

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 January 2023

Public Authority: Chief Constable of British Transport Police
Address: Force Headquarters
25 Camden Road
London
NW1 9LN

Decision (including any steps ordered)

1. The complainant requested information relating to a named officer. British Transport Police (BTP) provided some information within the scope of the request but neither confirmed nor denied holding the remaining requested information, citing sections 40(5B) (personal information) and 31(3) (law enforcement) of FOIA.
2. The Commissioner's decision is that BTP was entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds that information.
3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. On 25 June 2022, the complainant wrote to BTP and requested information in the following terms:

"[name redacted]

In relation to the above named officer I apply for the following information:

- 1) The BBC is reporting that a misconduct hearing will take place on [date redacted]. Why is there such a delay?

- 2) Is this officer suspended?
 - 3) If not why not?
 - 4) Is this officer still in public facing roles and duties?
 - 5) If so, why is this given the seriousness of the allegations?"
5. BTP responded on 22 July 2022. It stated that the following exemptions apply:
 - section 40(2) – Personal Information
 - section 31(1)(g) 2(b) - Law Enforcement
 6. It maintained that position at internal review.
 7. BTP subsequently revisited its handling of the request. It wrote to the complainant and provided information in response to part 1 of the request. However, it neither confirmed nor denied whether it held the requested information in scope of parts 2-5 of the request, citing sections 40(5) (personal information) and 31(3) (law enforcement) of FOIA.

Reasons for decision

8. The following analysis explains why the Commissioner is satisfied that BTP was entitled to neither confirm nor deny holding the information that has been requested in parts 2-5 of the request.
9. Section 40(5B) of FOIA allows a public authority to refuse to confirm or deny that it holds particular information if the mere act of confirming (or denying) that information is held would, in itself, reveal personal data about an identifiable individual and would contravene one of the data protection principles.
10. Therefore, for BTP to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of parts 2-5 of the request, the following two criteria must be met:
 - confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

11. In this case, the introduction to the request clearly states the name of a third party, namely the officer who is the subject of the request.
12. The Commissioner considers that information relating to a specific named police officer constitutes personal data about that officer. It follows that the Commissioner is satisfied that the officer involved is identifiable.
13. The information in scope of parts 2-5 of the request therefore falls within the definition of 'personal data' in section 3(2) of the Data Protection Act 2018, it being the officer's personal data.
14. BTP cannot confirm or deny to the general public that it holds information within the scope of parts 2-5 of the request without disclosing personal data about a third party.
15. The first criterion set out above is therefore met.

Would confirming whether or not the requested information is held contravene one of the data protection principles?

16. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent BTP from refusing to confirm whether or not it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.
17. The most relevant data protection principle in this case is principle (a), which states:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
18. 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 (or, as in this case, the public authority can only confirm whether or not it holds the requested information) if to do so would be:
 - lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) UK GDPR);
 - fair; and
 - transparent.

19. The Commissioner recognises the importance of taking a consistent approach when giving an NCND response. Not being consistent might give rise to inferences that could have adverse effects or give clues about the content of information that is protected from disclosure.
20. The context of the request in this case is a misconduct hearing. The information described would, if held, be in the context of a misconduct investigation.
21. The Commissioner recognises that BTP acknowledged that some details of the case have been published. However, the information requested at parts 2-5 of the request goes beyond the information in the public domain.
22. The Commissioner appreciates that the complainant considers that there is a public interest in disclosure on the basis that disclosure may build up confidence and trust within the community and encourage victims to come forward.
23. The Commissioner considers it is a legitimate interest for them to have. The Commissioner also recognises the wider public interest in transparency and accountability.
24. BTP accepted that the request asks about an area of policing that is clearly of high public interest. In that respect, BTP told the complainant that access to information about police misconduct cases is provided by the statutory framework in place. It explained that the processes and regulations in place are designed to allow as much transparency and public access and confidence in the system as possible.
25. However, it argued that the transparent nature of misconduct hearings does not mean that the police are required to confirm or deny the existence of, or disclose additional personal data about, individuals who have publicly been confirmed to be subject of a planned misconduct hearing in line with the regulations.
26. It also argued that disclosure in this case, by way of confirmation or denial, "would cause unwarranted attention to an identified individual".
27. The Commissioner accepts that the British Transport Police (Conduct) Regulations 2020 include measures which provide transparency with regard to misconduct cases.
28. Irrespective of any information that may be available outside of FOIA, he also accepts that individuals have a clear and strong expectation that their personal data will be held in accordance with data protection laws.

29. In this case, he is satisfied that the officer concerned would not reasonably expect BTP to disclose to the world at large whether or not it held information in scope of parts 2-5 of the request.
30. Taking all the above factors into account, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful.
31. As there is no lawful basis for doing so, confirming or denying would be unlawful and therefore BTP is entitled to rely on section 40(5B) of FOIA to neither confirm nor deny that the requested information is held
32. In light of his decision above, the Commissioner has not considered BTP's application of section 31(3) to the same information.

Right of appeal

33. 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

34. 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.
35. 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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