

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 June 2016

Public Authority: Chief Constable of Staffordshire Police

Address: Police Headquarters

PO Box 3167

Stafford

ST16 9JZ

Decision (including any steps ordered)

1. The complainant requested information relating to the return of a fugitive to the UK. Staffordshire Police refused this request under the exemptions provided by sections 30(1) (information held for the purposes of an investigation) and 40(2) (personal information) of the FOIA.
2. The Commissioner has exercised his discretion to consider section 40(5) (personal information). His decision is that section 40(5) is engaged and that Staffordshire Police should have refused to confirm or deny whether it held the requested information. The Commissioner has also found that Staffordshire Police breached section 17(5) of the FOIA by failing to respond to the complainant within 20 working days of receipt of the request.

Request and response

3. On 15 September 2015 the complainant wrote to Staffordshire Police and requested information in the following terms:

"A schedule or list of all information held by the force relating to the return of one-time fugitive [name redacted] to the UK prior to his arrest by Staffordshire Police.

Under Section 16 of FOI, please advise and assist about what documentation is either held electronically or in paper form about the return of [name redacted] to the UK prior to his arrest.

Please include file names and file types.

Please include email subject lines and wherever possible the names of the senders and the domain names of the email address of the intended recipients of those emails ie everything after the @ symbol: @hotmail.co.uk, etc."

4. Staffordshire Police responded on 14 October 2015 and refused the request under the exemption provided by section 44(1)(c) (contempt of court) of the FOIA. The complainant responded on 29 October 2015 to object to the refusal of his request. Rather than treat this as a request for internal review, Staffordshire Police responded on 16 December 2015 on the basis that the complainant had intended to make his information request again and again refused his request, this time citing section 14(1) (vexatious requests).
5. The complainant responded again objecting to the refusal of his request and this time Staffordshire Police did carry out an internal review, responding with the outcome of the review on 28 January 2016. At this stage Staffordshire Police cited sections 30(1) (information held for the purposes of an investigation) and 40(2) (personal information) of the FOIA as grounds for refusing the request.

Scope of the case

6. The complainant contacted the Commissioner on 8 February 2016 to complain about the refusal of his information request. The complainant indicated that he did not agree with the reasoning given for the refusal of his request and also referred to the delays in responding to his request.
7. As covered below, the Commissioner's view is that Staffordshire Police should have refused to confirm or deny whether it held the requested information and cited the exemption provided by section 40(5) of the FOIA. The analysis below therefore covers section 40(5), as well as the breach of the FOIA through the delay in responding.

Reasons for decision

Section 17

8. Section 17 requires that a response that refuses an information request must be sent within 20 working days of receipt of the request. Although, as covered elsewhere, the Commissioner's view is that Staffordshire

Police should have treated the complainant's 21 December 2015 correspondence as a request for internal review, having decided to treat it as a further information request. Staffordshire Police was obliged to respond to it within 20 working days of receipt. In failing to do so, Staffordshire Police breached section 17(5) of the FOIA.

Section 40

9. The Commissioner has discretion to consider exemptions not cited by the public authority. Given his role in relation to the Data Protection Act 1998 (DPA), the Commissioner will in particular consider whether to exercise that discretion to consider any limb of section 40 where necessary to avoid a breach of the DPA.
10. Staffordshire Police cited section 40(2). The Commissioner's view is that, for the reasons given below, the wording of the request meant that confirming or denying whether the requested information was held would in itself involve a disclosure of sensitive personal data. As a result, his view is that section 40(5) should have been cited, which provides an exemption from the duty to confirm or deny where to do so would involve disclosing personal data and that disclosure would be in breach of any of the data protection principles.
11. The complainant may argue that it is absurd to consider an exemption from the duty to confirm or deny after Staffordshire Police had confirmed that the information was held. However, the approach of the Commissioner is that a public authority can cite further exemptions during his investigation, including exemptions from the duty to confirm or deny where it had previously stated whether the information was held. The Commissioner takes the same approach when exercising his discretion to consider exemptions not cited by the public authority. Particularly where to do otherwise would perpetuate a breach of the DPA, this may mean belatedly applying an exemption from the duty to confirm or deny.
12. The duty to confirm or deny whether requested information is held is imposed by section 1(1)(a) of the FOIA. Consideration of section 40(5) involves two steps: first, whether providing the confirmation or denial would involve a disclosure of personal data, and secondly, whether disclosure of that personal data would be in breach of any of the data protection principles.
13. On the issue of whether confirmation or denial in response to the complainant's request would involve a disclosure of personal data, the definition of personal data is given in section 1(1) of the DPA:

“personal data’ means data which relate to a living individual who can be identified:

(a) from those data, or

(b) from those data and any other information which is in the possession of, or is likely to come into the possession of, the data controller”.

14. Complying with section 1(1)(a) in this case would effectively also confirm or deny whether the individual named in the request had been returned to the UK and arrested. Clearly this information would both relate to and identify that individual and so would be their personal data.
15. Section 2 of the DPA sets out what categories of personal data are classed as *sensitive* for the purposes of that Act. These include personal data as to the alleged commission by the data subject of an offence. The personal data in question here is, therefore, sensitive.
16. The next step is to address whether disclosure of that personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on the first data protection principle, which requires that personal data is processed fairly and lawfully.
17. Covering first whether disclosure would be fair, the Commissioner’s view is that cases where it will be considered fair to disclose into the public domain sensitive personal data are likely to be extremely rare. Sensitive personal data has, by its very nature, been deemed by the DPA to be the most private information about identifiable individuals. As disclosure of this type of information is likely to have a detrimental or distressing effect on the data subject, the Commissioner will generally take the view that it would be unfair for it to be disclosed.
18. In this case the complainant would argue that this personal data is already in the public domain and so confirmation or denial in response to his request would not be unfair. The Commissioner notes that there is relevant personal data in the public domain. Even so, the Commissioner does not agree that it is *necessarily* the case that the data subject could not hold a reasonable expectation that his or her personal data would not be disclosed in response to the complainant’s request. He does, however, accept that the existence of that personal data in the public domain is a relevant factor when considering whether disclosure would be fair.
19. Even if the Commissioner found that disclosure would be generally fair, this would not impact on the outcome of the complaint if he found that no condition from Schedule 3 of the DPA could be satisfied. In order to

address the point about relevant information being in the public domain, he has proceeded on the basis that he accepts that in the circumstances of this case disclosure could reasonably be considered to be fair, and he has gone on to consider the applicability of the Schedule 3 DPA conditions.

20. The Commissioner's general view is that the two conditions in Schedule 3 that might apply in relation to disclosures made under the FOIA are the first condition, which is that the data subject has consented to disclosure, and the fifth condition, which is that the data subject has already deliberately made the personal data public. The Commissioner is aware of no evidence that either of these conditions are met.
21. In conclusion, the Commissioner finds that none of the DPA Schedule 3 conditions apply in relation to this request. This means that confirmation or denial as to whether this sensitive personal data is held would be in breach of the first data protection principle. The finding of the Commissioner is, therefore, that the exemption provided by section 40(5) is engaged and Staffordshire Police was not obliged to confirm or deny whether it held the information requested by the complainant.

Other matters

22. First, as well as the finding above that Staffordshire Police breached section 17(5) by responding late, the Commissioner has also made a separate record of that breach and will consider further action should evidence from other cases suggest that this is necessary.
23. Secondly, the Commissioner is also concerned that the complainant's 29 October 2015 correspondence was treated as a new request, rather than as a request for an internal review. The Commissioner's view is that that correspondence was clearly an expression of dissatisfaction at the refusal of the 15 September 2015 request, hence it should have triggered an internal review. Staffordshire Police should ensure that it has an appropriate procedure in place to ensure that any written expression of dissatisfaction about the response to an information request is recognised as a request for internal review and dealt with accordingly.

Right of appeal

24. 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: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

25. 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.
26. 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

Ben Tomes
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