

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 May 2020

Public Authority: Chief Constable of Surrey Police
Address: Police Headquarters
Mount Browne
Sandy Lane
Guildford
GU3 1HG

Decision (including any steps ordered)

1. The complainant requested information relating to a court case involving Surrey Police. Surrey Police provided some information within the scope of the request, but refused to provide the remainder, citing section 40(2) (personal information) of the FOIA.
2. The Commissioner investigated Surrey Police's application of section 40(2) to the withheld information within the scope of part (1) of the request.
3. The Commissioner's decision is that the information is exempt from disclosure on the basis of section 40(2) of FOIA.
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 11 February 2019, the complainant wrote to Surrey Police and requested information in the following terms:

"How much were you ordered to pay in money damages in case of R (oao TL) v Surrey Police [2017] EWHC 129 (Admin) (31 January 2017)?

Provide the PSD/IOPC report".

6. The request was made using *'whatdotheyknow'*.
7. Surrey Police provided its substantive response on 1 August 2019, clarifying, with respect to part (2) of the request, that the incident was not reported to the Independent Office for Police Conduct (IOPC) and was dealt with as a complaint. It provided some information within the scope of the request, specifically a redacted copy of the report within the scope of part (2), but refused to provide the remainder. It cited the following exemptions as its basis for doing so:
 - section 44 (prohibitions on disclosure)
 - section 40 (personal information).
8. The complainant requested an internal review, stating:

"Explain why there would be a contempt of court if damages were disclosed".
9. Following an internal review, Surrey Police wrote to the complainant on 11 October 2019. It maintained its original position, clarifying that the information is subject to a confidentiality agreement and is therefore not suitable for disclosure.

Scope of the case

10. The complainant contacted the Commissioner on 11 October 2019 to complain about the way his request for information had been handled, simply stating:

"I apply for a s50 DN".
11. The Commissioner was mindful that the basis of his request for an internal review was in relation to contempt of court arising from disclosure of the information in scope of the first part of the request, rather than in relation to the redacted copy of the report that had been disclosed.
12. She therefore wrote to both parties, setting out the scope of her investigation, namely whether Surrey Police was entitled to rely on section 44(1)(c) as a basis for refusing to provide the information withheld by virtue of that exemption, ie information within the scope of part (1) of the request.
13. Despite the Commissioner clearly stating that her investigation was specifically with respect to Surrey Police's application of section 44, the complainant responded stating:

"Personal information such as names can be redacted".

14. During the course of the Commissioner's investigation, Surrey Police confirmed that it was no longer citing section 44. It confirmed, however, that section 40(2) applied to the information within the scope of part (1) of the request. It wrote to the complainant accordingly.
15. As those steps appeared to satisfy his complaint about Surrey Police's handling of part (1) of the request, specifically its application of section 44, the Commissioner wrote to the complainant, asking him to clearly set out any outstanding issues he wished to be considered in that regard.
16. The complainant disputed that he was requesting personal information and asked for a decision notice (DN).
17. In light of the above, the analysis below considers Surrey Police's application of section 40(2) to the withheld information within the scope of part (1) of the request.

Reasons for decision

Section 40 personal information

18. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3) or 40(4) is satisfied.
19. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
20. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.

¹ As amended by Schedule 19 Paragraph 58(3) DPA

21. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

22. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

23. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
24. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
25. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
26. The Commissioner's guidance² states:
- "The DPA defines personal data as any information relating to an identified or identifiable living individual. If an individual cannot be directly identified from the information, it may still be possible to identify them".*
27. The request in this case relates to the amount of damages Surrey Police was ordered to pay in the context of a particular case. It is accepted that the case in question arose from a complaint about an unlawful arrest.
28. The Commissioner is satisfied that information arising from an incident involving an arrest relates to the individual concerned ('the claimant').
29. The second part of the test is whether the withheld information identifies any individual.

² <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-regulation-13.pdf>

30. In his brief correspondence with the Commissioner regarding his request for a DN in this case, the complainant emphasised that, as he was not requesting a name, he was not requesting personal data.
31. In its submission to the Commissioner, Surrey Police confirmed its view that the information requested is the personal data of the claimant.
32. The Commissioner notes that, in the judgement referred to in the request, the claimant's identity was anonymised.
33. The Commissioner is mindful that the issue to be considered in a case such as this is whether disclosure to a member of the public would breach the data protection principles, because an individual is capable of being identified from apparently anonymised information.
34. She accepts that different members of the public may have different degrees of access to the 'other information' needed for re-identification to take place.
35. A test used by both the Commissioner and the First-tier Tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of reidentification of an individual from information which, on the face of it, appears truly anonymised.
36. In the circumstances of this case, having considered the withheld information and the wording of the request, the Commissioner is satisfied that the information relates to an order to pay damages to the claimant. She is satisfied that the information both relates to, and identifies, the individual concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
37. She has reached that conclusion on the basis that the focus of the information is the claimant and that information about the claim for damages is clearly linked to them.
38. In the circumstances of this case, the Commissioner is further satisfied that the individual concerned would be reasonably likely to be identifiable from a combination of the requested information and other information which is likely to be in, or come into, the possession of others, such as those with knowledge of the arrest and subsequent complaint.
39. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under

the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

40. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

41. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

42. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

43. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

44. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" lawful bases for processing listed in the Article applies.

45. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"³ .

³ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

46. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

- (i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;
- (ii) Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;
- (iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

47. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

48. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

49. From the available correspondence, the Commissioner can find no legitimate interest arguments from the complainant in support of disclosure of the requested information, either on his own behalf or on behalf of the public at large.

50. However, the Commissioner accepts that there is a legitimate interest with regard to accountability for a claim for damages to be paid by Surrey Police.

Is disclosure necessary?

51. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

52. The Commissioner is prepared to accept that disclosure of the withheld information is necessary to meet the interests identified above.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

53. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
54. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
55. In the Commissioner's view, a key issue is whether the individual concerned would have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as an individual, and the purpose for which they provided their personal data.
56. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
57. The Commissioner is mindful of the context of the request for information. She acknowledges that, using the details cited in the request for information, she was able to find information about the case in question in the public domain. However, while information about the case is available in the public domain, given the nature of the allegations which gave rise to the complaint, the information is anonymised.
58. The Commissioner appreciates that the individual involved would have no expectation that their personal data would be disclosed under FOIA.
59. Furthermore, the Commissioner accepts that disclosure of the withheld information risks invading the privacy of the individual concerned.

60. During the course of the Commissioner's investigation, Surrey Police confirmed that it had sought consent to disclosure in this case, but that it had been unable to obtain consent.
61. The Commissioner considers that disclosure of their personal information under the FOIA would be likely to result in unwarranted damage or distress to the individual concerned.
62. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
63. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

Conclusion

64. The Commissioner has therefore decided that Surrey Police was entitled to withhold the information under section 40(2), by way of section 40(3A) (a).

Right of appeal

65. 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@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

66. 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.

67. 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

**Laura Tomkinson
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