

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 November 2018

Public Authority: Office of the Police and Crime Commissioner for Norfolk

Address: Building 8 Jubilee House
Falconers Chase
Wymondham
Norfolk
NR18 0WW

Decision (including any steps ordered)

1. The complainant requested information from the Office of the Police and Crime Commissioner for Norfolk (OPCC) relating to costs incurred in relation to specified legal proceedings.
2. The OPCC refused to confirm or deny whether it held relevant information, citing section 40(5) (personal information) of the FOIA.
3. The Commissioner's decision is that the OPCC was not entitled to rely on either section 40(5)(a) or section 40(5)(b)(i) of the FOIA.
4. The Commissioner requires the OPCC to take the following steps to ensure compliance with the legislation:
 - confirm or deny whether it holds the requested information in accordance with section 1(1)(a) of the FOIA.
5. The OPCC must take this step 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

6. On 19 March 2018, the complainant wrote to the OPCC and requested information in the following terms:

"I am requested [sic] information on public money spent on the case on [the complainant] v Officer for Police Crime Commissioner of Norfolk & the Chief Constable of Norfolk Police.

I request to know the figure of "all" costs and invoices that will be or have been paid to Filed Fischer for representation.

I would also like to know the breakdown of:

** The costs for the time spent on the application for a Charging Order*

** The costs for perpetration "and" representation for the hearing on the 8th March at London High Court*

** The costs for the total of everything.*

As your Office has undoubtedly shown negativity towards me in the past, I must inform you that this request falls squarely under the FOI Act and you are obliged to provide the following information. This obligation has been reaffirmed in the case of Neil Wilby v Office for Police and Crime Commissioner for North Yorkshire. This request was identical to mine and the PCC refused it. The case went to Court and the Tribunal made an Order for the PCC to supply the information.

I trust you will fulfill your obligations and there will be no need to waster [sic] any public funds on taking this case to the Tribunal".

7. The request was made through 'whatdotheyknow'.
8. The OPCC responded on 18 April 2018. It refused to confirm or deny whether the requested information was held, citing section 40(5) (personal information) of the FOIA.
9. Following an internal review, the OPCC wrote to the complainant on 16 May 2018 upholding its view.

Scope of the case

10. The complainant contacted the Commissioner on 22 May 2018 to complain about the way his request for information had been handled.
11. He disputed that legal costs can be considered as personal data on the basis that they do not identify anyone. He also told the Commissioner:

"In any event, the people who have spent the money are public servants and the public have a right to know about public spending".

12. In support of his argument, he referred to there being *'an abundance of case law that is in contrast to the OPCCN's rationale'*. Citing one case in particular that he considered relevant, he told the Commissioner:

"... there is no need for me to cite the wealth of cases. However, one case that is worth citing is Wilby v OPCCNY".

13. The Commissioner is mindful of the wording of the request in this case, in particular that it contains references to a court case that identifies the complainant, and an application for a charging order.
14. In light of the above, and with due regard to the wording and context of the request, the analysis below considers whether the OPCC was entitled to rely on section 40(5) of the FOIA to neither confirm nor deny holding the requested information, either on the basis of section 40(5)(a) or section 40(5)(b)(i).

Reasons for decision

Section 40 personal information

15. Section 40(5) of the FOIA provides certain exemptions from the duty to confirm or deny whether information is held, provided certain conditions are met.
16. Section 40 of the FOIA, so far as is relevant to the issues to be determined in this case, states that:

"(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject

...

(5) The duty to confirm or deny –

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either-

(i) the giving to a member of public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded”.

17. Section 40(5)(a) of the FOIA allows a public authority to neither confirm nor deny holding the requested information if the information, if held, would amount to the requester’s personal data. The rationale for this being that, if the requested information would amount to the requester’s personal data, there is a more appropriate mechanism under data protection legislation for the requester to obtain his or her personal data.
18. Section 40(5)(b)(i) allows a public authority to neither confirm nor deny holding the requested information if the act of confirmation or denial itself would reveal personal information and breach any of the data protection principles.

Section 40(5)(a)

Is the requested information personal data relating to the requester?

19. The definition of personal data is set out in section 1 of the Data Protection Act 1998 (DPA), the legislation in force at the time of this request. Section 1 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.
21. 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.
22. The complainant disputed the OPCC’s application of section 40(5) in this case. In correspondence with the OPCC, he said:

"... There are two public bodies in this claim who are "public" not private. I am the only other party and I consent to any information about me regarding this case be made public.

Secondly, simply listing how much "money" has been spent can not in itself be classed as private information.

Thirdly, the public have an inherent right to know what their money is being spent on".

23. The complainant referred the OPCC, and the Commissioner, to what he considered to be a similar case to his, EA/2017/0076¹, a case which also involved legal costs.
24. In that case, having considered the arguments, the First-tier Tribunal concluded that the identity of the claimant was immaterial; the information related to the quantum of expenditure.
25. Similarly, in this case, the Commissioner accepts that the requested information, the OPCC's legal costs, if held, would not sufficiently relate to the complainant to be considered to be his personal data.
26. She has reached this conclusion on the basis that the costs, if held, would not be biographically significant to the complainant, would not have him as its focus and would not affect his privacy. Rather, the requested costs, if held, would relate to the Police and Crime Commissioner for Norfolk and/or the Chief Constable of Norfolk Police.
27. Accordingly, the Commissioner finds that section 40(5)(a) does not apply: the requested legal costs, if held, would not be the complainant's personal data. The Commissioner has therefore gone on to consider section 40(5)(b)(i) and whether the act of confirmation or denial itself would be in breach of the data protection principles.

Section 40(5)(b)(i)

28. As noted above, the Commissioner considers that section 40(5)(b)(i) is about the consequences of confirming or denying whether the information is held and not about the content of the information requested. The issue is not whether disclosure would contravene data protection principles or section 10 of the DPA, but whether confirming or denying that the information is held would do so.

¹

<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2105/Wilby,%20Neil%20EA-2017-0076.pdf>

29. In relation to section 40(5)(b)(i) of the FOIA, the Commissioner's published guidance states²:

"This subsection refers to giving the confirmation or denial "to a member of the public". This reflects the fact that, in general terms, FOIA is concerned with disclosure to the world, and not to the particular individual who submitted the request".

30. The Commissioner recognises that there may be circumstances, for example requests for information about criminal investigations or complaints, in which simply to confirm whether or not a public authority holds relevant information can, in itself, reveal something about an individual. For example, to either confirm or deny that the information is held could indicate whether a person is, or is not, the subject of a complaint or some form of action. If to do so would contravene data protection principles, for example because it would be unfair, then the public authority is not obliged to confirm or deny that it holds the information.

Would confirmation or denial disclose personal data?

31. The Commissioner considers that context is important here. She considers it inescapable that confirmation or denial in response to any part of the request would disclose whether or not the OPCC holds information relating to the specified proceedings.

Would confirming or denying that the requested information is held contravene data protection principles?

32. The Commissioner considers that the first data protection principle is relevant in the circumstances of this case, in particular the requirement that personal data is processed fairly.

33. The first data protection principle 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, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

²

https://ico.org.uk/media/1206/neither_confirm_nor_deny_in_relation_to_personal_data_and_regulation_foi_eir.pdf

34. The processing in this case would be the act of confirming or denying whether the requested information is held. This means that confirmation or denial can only be provided in this case, if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions. If disclosure, by way of confirmation or denial, would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

Would confirmation or denial breach the first data protection principle?

35. The Commissioner is mindful of the wording of the request in this case.

36. In support of its application of section 40(5), the OPCC told the Commissioner:

"To either confirm or deny whether the OPCCN holds any information under the terms of the FOIA means that the OPCCN as a public authority would be confirming, to the world at large, whether it holds details of a court case involving the complainant".

37. In accordance with the first principle, deciding whether disclosure - in this case the confirmation or denial that information is held - would breach any of the data protection principles requires a consideration of whether disclosure would be "fair".

38. The Commissioner considers that information relating to legal proceedings, if held, will generally carry a strong expectation of privacy for the parties concerned.

39. In considering fairness in this case, the Commissioner has had regard to the consequences of disclosure. She considers that the question - in respect of fairness - is whether disclosure, by way of confirmation or denial, would be likely to result in unwarranted damage or distress to the individual concerned.

40. In this case, the Commissioner recognises that the complainant submitted his request via 'whatdotheyknow', a public website that facilitates the submission of freedom of information requests to public authorities and the dissemination of their responses.

41. She also accepts that he referred in his request to a decision of the First-tier Tribunal.

42. Furthermore, having received the OPCC's initial response, in which it refused to confirm or deny whether it held the requested information, the complainant told the OPCC:

"... I consent to any information about me regarding this case be made public".

43. In the circumstances of this particular case, the Commissioner is satisfied that the complainant, in making the request on a public website with reference to a decision of the First Tier Tribunal in which personal data was ordered to be disclosed to the world at large in response to a FOIA request, was aware of the implications and consequences of consenting to disclosure, by way of confirmation or denial, to the world at large.
44. She is therefore satisfied that it could be argued that such disclosure would be within the reasonable expectations of the individual. She is also satisfied that disclosure, by way of confirmation or denial, would be unlikely to result in unwarranted damage or distress to the individual concerned in these circumstances.
45. Having accepted that disclosure, by way of confirmation or denial, would not be unfair to the complainant, the Commissioner has next considered whether it would meet a condition in Schedule 2 of the DPA.
46. There are six conditions in Schedule 2, but only condition 1 (consent) or condition 6 (legitimate interests) should be relevant to disclosure under FOIA. The other conditions all refer to disclosure for a specific purpose, which cannot apply as disclosures under FOIA are not made for these purposes, but for the purpose of complying with FOIA.
47. In this case, the Commissioner is satisfied that the complainant gave his consent to the processing at the time of asking for internal review.
48. She also recognises the argument that there is a legitimate interest in the public understanding the costs which the Police and Crime Commissioner for Norfolk and/or the Chief Constable of Norfolk Police may have incurred.
49. She therefore considers that a Schedule 2 condition is met.

Would the disclosure be lawful?

50. In addition to meeting a Schedule 2 condition, any disclosure must also be lawful in order to comply with the first principle. The Commissioner's guidance defines 'lawful' as follows:

""Lawful"" refers to statute law and common law, whether criminal or civil. This includes industry-specific legislation or regulations. Furthermore, a disclosure that would breach an implied or explicit duty of confidence or an enforceable contractual agreement would also be unlawful".

51. In this case, the Commissioner is not aware of any reason why disclosure would not be lawful.

52. In light of the above, the Commissioner is satisfied that it would be fair, lawful and meet one of the conditions in Schedule 2 of the DPA to disclose, by way of confirmation of denial, whether the requested information is held.
53. Accordingly, she considers that the exemption provided by section 40(5)(b)(i) is not engaged.

Right of appeal

54. 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

55. 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.
56. 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

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