

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 June 2016

Public Authority: Chief Constable of Kent Police
Address: Police Headquarters
Sutton Road
Maidstone
Kent
ME15 9BZ

Decision (including any steps ordered)

1. The complainant requested information about named persons she believed to be associated with, or employed by, Kent Police. The police refused to confirm or deny holding the information requested, relying on the exemption at section 40(5) (personal data) of the FOIA.
2. The Commissioner's decision is that the police had cited section 40(5) correctly and so were not obliged to confirm or deny whether the requested information was held. No steps are required.

Request and response

3. On 8 December 2015, the complainant requested information from Kent Police in the following terms:
Please could you provide me with the positions of [names redacted] at Kent Police in January 2013
4. The police responded on 8 January 2016 and neither confirmed nor denied holding the requested information citing the section 40(5) FOIA exemption.
5. Following an internal review the police wrote to the complainant on 13 April 2016 and confirmed their position.

Scope of the case

6. In January 2016 and subsequently the complainant complained to the Commissioner about the way her request for information had been handled.
7. The Commissioner has seen that the information request is part of a more extensive correspondence with the police, the other parts of which he has disregarded. In his investigation he considered the police application of the section 40(5) FOIA exemption to the 8 December 2015 information request . He considered evidence and representations, some of them extensive, provided by the complainant and the police and made an internet search for any relevant information about the persons named in the request that there might be in the public domain.

Reasons for decision

8. Under section 1(1)(a) of FOIA, a public authority is obliged to advise an applicant whether or not it holds the requested information. This is known as the “duty to confirm or deny”. However, the duty to confirm or deny does not always apply and public authorities may refuse to confirm or deny holding information through reliance on certain exemptions under FOIA.

Section 40 – personal information

9. Generally, the provisions in section 40 subsections 1 to 4 FOIA exempt personal data from disclosure under FOIA if to do so would breach any of the data protection principles set out in the Data Protection Act 1988 (the ‘DPA’). Section 40(5) of FOIA states that the duty to confirm or deny whether or not information is held does not arise if providing the public with confirmation or denial would itself contravene any of the data protection principles.
10. 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 refuse to confirm or deny whether or not it holds the requested information.
11. Consideration of section 40(5) involves two steps: first, 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 providing confirmation or denial would involve a disclosure of personal data, as defined by the DPA. If it would not, then section 40(5) 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 requested information clearly relates to identified living individuals who the complainant believes to be, or to have been, police employees or associates. By its nature the request identifies those individuals and that information, if held, would constitute their personal data. Accordingly the Commissioner is satisfied that confirmation or denial with regard to police employment or association would involve a disclosure of personal data.

Would disclosure breach any data protection principles?

16. The police said that confirmation or denial would breach the first data protection principle and explained to the complainant that confirming whether or not individuals had been employed by, or associated with, the police would breach their legitimate expectation of privacy.

17. When considering the first principle the Commissioner will generally seek to balance the reasonable expectations of the data subject(s) with the consequences of compliance with the request, and the general principles of accountability and transparency.

18. The first data protection principle requires that personal data is processed fairly and lawfully and that one of the conditions in schedule 2 of the DPA is met in order to disclose personal data.

19. 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); and
 - the balance between the rights and freedoms of the data subject and the legitimate interests of the public.
20. The Commissioner considers that information about employment related matters will usually be inherently 'private' in nature and he recognises that police officers and other employees or associates will have a high expectation that such matters will not be placed in the public domain and that their privacy will be respected. As such, their reasonable expectation would be that information of the type requested would not be disclosed.
21. Disclosure of information relating to employment status or other association with the police could prove detrimental to any police employee or to a member of the public if it were placed into the public domain via FOIA. As such it could cause unnecessary and unjustified damage or distress to the individuals concerned.
22. The Commissioner appreciates that there is a general public interest in accountability and transparency by public authorities. On the other hand the Commissioner recognises that this legitimate interest must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of any individual who would be affected by confirming or denying that the requested information is held, ie the individuals themselves.
23. In considering whether the exemption contained within the section 40(5)(b)(i) FOIA exemption was correctly applied, the Commissioner has taken into account that disclosure under FOIA should be considered in its widest sense – which is to the public at large. A confirmation or denial in the circumstances of this case would reveal to the public information which is not already in the public domain.
24. Having regard for the reasonable expectations of the data subjects, and the potential impact on them if the existence of their personal data were to be confirmed or denied, the Commissioner considers that it would be reasonable for an individual to expect that any information held about them by the police would only be used for policing purposes and that to process that information in another way would be unfair. While he accepts that there is a limited legitimate interest in the disclosure of this

information, he does not consider that this outweighs these other factors.

25. 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. This is a different balancing exercise from 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.
26. The interest in disclosure must be a public interest, not the private interest of an individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.
27. In the course of his investigation the Commissioner investigated with the police the relevant information held by them relating to January 2013. He considers that junior police officers and members of staff would have a greater expectation of privacy than would more senior employees. In this matter, the police confirmed that none of its then senior employees fell within the scope of the information request.
28. In the light of relevant police information and the reasonable expectations of the individual data subjects concerned, the Commissioner is satisfied that confirming or denying if the requested information is held would be an intrusion into the data subjects' privacy and could potentially cause unnecessary and unjustified distress. He considers these arguments outweigh any legitimate interest in disclosure. He has therefore concluded that confirmation or denial in this case would breach the first data protection principle and finds the exemption at section 40(5) FOIA is engaged and that the duty to confirm or deny did not arise.
29. As the Commissioner has determined that it would be unfair to confirm or deny if the information is held, he did not go on to consider whether disclosure would be lawful or whether one of the schedule 2 DPA conditions is met.

Conclusion

30. The Commissioner decided that the information requested, if held, would be the personal data of the individuals as it would relate to them personally. He also finds that, if held, it would be unfair to disclose it and that to do so would breach the first DPA data protection principle. The information would accordingly be exempt from disclosure under section 40(2) FOIA. Therefore, under section 40(5)(b)(i) FOIA, the police are not required to confirm or deny that the information requested is held.

Right of appeal

31. 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

32. 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.
33. 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

Jon Manners
Group Manager

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