

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 August 2022

Public Authority: Chief Constable of Durham Constabulary
Address: Police Headquarters
Aykley Heads
Durham
DH1 5TT

Decision (including any steps ordered)

1. The complainant has requested information on the identity of an individual who they say placed a telephone call to Durham Constabulary. Durham Constabulary has relied on section 40(2) (personal data) to withhold information within scope of the first part of the request. It has neither confirmed nor denied it holds information requested in the second part under section 31(3) of FOIA, which concerns law enforcement.
2. The Commissioner's decision is as follows:
 - The information requested in the first part of the request is exempt information under section 40(2) of FOIA as it is the personal data of a third person and releasing this information would not be lawful.
 - Durham Constabulary is entitled to rely on section 31(3) of FOIA to neither confirm nor deny it holds the information requested in the second part of the request as to do so would be likely to prejudice the apprehension or prosecution of offenders, and the exercise of Durham Constabulary's functions for the purpose of ascertaining whether any person has failed to comply with the law.
 - Durham Constabulary breached section 17(1) as its refusal of the request was not adequate.

3. The Commissioner does not require Durham Constabulary to take any corrective steps.

Request and response

4. On 24 September 2019, the complainant wrote to Durham Constabulary and requested information in the following terms:

“Please could you confirm urgently - for a Court Hearing on Thursday [1] the name of the individual who maliciously placed a call with yourselves on 26th April 2016 or [2] confirm that it was definitely not a member of my family.”

5. On 24 September 2019 Durham Constabulary provided the complainant with a response to this and a later request they submitted the same day. It indicated that it could not provide the name of “any” third party as, if such data were held, disclosing it would breach the data protection legislation.
6. Having received its response, the complainant requested an internal review, but Durham Constabulary did not undertake a discrete review under FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 23 May 2022 to complain about the way their request for information had been handled.
8. As a result of their complaint to the Commissioner, Durham Constabulary reconsidered its response to the request. It issued the complainant with what was effectively an internal review response on 15 July 2022. Durham Constabulary refused to confirm or deny whether it held information within scope of the request under section 31(3) of FOIA.
9. Durham Constabulary subsequently confirmed to the Commissioner that it was relying on section 40(2) with regard to the first part of the request and section 31(3) with regard to the second part.
10. The Commissioner’s investigation has focussed on Durham Constabulary’s reliance on these two exemptions. He will also consider Durham Constabulary’s refusal of the request.
11. The Commissioner has considered Durham Constabulary’s handling of internal reviews under ‘Other Matters’ in the course of a separate

investigation¹ associated with the second request. He does not intend to consider it again here.

Reasons for decision

Section 40 – personal data

12. In the first part of their request the complainant has requested the name of a person who they say made a call to Durham Constabulary.
13. 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(3A)(3B) or 40(4A) is satisfied.
14. In this case the relevant condition is contained in section 40(3A)(a) . 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').
15. 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 FOIA cannot apply.
16. Second, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

"any information relating to an identified or identifiable living individual".
18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4020106/ic-108593-12w7.pdf>

19. 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.
20. 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.
21. In this case, the complainant has requested the name of the individual who they say placed a telephone call to Durham Constabulary.
22. The Commissioner is satisfied that the information relates to the person who may have made the call (ie the data subject). He is satisfied that this information both relates to and could identify the person concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
23. 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. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

24. 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".

25. 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.
26. 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

27. 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.
28. 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” .

29. 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:
- **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information
 - **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question
 - **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject
30. 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

31. 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.
32. The complainant has a personal interest in the requested information and has referred to a Court hearing.

Is disclosure necessary?

33. ‘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.

34. Both Durham Constabulary and the Commissioner, in wider correspondence they have had with the complainant, have advised the complainant to consider any alternative routes through which they could access the information they are seeking, such as through a solicitor under Schedule 2 Part 1 (5)(3) of the DPA 2018. As such, the Commissioner considers that disclosure under FOIA may well not be necessary. However, in the interests of completeness he will carry out the third part of the test, the balancing test.

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

35. 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 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.

36. 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

37. In the Commissioner's view, a key issue is whether the individual concerned has 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 individuals, and the purpose for which they provided their personal data.

38. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

39. As noted, the requested information concerns a personal interest of the complainant; it has no wider public interest and the complainant has not presented a strong case, or any case, that supports their view that the information should be released. As has also been noted, there may be other routes through which the complainant can access the information.

40. Regarding the data subject's interests, the Commissioner is satisfied that the individual who may have placed a call to Durham Constabulary

would not expect their name to be released to the world at large as the result of a request under FOIA. Given that expectation and the circumstances ie the reporting of a concern to the police, the Commissioner believes that disclosing their name would cause that individual a good deal of harm or distress.

41. 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 disclosing the information would not be lawful.
42. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's view

43. The Commissioner has therefore decided that Durham Constabulary is entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Section 31 – law enforcement

44. In the second part of their request, the complainant has asked Durham Constabulary to confirm whether or not a person who may have made a call to it was a member of their family.
45. Under section 1(1)(a) of FOIA, anyone who requests information from a public authority is entitled to be told if the authority holds the information ('the duty to confirm or deny').
46. However, under section 31(3) of FOIA, the duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection 31(1).
47. The matters that Durham Constabulary has confirmed it considers would be likely to be prejudiced (rather than **would** be prejudiced) by confirming or denying it holds the requested information are those under:
 - section 31(1)(b) – the apprehension or prosecution of offenders, and;
 - section 31(1)(g) - the exercise by any public authority of its functions for any of the purposes specified in subsection (2).

48. The purposes under section 31(2) that Durham Constabulary has identified would be likely to be prejudiced by confirming or denying it holds the requested information are those under:
- (a) the purpose of ascertaining whether any person has failed to comply with the law
 - (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper; and
 - (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or arise.
49. In its submission to the Commissioner, Durham Constabulary has said that if it were to confirm or deny whether it holds the requested information it would erode its ability to protect law enforcement information such as incident or crime reports associated with investigations.
50. Durham Constabulary has gone on to say that confirming or denying whether this information is held could harm, that is, compromise the confidence of the public and organisations to supply it with information, which would then hinder law enforcement.
51. Durham Constabulary says it takes seriously its responsibility to obtain and gather information/intelligence and evidence as part of its law enforcement processes. Information/intelligence and evidence is only ever obtained as per current legislative and common law frameworks to aid the delivery of effective law enforcement. In this case, the harm to its law enforcement capability outweighs the need to confirm or deny.
52. Durham Constabulary says that confirming or denying it holds the requested information, and information of this type, would be likely to harm its ability to prevent and detect crime and to prosecute offenders and the other law enforcement functions it has cited under section 31 of FOIA. This is because individuals may well be less inclined to come forward and provide information and/or intelligence and cooperate with the Police in the future.
53. This would especially be the case if they were aware that the information they provided [or, indirectly, information about an incident that may or may not have been reported] could be disclosed to the world at large through someone requesting it [or if Durham Constabulary confirmed or denied it holds particular information], some time in the future and in circumstances sitting outside of the legislative criminal justice or regulatory processes.

54. Where information is volunteered or reported by a member of the public, or is supplied from a confidential source, Durham Constabulary has told the Commissioner that that person has provided that information on the understanding that they will not be publicly identified, and that any information they may have supplied and the identity of its source will be protected.

The Commissioner's conclusion

55. The Commissioner is satisfied, for the reasons that will be discussed below, that confirming or denying the requested information is held would be likely to prejudice Durham Constabulary's ability to apprehend or prosecute offenders, under section 31(1)(b) of FOIA.
56. With regard to its reliance on section 31(1)(g), the Commissioner also accepts that Durham Constabulary carries out the function of enforcing the law and he has gone on to consider the purposes for which it exercises that function. The first that Durham Constabulary has cited is the purpose of ascertaining whether any person has failed to comply with the law, under subsection 31(2)(a). The Commissioner is again satisfied for the reasons that will be discussed below that confirming or denying the requested information is held would be likely to prejudice Durham Constabulary's ability to exercise its function for that purpose. Since he has found that section 31(1)(g) of FOIA is engaged by way of subsection 31(2)(a), the Commissioner has not considered Durham Constabulary's citing of subsections 31(2)(b) and 31(2)(c).
57. The Commissioner accepts Durham Constabulary's position that if it were to confirm or deny that it holds information within scope of the second part of the complainant's request could potentially provide information about any caller.
58. As such, the Commissioner considers that confirmation or denial in this case would therefore be likely to inhibit people from contacting Durham Police with concerns in the future. This is because they could be concerned that there was a risk of information about any incident - including their own involvement in any incident, their identity, and even the fact of whether or not any incident had taken place - being made public as the result of a FOIA request.
59. The Commissioner therefore accepts that confirming or denying whether the requested information is held would be likely to result in prejudice to Durham Constabulary's ability to apprehend or prosecute offenders under section 31(1)(b) of FOIA and would be likely to prejudice the exercise of Durham Constabulary's functions under section 31(1)(g) of

FOIA, for the purpose described under subsection 31(2)(a). The Commissioner's decision is therefore that section 31(3) is engaged.

60. Section 31(3) is a qualified exemption and so the Commissioner has next considered whether in all of the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest test

Public interest in disclosing the information

61. Durham Constabulary has acknowledged that there is a general public interest in disclosing information [or confirming or denying information is held]. This is because it promotes accountability and transparency and helps to maintain the public's confidence and trust.
62. The Commissioner also notes that the complainant has a personal interest in being provided with the requested information, if it is held. However, FOIA concerns disclosure to the general public at large and does not allow for private disclosure to an interested party.

Public interest in maintaining the exemption

63. Durham Constabulary's position is that disclosure/confirmation or denial could discourage people from voluntarily providing information to it. This would happen if individuals or organisations were aware Durham Constabulary may, if it held such information, reveal the fact of any call or other associated information to the world at large under FOIA.
64. Durham Constabulary says it is important for the general public to have confidence in the Police Service, which is responsible for enforcing the law. Confirmation or denial in this case would not, in Durham Constabulary's view, satisfy any higher public interest because it would compromise the free flow of information, intelligence or evidence provided to Durham Constabulary and to the wider Police Service.
65. Durham Constabulary says it is a matter of fact that even where the provider of any information is not a confidential source, there is still a public interest in not discouraging others from cooperating with public authorities and supplying them with the information they need on a voluntary basis. There is clearly a public interest in not deterring the voluntary supply of any information to Durham Constabulary or any Police Force.

Balance of the public interest

66. The Commissioner considers that, although the information the complainant has requested is of interest to them, it has no wider public interest.
67. The Commissioner has considered Durham Constabulary's submission and all the circumstances of this case. He is satisfied that there is far greater public interest in individuals not being reluctant to alert Durham Constabulary to any concerns they have which may require its involvement. Without individuals volunteering information to Durham Constabulary, the task of protecting lives and property, and preventing and detecting criminal offences, would be made more difficult. The Commissioner finds that the public interest therefore favours neither confirming nor denying the requested information is held on this occasion.

Section 17 – refusal of request

68. Under section 17(1) of FOIA, a public authority which is relying on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which (a) states that fact, (b) specifies the exemption in question, and (c) states (if that would not otherwise be apparent) why the exemption applies.
69. In its refusal of 24 September 2019 Durham Constabulary discussed data protection legislation, but it did not specify the FOIA exemption on which it was relying. It was not until 15 July 2022, that Durham Constabulary clearly confirmed to the complainant that it was refusing their request under a specific exemption - section 31(3) of FOIA. The Commissioner therefore finds that Durham Constabulary's refusal notice did not fully meet the requirements of section 17(1).

Right of appeal

70. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

71. 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.
72. 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

Cressida Woodall
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