

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 18 July 2018

**Public Authority:** Chief Constable of South Wales Police

**Address:** [foi@south-wales.pnn.police.uk](mailto:foi@south-wales.pnn.police.uk)

### Decision (including any steps ordered)

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1. The complainant requested information about a particular police investigation. South Wales Police refused to confirm nor deny holding any information citing the exemptions at sections 30(3) and 40(5) of the FOIA. The Commissioner's decision is that South Wales Police has applied section 40(5) of the FOIA appropriately to the request. The Commissioner does not require any steps to be taken.

### Request and response

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2. On 26 September 2017 the complainant wrote to South Wales Police and requested information in the following terms:

*"Please can you send me any information you have on a [name redacted], D.o.B: [date of birth redacted], Date of Death: [date redacted].*

*He was sentenced at Cardiff Crown Court on 30<sup>th</sup> September 1998, [redacted] jailed for abuse. The main information required is what dates were the allegations first made? I understand I might be allowed the person's full name who made the allegations, would it be possible to have just their first name? "*

3. South Wales Police responded on 26 October 2017 and refused to confirm or deny whether the requested information is held by virtue of sections 30(3) and 40(5) of the FOIA.

4. On 27 October 2017 the complainant requested an internal review of South Wales Police's handling of the request.
5. South Wales Police provided the outcome of its internal review on 9 January 2018 and upheld its position that the information requested was exempt under sections 30(3) and 40(5) of the FOIA.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 12 January 2018 to complain about the way her request for information had been handled.
7. During the course of the Commissioner's investigation South Wales Police also indicated that it considered section 38(2) of the FOIA applied to the request in this case.
8. The Commissioner has considered in this decision notice whether South Wales Police was entitled to neither confirm nor deny the requested information is held. Nothing within this decision notice should be taken as implying that South Wales Police does or does not hold the requested information.
9. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the FOIA. In considering such matters, the Commissioner is mindful that whilst an individual may be aware that information does or does not exist because of their involvement in events, it does not follow that the general public is also aware of the existence of that information. Disclosure under the FOIA is a disclosure to the world at large.
10. In a case such as this one, the decision for the Commissioner is whether confirmation or denial that the information is held should be placed in the public domain. The Commissioner recognises that the complainant has personal reasons for making the request in this case. However, neither the identity of the applicant nor any purely personal reasons for wanting the requested information are relevant to the consideration of a freedom of information request. FOIA concerns disclosure to the public, and public interests, rather than a specified individual's private interests.

### **Reasons for decision**

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11. Section 1(1)(a) of the FOIA requires a public authority to inform a requester whether it holds the information specified in the request.

However, there may be occasions when complying with the duty to confirm or deny under section 1(1)(a) would in itself disclose sensitive or potentially damaging information that falls under an exemption. In these circumstances, the FOIA allows a public authority to respond by refusing to confirm or deny whether it holds the requested information.

12. A public authority can only refuse to confirm or deny whether it holds the information, if doing so would in itself reveal information that falls under an exemption.
13. The decision to use a neither confirm nor deny response will not be affected by whether a public authority does or does not in fact hold the requested information. The starting point, and main focus in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.
14. A public authority will need to use the neither confirm nor deny response consistently, over a series of separate requests, regardless of whether it holds the requested information. This is to prevent refusing to confirm or deny being taken by the requester as an indication of whether or not information is in fact held.
15. It is sufficient to demonstrate that either a hypothetical confirmation, or a denial would engage the exemption. In other words, it is not necessary to show that both confirming and denying information is held would engage the exemption from complying with section 1(1)(a) of the FOIA.

## **Section 40 – personal data**

16. Section 40(5)(b)(i) FOIA provides that if a public authority receives a request for information which, if held, would be the personal data of a third party, it can rely on section 40(5)(b)(i) to neither confirm or deny whether or not it holds the requested information.
17. 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?***

18. The first step for the Commissioner is to determine whether the requested information, if held, constitutes personal data as defined by the Data Protection Act 1998 (“the DPA”). If it is not personal data, then section 40 cannot apply.

19. 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."*

20. 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.

21. The request refers to two individuals (Individual A, - a deceased individual named in the request as being convicted of a criminal offence in 1998) and Individual B, a child that the requester states made allegations against Individual A. During the course of the Commissioner's investigation, the complainant confirmed that she was seeking access to all information relating to Individual A's case in September 1998, including:

- *When was the first allegation made?*
- *Dates of Magistrate Court Hearings?*
- *Dates of Crown Court Hearing?*
- *Police Officers involved in the case?*
- *Names of all the Complainant's?*
- *How long was [Individual A]'s sentence?"*

22. Although the request is focused on Individual A, if information were held, it would relate to an investigation involving another person [Individual B]. As such, confirming or denying whether or not any information is held would disclose something about Individual B and therefore result in the processing of their personal data.

***Is the requested information sensitive personal data?***

23. South Wales Police explained that it considered that, if held, the requested information would also be sensitive personal data relating to Individual B.

24. Sensitive personal data is personal information which falls into one of the categories set out in section 2 of the DPA. Of relevance in this case is that section 2 relates to personal data consisting of information as to:

*"(f) his sexual life"*

25. In this case, given that the request relates to information about the existence, or otherwise, of a criminal investigation/prosecution into allegations of sexual abuse made by Individual B against Individual A the Commissioner is satisfied that any information, if held, would fall under sub-section 2(f).

26. This means that the confirmation or denial can only be disclosed if to do so would be fair, lawful and would meet one of the conditions in schedule 2 of the DPA and, because it is sensitive personal data, also one of the conditions in schedule 3. If confirmation or denial would fail to satisfy any one of these criteria, then South Wales Police is not required to provide a response.

27. Therefore, even if the Commissioner found that confirmation or denial would be generally fair and that there was a suitable schedule 2 condition to support it, this would not result in that action if no schedule 3 condition could be satisfied. She has therefore gone on to firstly consider the applicability of the conditions within schedule 3 of the DPA. If there is no relevant schedule 3 condition then a full consideration of any data protection principle or any schedule 2 condition is unnecessary.

### ***Is there a relevant Schedule 3 condition?***

28. The Commissioner's view, as set out in her guidance on section 40<sup>1</sup>, 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. This is because the other conditions concern disclosure for a stated purpose, and so cannot be relevant to the 'applicant blind' and 'purpose-blind' nature of disclosure under FOIA.

29. The complainant has asserted that there are strong grounds for disclosure of the information requested in this case. The Commissioner has not reproduced these arguments here as they are of a sensitive

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>

nature. However, in summary, the complainant has alleged that the information in question is required to demonstrate a miscarriage of justice in relation to an individual that she is acting on behalf of.

30. The complainant also stated that the subject matter associated with her request was the subject of media articles in 1998. South Wales Police confirmed that it is not aware of any information relating to any investigation/court case in the public domain. South Wales Police explained that it is possible for a member of the public to attend a library and search through old copies of local newspapers, such as the South Wales Echo, which may contain relevant information going back to 1998. However, it would not be possible to search back copies of newspapers using keyword searches as the information would be held on microfilm only.
31. The Commissioner's view is that that information disclosed in court may briefly enter the public domain in theory, but its availability in practice is likely to be short-lived unless it passes into other more permanently available sources (eg online newspaper reports). If a member of the public can no longer access the information at the time of the request, any disclosure under the FOIA would, in practice, be revealing 'new' information over and above what is currently public knowledge.
32. The Commissioner considers that information can only be considered to be in the public domain if it is realistically accessible to the public at the time of the request. The question is not whether it is theoretically in the public domain, but whether it is actually available in practice. In that context, the courts have found that information which can be easily found using a simple internet search is considered to be in the public domain. However, information will not be in the public domain if it would require unrealistic persistence or specialised knowledge to find it, even if it is theoretically available somewhere in a library or on the internet. In practice a normal member of the public would still not be able to find that information. In addition, information is not necessarily in the public domain just because it is known to the requester. The question is still whether a hypothetical interested member of the public could access the information.
33. The Commissioner notes that the subject matter relating to the request dates back to 1998. Any media articles which may have been issued in connection with it are likely to be held on microfilm only and would require 'specialist' knowledge concerning dates and/or the identities of individuals in order to locate any relevant information which may be held on the microfiche. In addition, the Commissioner has conducted her own internet searches and has found no evidence to suggest that there is any information about any investigation/court case in the public domain.

34. The Commissioner has seen no evidence or indication that Individual B has specifically consented to their sensitive personal data being disclosed to the world in response to the FOIA request or that they have deliberately made their sensitive personal data public.
35. In conclusion, the Commissioner does not find that any condition within schedule 3 of the DPA can be satisfied in this case. Therefore, confirmation or denial as to the existence or otherwise of this sensitive personal data would be in breach of the first data protection principle. The finding of the Commissioner is that the exemption provided by section 40(5)(b) is engaged and South Wales Police was not obliged to confirm or deny whether any information is held. As section 40(5)(b) is properly engaged it is not necessary to go on to consider the applicability of sections 30(3) and 38(2).

## Right of appeal

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36. 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)

37. 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.
38. 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 .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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