitably motivated in that she was able to locate the alleged victim. Accordingly, she concludes that the requested information, if held, is also the alleged victim's personal data.

Is the information sensitive personal data?

20. Sensitive personal data is personal data which falls into one of the categories set out in section 2 of the DPA. The Commissioner considers the relevant category in this instance is:

(g) the commission or alleged commission by him of any offence.

21. In this case, the request relates to what could have initially comprised an officer's misconduct, and may subsequently have related to a criminal offence. The Commissioner is therefore satisfied that any confirmation or denial as to the existence of the requested information falls under sub-section 2(g).

¹ <https://ico.org.uk/media/fororganisations/documents/1061/anonymisation-code.pdf>

22. Having accepted that the request is for the sensitive personal data of a living individual other than the applicant, the Commissioner must go on to consider whether confirming or denying if the information is held would contravene any of the data protection principles.

Would confirmation or denial breach the first data protection principle?

23. 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."*

24. 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 and, in this case, one of the DPA Schedule 3 conditions. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.
25. The Commissioner has first considered whether disclosure would be fair.
26. 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 two parties at the centre of this request have different considerations to be taken into account, one as a possible victim of crime, the other as an employee. The Commissioner will therefore consider them separately. She has considered the alleged victim first, noting that if the exemption is engaged in respect of her, it will not be necessary to go on to consider the position of the officer.

The alleged victim's position

28. The Commissioner recognises that people have an instinctive expectation that the police service, in its role as a responsible data controller, will not disclose certain information about them and that it will respect their confidentiality. This will be the case for both its own staff and members of the public which it deals with.
29. Furthermore, the Commissioner considers that, in most cases, the very nature of sensitive personal data means it is more likely that disclosing it will be unfair. The reasonable expectation of the data subject in such circumstances will be that this type of information would not be disclosed to the public.
30. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the withheld information. She will also take into account the fact that disclosure under the FOIA is effectively an unlimited disclosure to the public at large, without conditions.
31. Given the nature of the request, and the sensitivity of the subject matter, the Commissioner considers that disclosure in this case could have led to an intrusion into the private life of the individual concerned and the consequences of any disclosure could have caused damage and distress to her. Whilst the complainant has commented further to the Commissioner about the change of circumstances over the course of time - as mentioned above - the Commissioner must consider the circumstances at the time that a request is made. At that time the alleged victim was unnamed in the public domain. The Constabulary has also confirmed to the Commissioner that it had made no press releases naming the alleged victim and did not have her consent to disclose any related information, if held.
32. 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.
33. 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.

34. 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.
35. The Commissioner understands the complainant's reasons for making the request and her wanting to know whether or not an alleged complaint against a named officer was ever properly investigated by the force at the time it occurred - her belief being that, had it been properly investigated at the time, then this may have prevented the officer committing further offences. Whilst the Commissioner accepts that this is a genuine reason for making this request, it must be borne in mind that, at the time the request was made, the identity of the alleged victim had not been publicised. Clearly this may not be the case today, and a fresh request for the same information may well elicit a different response, but this was not the situation when the request was made. It could therefore be reasonably assumed that at that time of the request the alleged victim wished to remain anonymous.
36. In light of the nature of the information and the reasonable expectations of the alleged victim, the Commissioner is satisfied that, at the time of the request, 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 data subject. She considers these arguments outweigh any legitimate interest in disclosure. She has therefore concluded that confirmation or denial in this case would breach the first data protection principle. She therefore finds the exemption at section 40(5) engaged and the duty to confirm or deny did not arise.
37. 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 or Schedule 3 DPA conditions is met. Furthermore, she has not found it necessary to consider the position in relation to the officer concerned.

Right of appeal

38. 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

39. 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.
40. 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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