

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 May 2018

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

Decision (including any steps ordered)

1. The complainant has requested to know how many burglaries and robberies took place in a geographical area over three days in 2017. Hampshire Constabulary would neither confirm nor deny holding this information, citing sections 30(3) (investigations and proceedings) and 40(5) (personal information) of the FOIA as its basis for doing so.
2. The Commissioner's decision is that Hampshire Constabulary has not demonstrated that either exemption is engaged.
3. The Commissioner requires Hampshire Constabulary to take the following steps to ensure compliance with the legislation:
 - issue a fresh response to the request, which is compliant with section 17 of the FOIA and which does not rely on section 30(3) or section 40(5) of the FOIA.
4. Hampshire Constabulary must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 11 December 2017 the complainant wrote to Hampshire Constabulary and requested information in the following terms:

"For the period from Saturday 4 November until Monday 6 November, please provide numbers and locations in which the following offences took place in the West Meon/Hambledon area (shown here:

<https://www.police.uk/hampshire/9WG04/crime/>

Burglaries

Robberies

NB: When I say location, I am not asking for any information that would identify a victim."

6. Hampshire Constabulary responded on 10 January 2018. It would neither confirm nor deny ("NCND") holding the information, citing the exemptions at section 30(3) (investigations and proceedings) and 40(5)(a) (personal information) of the FOIA.
7. At internal review, referring to *"...the extremely short date period and small area specified..."*, Hampshire Constabulary upheld its application of the two exemptions.

Scope of the case

8. The complainant contacted the Commissioner on 7 March 2018 to complain about the way his request for information had been handled.
9. The Commissioner has considered in this decision notice Hampshire Constabulary's application of section 30(3) and section 40(5) of the FOIA to issue a NCND response.

Reasons for decision

10. Under section 1(1)(a) of the 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, there are circumstances when complying with the duty to confirm or deny under section 1(1)(a) would in itself disclose exempt information. In these circumstances, the FOIA allows a public authority to respond by refusing to confirm or deny whether it holds the requested information.
11. In this case, Hampshire Constabulary has argued that it is excluded from the duty to confirm or deny by virtue of section 30(3) (investigations and proceedings) and section 40(5) (personal information) of the FOIA.

Section 30 – investigations and proceedings conducted by public authorities

12. Section 30(3) of the FOIA provides an exclusion from the duty to confirm or deny whether information is held in relation to any information which, if held, would fall within any of the classes described in sections 30(1) or 30(2) of the FOIA.
13. Despite being asked to, Hampshire Constabulary did not state to the Commissioner which limb of section 30(1) it was relying on. Based on previous experience of the circumstances in which a police force would cite section 30, the Commissioner would expect to see section 30(1)(a) cited here, and she has exercised her discretion and treated it as having been cited in this case.

14. Section 30(1)(a) of the FOIA states:

“Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained –

(i) whether a person should be charged with an offence, or

(ii) whether a person charged with an offence is guilty of it”.

15. The Commissioner considers that the phrase “*at any time*” means that information can be exempt under section 30(1) if it relates to a specific ongoing, closed or abandoned investigation. The information requested (if it was held) must be held for a specific or particular investigation and not for investigations in general. Although Hampshire Constabulary did not state which limb of section 30(1) it was relying on, this premise applies to all parts of sub-section (1).
16. Consideration of section 30(3) is a two-stage process. First, the exemption must be shown to be engaged. Secondly, as section 30 is a qualified exemption, it is subject to the public interest test: whether, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in confirming or denying whether the public authority holds the information.

Is the exemption engaged?
17. The first step is to address whether, if Hampshire Constabulary held information falling within the scope of the complainant’s request, this would fall within the classes specified in section 30(1) of the FOIA.

18. Referring to the wording of the request, the Commissioner is satisfied that any information, if held by Hampshire Constabulary, would be held in relation to investigation(s) into specific burglaries and robberies within the geographical area and timeframe specified in the request, and thus that it would fall within the class described in section 30(1)(a)(i) (that is, it would be held for the purposes of an investigation into whether a person should be charged with an offence). The exemption provided by section 30(3) is, therefore, engaged in respect of the requested information.

The public interest test

19. The Commissioner must consider what public interest there is in confirmation or denial. She must also consider whether confirmation or denial would be likely to harm any investigation that Hampshire Constabulary might be conducting, which would be counter to the public interest, and what weight to give to these public interest factors.
20. The purpose of section 30 is to preserve the ability of relevant public authorities to carry out effective investigations. Key to the balance of the public interest in a case where this exemption is found to be engaged is whether confirmation or denial could have a harmful impact on the ability of Hampshire Constabulary to carry out effective investigations. Clearly it would not be in the public interest to jeopardise the ability of the police to investigate crime effectively.
21. The complainant did not offer any arguments for why compliance with the request was in the public interest. The following represent Hampshire Constabulary's consideration of the public interest.

Public interest arguments in favour of confirming or denying

22. Hampshire Constabulary acknowledged that confirmation or denial as to whether the requested information was held would facilitate accountability in respect of the spending of public funds and its investigatory focus.

Public interest arguments in favour of maintaining the exclusion of the duty to confirm or deny

23. Hampshire Constabulary argued that confirming or denying whether the requested information was held would disclose whether a criminal investigation has occurred or is currently occurring, and that this may compromise any ongoing investigative activity.
24. Hampshire Constabulary's own published crime map for the geographic area covered by the request shows that there were two burglaries during the month of November 2017. It said that confirmation or denial in response to the request would therefore clarify whether those

incidents occurred over the period specified in the request. It said that this may compromise any ongoing investigative activity.

25. It also said that crimes can be reported weeks and in some cases months after the date period has passed, therefore the NCND approach means any crime which may or may not have been reported after the date in question will not be identified via the FOIA.

The Commissioner's view

26. The Commissioner asked Hampshire Constabulary a series of detailed questions about its application of section 30(3). Its response was brief, vague and consisted of little more than what it had already informed the complainant. As noted in paragraph 13, it failed to specify which limb of section 30(1) it was relying on. The public interest arguments it provided suggested that it considered that because section 30(3) was engaged, it would not be in the public interest to override it.
27. Hampshire Constabulary failed to explain how confirmation or denial would adversely affect any police investigation, stating simply that it "may". It offered no arguments or submissions to the Commissioner which provided a causal link between confirming or denying whether burglaries and robberies took place over the specified three day period, and any effect or outcome relevant to the exemption, which would be counter to the public interest.
28. In any case, the Commissioner notes that the request was received shortly after the time period about which it was requesting information, and that by Hampshire Constabulary's own admission it is entirely possible that further crimes committed during November had not yet been reported. The withheld information is therefore a snapshot of the position as it was at the time of the request and does not necessarily represent the full or final picture for the dates specified. This calls into question the extent to which individual investigations could be identified, and thus, compromised.
29. The Commissioner made it clear to Hampshire Constabulary that its response should set out its final position on the request and that it is the public authorities' responsibility to satisfy the Commissioner that an exemption applies and that it has complied with the law. She asked it specific questions and provided it with links to guidance which would assist it to do this.
30. In cases where an authority has failed to provide adequate arguments in support of the application of exemption the Commissioner does not consider it to be her responsibility to generate arguments on its behalf.
31. In this instance the Commissioner considers that Hampshire Constabulary has had ample opportunities to justify its position,

including at the time of its initial response, at the internal review stage and during her investigation. On the basis of the available evidence, and mindful of the public interest in the police being transparent and accountable regarding crime mapping, the Commissioner has concluded that, while section 30(3) is engaged, Hampshire Constabulary has failed to demonstrate that the public interest in maintaining the exclusion from the duty to confirm or deny is stronger than that in confirming or denying whether the information is held. It follows that Hampshire Constabulary was not entitled to rely on section 30(3) to issue a NCND response to the request.

Section 40 – personal information

32. Section 40(5) of the FOIA states that the duty to confirm or deny whether or not information is held does not arise where the requester is requesting their own personal data, or if confirming or denying would contravene any of the data protection principles set out in the Data Protection Act 1998 (“the DPA”).
33. Hampshire Constabulary stated in its correspondence with the complainant that it was relying on section 40(5)(a) to neither confirm nor deny whether it held the requested information. This sub-section applies where the information requested is the requester’s own personal data.
34. It was not clear to the Commissioner from reading the request, and in subsequent correspondence, whether Hampshire Constabulary had in fact intended to cite section 40(5)(b) (which would apply where confirming or denying would breach any of the data protection principles in respect of third parties other than the complainant). She explained this to Hampshire Constabulary and specifically asked it to clarify which subsection of section 40(5) it was relying on, together with a series of detailed questions aimed at helping her to understand why section 40(5) might apply.
35. In its response, Hampshire Constabulary made no reference to section 40, or to the questions the Commissioner had asked. The only comments it made which appeared to relate in any way to the issue of personal data were as follows:

“The national crime mapping website states the following in relation to the anonymisation of published crime data:

“Privacy and Anonymisation

Trying to find a balance between providing granular crime data and protecting the privacy of victims has been one of the biggest challenges involved in releasing this data.

We consulted heavily with the Information Commissioner's Office and Data Protection specialists in the Home Office in the run up to releasing this data, and worked within their guidance to create an anonymisation process which adequately minimises privacy risks whilst still meeting our transparency goals and being useful to the public.

Further information relating to privacy as follows:

<https://www.police.uk/about-this-site/faqs/#what-have-you-done-to-ensure-that-my-privacy-is-protected-on-the-crime-map>

Due to the above, we believe it was necessary to apply a neither confirm nor deny response for burglary and robbery crimes recorded within the 3 day period stated".

36. Hampshire Constabulary has failed to specify its grounds for relying on section 40(5) and they are not clear from the request or the correspondence with the complainant. The Commissioner is left unable to identify who the data subjects might be, and thus whether the request falls to be dealt with under the subject access provisions of the DPA if it is the complainant himself, or, alternatively, whether it is necessary to go on to consider whether confirming or denying might breach the data protection rights of third parties.
37. Referring back to her comments in paragraphs 26-30, the Commissioner finds that Hampshire Constabulary has not demonstrated that section 40(5) is engaged.

Conclusion

38. The Commissioner's conclusion is that Hampshire Constabulary has not demonstrated that section 30(3) or section 40(5) apply, and therefore it is required to take the action set out in paragraph 3 of this decision notice.

Right of appeal

39. 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

40. 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.
41. 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
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