

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 October 2017

Public Authority: Chief Constable of Gloucestershire
Address: Police Headquarters
1 Waterwells Drive
Quedgeley
Gloucester
Gloucestershire
GL2 2AN

Decision (including any steps ordered)

1. The complainant has requested information about the disciplinary history of three named police officers. Gloucestershire Constabulary would neither confirm nor deny whether it held the information described in the request, citing the exemption at section 40(5) (personal information) of the FOIA.
2. The Commissioner's decision is that Gloucestershire Constabulary was entitled to apply section 40(5).
3. The Commissioner requires no steps to be taken.

Request and response

4. On 10 February 2017, the complainant wrote to Gloucestershire Constabulary and requested information in the following terms:

"Under the Freedom of Information Act 2000 (FOIA), I would like to request information of all disciplinary history, including allegations, in respect of following police officers.

Gloucestershire Constabulary's SOCU police officer [name redacted]

Gloucestershire Constabulary's SOCU police officer [name redacted]

Gloucestershire Constabulary's SOCU police officer [name redacted]."

5. Gloucestershire Constabulary responded on 20 February 2017. It would neither confirm nor deny whether it held the information, citing the exemption at section 40(5) of the FOIA.
6. The complainant requested an internal review, which Gloucestershire Constabulary conducted, the result being that it upheld its application of section 40(5).

Scope of the case

7. The complainant contacted the Commissioner on 6 April 2017 stating that he wished to appeal against Gloucestershire Constabulary's decision to apply section 40(5) of the FOIA.
8. The Commissioner has considered this matter without knowledge of whether the requested information is or is not held by Gloucestershire Police.

Reasons for decision

9. Under section 1(1)(a) of FOIA, a public authority is obliged to advise an applicant whether or not it holds the information they have requested. 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 the FOIA.

Section 40 – personal information

10. The provisions in section 40, subsections 1 to 4 of the FOIA, exempt personal data from disclosure if disclosure would breach any of the data protection principles set out in the Data Protection Act 1998 (the 'DPA').
11. Section 40(5)(b)(i) of the FOIA states that the duty to confirm or deny whether or not information is held does not arise if providing confirmation or denial would itself contravene any of the data protection principles.
12. The practical effect 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 may rely on section 40(5)(b)(i) to refuse to confirm or deny whether or not it holds the requested information.
13. Consideration of section 40(5) involves two steps: first, whether providing the confirmation or denial would involve the disclosure of

personal data, and if it would, whether the disclosure would breach of any of the data protection principles.

Is the information personal data?

14. 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.

15. 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."

16. 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.

17. The information requested in this case clearly relates to identifiable, living individuals, as it contains their names. Thus, information about their disciplinary records and any allegations made against them, if held, would constitute their personal data.

18. Accordingly, the Commissioner is satisfied that confirmation or denial in this case would involve a disclosure of personal data with regard to disciplinary matters.

Would confirmation or denial breach the first data protection principle?

19. The first data protection principle of the DPA 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..."

19. In the case of an FOIA request, personal data is processed when it is disclosed in response to the request. In this case, it would be processed if Gloucestershire Constabulary was to confirm or deny whether it holds any information, as this action alone would impart information about the individuals named in the request (ie it would be possible to infer either

that an individual had or had not been subject to disciplinary procedures).

20. Since confirming or denying constitutes "processing", it follows that confirmation or denial can only be given if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions. If confirmation or denial would fail to satisfy any of these criteria, then Gloucestershire Constabulary is not obliged to confirm or deny whether it holds the information.
21. The Commissioner has first considered whether disclosure would be fair to the individuals named in the request. 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.
22. The Commissioner considers that information about employment related matters, including an individual's disciplinary record, will usually be inherently 'private' in nature and she recognises that police officers – as with other employees - will have a high expectation that any information about such matters which relates to them will not be placed in the public domain; they would expect that their privacy will be respected. As such, their reasonable expectation would be that whether or not Gloucestershire Police holds disciplinary records in respect of them is something which would not be disclosed.
23. As to the consequences of disclosure upon a data subject, the question – in respect of fairness - is whether disclosure would be likely to result in unwarranted damage or distress to that individual.
24. 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 FOIA is effectively an unlimited disclosure to the public at large, without conditions.
25. The disclosure of information relating to the existence or otherwise of a disciplinary record, and allegations of misconduct, could prove detrimental to the individuals named in the request if it were placed into the public domain via FOIA.
26. On the potential impact of disclosure, Gloucestershire Police said:

"Police officers / staff are in a unique position in that any information disclosed which confirms whether any disciplinary action has been taken could potentially lead to them being discredited and therefore not able to fulfil their function to prevent / detect crime and bring offenders to justice. As when giving evidence, a defence lawyer could discuss any disciplinary information in the public domain and this could lead to unsuccessful prosecutions."

27. Confirmation or denial in this case could therefore have adverse implications for the named individuals in their professional capacity. The Commissioner also considers that it would be unnecessarily intrusive into their private lives if information which suggested that they had a disciplinary record or had had allegations made against them, was disclosed to the world at large, under the FOIA. The consequences of any such disclosure could result in unnecessary and unjustified distress to them.
28. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in its disclosure.
29. This is a different balancing exercise than the normal public interest test carried out in relation to the so called "qualified" exemptions 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 whether or not 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.
30. The Commissioner accepts that in considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for their own sake, along with specific interests. However, the interest in disclosure should be a public interest, not the private interests of the individual requester. The requester's interests will only be relevant in so far as they reflect a wider public interest.
31. The complainant has not offered any arguments as to why it is in the public interest that the information should be disclosed, although the Commissioner notes that he is considering appealing a criminal conviction and that the information might have been requested in connection with that. On that point, Gloucestershire Police says that the complainant:

"...has been advised on many occasions that if he wishes to appeal against a conviction he must go through the correct channels, namely the Criminal Cases Review Commission, to obtain the relevant

disclosures. He should not be seeking information that he is not entitled to through either the Subject Access gateway or a Freedom of Information Act request."

32. The complainant therefore has a formal route through which he may seek access to this information, and disclosure in that context, if granted, would not have the wider adverse privacy implications for the individuals named in the request.
33. With regard to the request to know of any allegations made against the named individuals, the Commissioner notes that it is an unfortunate fact that most police officers will have allegations made against them during their careers that are unfounded and may even be maliciously motivated. Confirmation that an officer has had allegations made against them is therefore not a reliable indicator as to whether or not some misconduct has actually occurred.
34. The Commissioner acknowledges that the integrity of police officers is of genuine public interest. Their actions need to be lawful and their individual conduct is of paramount importance to the maintenance of the public's trust in the police service as a whole.
35. However, where individual officers' behaviour is called into question, there are official channels and procedures through which this should be investigated and addressed (for example, via the force Professional Standards Department or referral to the Independent Police Complaints Commission). These referrals ensure that serious or systematic misconduct is identified and dealt with appropriately via the appropriate channels rather than through a disclosure to the world at large under the FOIA. The Commissioner is satisfied that the public interest in scrutiny of police officers is, to a very large degree, already served by these procedures.
36. In light of the nature of the information and the reasonable expectations of the individuals concerned, the Commissioner is satisfied that 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 individuals named in the request; 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 and therefore finds the exemption at section 40(5) is engaged and that 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

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consider whether it would be lawful or whether one of the schedule 2 conditions is met.

Right of appeal

20. 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

21. 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.
22. 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

Samantha Bracegirdle
Senior Case Officer
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Wycliffe House
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