

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 22 September 2022

**Public Authority:** Chief Constable of West Midlands Police

**Address:** Lloyd House  
Colmore Circus  
Birmingham  
B4 6NQ

#### **Decision (including any steps ordered)**

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1. The complainant requested information relating to the number of individuals charged in relation to fraud offences.
2. West Midlands Police confirmed it held information but refused to provide it, citing sections 40(2) (personal information) and 31(1) (law enforcement) of FOIA.
3. The Commissioner's decision is that West Midlands Police is entitled to withhold this information in accordance with section 40(2) of FOIA.
4. The Commissioner requires no steps to be taken as a result of this decision.

#### **Request and response**

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5. On 26 June 2021, the complainant wrote to West Midlands Police and requested information in the following terms:

“Request 1

For each month in the financial years 2019/20 and 2020/21, please provide the number of reports of fraud passed to you from the National Fraud Intelligence Bureau (NFIB) to investigate.

Request 2

Please provide the number of individuals charged with offences in connection with the reports identified in Request 1”.

6. The request was made using the 'whatdotheyknow' website.
7. West Midlands Police responded on 13 June 2021, citing section 12 (cost of compliance) of FOIA. It did, however, provide some relevant information in scope of Request 1 as a gesture of goodwill.
8. On 31 July 2021 the complainant subsequently revised his request as follows:

“Thanks for your email of 13 July 2021 .... I therefore wish to refine Request 2 (whilst keeping Request 1 intact).

Request 2:

Please provide the number of individuals charged with offences in connection with the reports identified in Request 1 for the month of May 2019 only”.

9. West Midlands Police responded on 25 August 2021. It refused to provide the requested information, citing the following exemptions as its basis for doing so:
  - section 31 (1)(a)(b) (Law enforcement)
  - section 40 (Personal information)
10. Following an internal review, West Midlands Police wrote to the complainant on 23 September 2021 maintaining its original position.

### **Scope of the case**

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11. The complainant contacted the Commissioner on 25 September 2021 to complain about the way his refined request for information had been handled.
12. He disputes that disclosure would impede law enforcement. With regards to the application of section 40, he considers his request is for statistical information rather than personal information.
13. In support of his complaint, the complainant told the Commissioner that other police forces have provided similar information. He acknowledged, however, that in one of those cases, the figures provided were annual figures.

14. Although the Commissioner understands from the complainant that some police forces would appear to have complied with similar requests, he does not consider that this sets an automatic precedent for disclosure under FOIA. In the Commissioner's view, each case must be considered on its merits.
15. The analysis below considers West Midlands Police's application of section 40(2) of FOIA to the requested information. If the Commissioner considers that it has been incorrectly cited, he will then consider whether section 31(1) applies.

## **Reasons for decision**

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### **Section 40 personal information**

16. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
17. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
18. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
19. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

### **Is the information personal data?**

20. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
22. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
23. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
24. The Commissioner acknowledges that the withheld information in this case comprises a number, namely the number of individuals charged with offences in connection with the reports identified in Request 1, for the month of May 2019 only. He recognises that the complainant considers the information is statistical.
25. The Commissioner accepts that there are circumstances where, while an individual cannot be directly identified from the information, it may still be possible to identify them.
26. The Commissioner is satisfied that information relating to an individual charged in connection with fraud undoubtedly relates to them.
27. The second part of the test is whether the withheld information identifies any individual.
28. In this case, West Midlands Police told the complainant:

"It would be unfair to release this information where any person could be identified from the data and in this case the right to privacy outweighs any public interest in release".
29. However, it also told him, albeit in relation to its application of section 31:

"Consideration has been given to if there were a case of very high or very low number of individuals being charged with offences...".
30. The Commissioner is mindful that the issue to be considered in a case such as this is whether disclosure to a member of the public would breach the data protection principles, because an individual is capable of being identified from apparently anonymised information.
31. He accepts that different members of the public may have different degrees of access to the 'other information' needed for re-identification to take place.

32. A test used by both the Commissioner and the First-tier Tribunal in cases such as this 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 reidentification of an individual from information which, on the face of it, appears truly anonymised.
33. In summary, the test is whether the withheld information can identify an individual with a degree of certainty when it is combined with any additional information which is reasonably likely to be accessed and used to aid identification.
34. The withheld information in this case comprises the number of individuals charged with a specific type of offence in a specified month.
35. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the individual(s) concerned.
36. He has reached that conclusion on the basis that the focus of the information is the individual(s) who were charged and that information about their offending is clearly linked to them.
37. The Commissioner is further satisfied that the individuals concerned would be reasonably likely to be identifiable from a combination of the requested information and other information which is likely to be in, or come into, the possession of others, such as those with knowledge of the fraudulent activity.
38. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
39. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
40. The most relevant DP principle in this case is principle (a).

**Would disclosure contravene principle (a)?**

41. Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

42. 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 lawful, fair and transparent.
43. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.
44. In addition, if the requested data is criminal offence data, in order for disclosure to be lawful and compliant with principle (a), it must also meet the requirements of Article 10 of the UK GDPR.

### **Is the information criminal offence data?**

45. Information relating to criminal convictions and offences is given special status in the UK GDPR.
46. Article 10 of the UK GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to:
  - (a) The alleged commission of offences by the data subject; or
  - (b) Proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.
47. Having considered the wording of the request, the Commissioner finds that the requested information does include criminal offence data. He has reached this conclusion on the basis that the requested information relates to the individual(s) charged, in relation to the commission of fraud offences, during a specified timeframe of one month.
48. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.
49. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under FOIA are the conditions at Part 3 paragraph 29 (consent from the data subject) or Part 3 paragraph 32 (data made manifestly public by the data subject).
50. The Commissioner has seen no evidence or indication that the individual(s) concerned have specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.

51. As none of the conditions required for processing criminal offence data are satisfied there is no legal basis for its disclosure. Processing this criminal offence data would therefore breach principle (a) and so this information is exempt under section 40(2) of FOIA.
52. In light of that decision, the Commissioner has not considered West Midlands Police's application of section 31 to the same information.

## Right of appeal

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53. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

54. 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.
55. 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 .....**

**Laura Tomkinson  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**