

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 24 January

**Public Authority:** Chief Constable of Hampshire Constabulary  
**Address:** Police Headquarters  
West Hill  
Romsey Road  
Winchester  
Hants  
SO22 5DB

### Decision (including any steps ordered)

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1. The complainant has requested information relating to a fixed penalty notice served on him. Hampshire Police explained that it was neither confirming nor denying whether it held the requested information by virtue of section 40(5)(a) (an applicant's personal information) of FOIA.
2. The Commissioner's decision is that Hampshire Police has applied section 40(5)(a) of FOIA appropriately. However, she considers that it has breached sections 10(1) (time for compliance) and 17 (refusal of a request) of FOIA.
3. The Commissioner does not require Hampshire Police to take any steps as a result of this decision.

### Request and response

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4. On 22 September 2015, the complainant wrote to Hampshire Police (HP) and requested information in the following terms:

*"I write with reference to Fixed Penalty Notice [number redacted] to ask, as a Freedom of information request, that you confirm or deny that you hold information that demonstrates the this matter was 1(a) processed with regard to relevant ACPO guidelines and that (b) ACPO 5.1 was applied as part of such processing (c) that the requisite determination of such application was undertaken*

*and (ii) you hold the identity of the determining party (iii) the wording of such determination.*

*I further ask that you confirm or deny that you hold information regarding*

*(d) That action required to be taken as a result of such determination and*

*(e) That such action warranted/required prosecution in the state case.*

*I also ask that you confirm or deny that you hold information regarding*

*2(a) The action actually taken with regard to the matter and*

*(b) Demonstrating that such action was either in compliance with or contrary to 1(d).*

*3. (and if not in compliance)*

*(a) What action is required to be taken an*

*(b) who is responsible for taken such action*

*(c) if unauthorised revenue was generated.*

*4. I also ask that you confirm or deny that you hold related information relied upon in photographic form."*

5. Following a First-tier Tribunal decision<sup>1</sup>, HP responded on 12 May 2017. It refused to confirm or deny whether it held the requested information by virtue of section 40(5)(a). It also explained that this was an absolute exemption and therefore was not subject to any public interest considerations.
6. The complainant did not request an internal review. However, the Commissioner contacted HP who confirmed that if it had carried out an internal review, it would have upheld its application of section 40(5)(a).

## **Scope of the case**

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7. The complainant contacted the Commissioner 26 June 2017 to complain about the way his request for information had been handled. He explained that he considered that HP was incorrect to claim that section 40(5)(a) was an absolute exemption. He also explained that the requested information was linked to legal proceedings and pointed to information the Commissioner had published:

"Legal advice and proceedings

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1992/Piesse,%20Michael%20\(Col\)%20EA-2016-0198%20\(29.03.17\)%20.pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1992/Piesse,%20Michael%20(Col)%20EA-2016-0198%20(29.03.17)%20.pdf)

Personal data is exempt from the non-disclosure provisions where the disclosure of the data is necessary:

- for or in connection with any legal proceedings (including prospective legal proceedings);
  - for obtaining legal advice; or
  - for establishing, exercising or defending legal rights.”
8. The Commissioner notes that this is in relation to the Data Protection Act 1998<sup>2</sup> (DPA), not the FOIA.
9. The Commissioner will consider whether HP has applied section 40(5)(a) appropriately and the length of time taken to deal with the request.

### **Reasons for decision**

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10. Under section 1(1)(a) of the 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 authorities may refuse to confirm or deny through reliance on certain exemptions under the FOIA.

### **Section 40 – personal information**

11. Section 40(5)<sup>3</sup> of the FOIA provides that public authorities are not obliged to confirm or deny that they hold information which is (or if it were held, would be) personal data of the applicant.
12. Section 40(1) of the FOIA provides that information which is the personal data of the applicant is exempt from disclosure under the FOIA. This is because there is a separate legislative access regime for an individual’s own personal data, namely the right of subject access under section 7 of the DPA. The 40(1) exemption is absolute, which means there is no requirement to consider the public interest.

### **Would confirming or denying that the requested information is held constitute a disclosure of personal data?**

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<sup>2</sup> <https://ico.org.uk/for-organisations/guide-to-data-protection/exemptions/>

<sup>3</sup> [https://ico.org.uk/media/for-organisations/documents/1206/neither\\_confirm\\_nor\\_deny\\_in\\_relation\\_to\\_personal\\_data\\_and\\_regulation\\_foi\\_eir.pdf](https://ico.org.uk/media/for-organisations/documents/1206/neither_confirm_nor_deny_in_relation_to_personal_data_and_regulation_foi_eir.pdf)

13. The definition of personal data is set out in section 1 of the DPA:

*"...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 individual and the individual must be identifiable. Information will relate to an individual 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 Commissioner has considered the wording of the complainant's request. She also asked him to confirm whether the fixed penalty notice in question was his; he confirmed that this was the case.
16. The Commissioner considers that if held, the requested information would be the complainant's own personal data as it would relate to him, as it is about his fixed penalty notice. She therefore considers that the present request is a request for information which can be linked to a named, living individual – in this case, the complainant himself. It is therefore his personal data and falls within the scope of section 40(1).
17. It follows from this that to comply with section 1(1)(a) would put into the public domain information about the existence or otherwise of a fixed penalty notice linked to the complainant; this would constitute a disclosure of personal data that would relate to the complainant.
18. In considering whether HP should have applied section 40(5)(a) the Commissioner has taken into account that the FOIA is applicant blind and that any disclosure would be to the world at large. If the information were to be disclosed, it would be available to any member of the public, not just the complainant. Confirmation or denial in the circumstances of this case would reveal to the general public information about the complainant which is not already in the public domain and which is not reasonably accessible to it. The Commissioner therefore considers that the exemption was correctly relied upon by HP in this case.
19. HP also confirmed that the complainant had submitted a subject access request about this and it had been dealt with under the DPA. The Commissioner considers that this is the correct access regime, as she

considers that the complainant is asking for his own personal information.

### **Procedural issues**

20. The complainant submitted his request on 22 September 2015. HP responded on 12 May 2017.

### **Section 10 – time for compliance**

21. Section 10(1) requires that the public authority must respond to a request promptly and in any event no later than 20 working days after the date of receipt.
22. The Commissioner considers that the HO has breached section 10(1) as it took longer considerably longer than 20 working days to respond to the request.

### **Section 17 – refusal of a request**

23. Section 17(1) states that if a public authority wishes to refuse any part of a request it must issue a refusal notice within the 20 working day time for compliance, citing the relevant exemptions.
24. The Commissioner considers that HO has breached section 17(1) as it took considerably longer than 20 working days to respond to the complainant, citing the relevant exemption.

## Right of appeal

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25. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

26. 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.
27. 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**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**