

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 December 2023

Public Authority: Commissioner of the City of London Police
Address: Police Headquarters
Guildhall Yard East
London
EC2V 5AE

Decision (including any steps ordered)

1. The complainant requested a copy of a decision report regarding a complaint he believed had been made about a senior officer. City of London Police ('CoLP') would neither confirm nor deny ('NCND') whether it held the requested information, citing sections 40(5A) and (5B) (Personal information) and 30(3) (Investigations and proceedings) of FOIA.
2. The Commissioner's decision is that CoLP was entitled to apply section 40(5B)(a)(i) of FOIA to issue an NCND response. However, it breached section 17(1) of FOIA by failing to issue a valid refusal notice within the 20 working day time for compliance.
3. The Commissioner requires no steps as a result of this decision.

Request and response

4. On 5 June 2023, the complainant wrote to CoLP and requested information in the following terms:

"In 2021/2, a complaint was made by a former Special Constable against [job title of senior officer, redacted], and was supported by several other former and serving officers. In March 2023, this complaint was dismissed with no case to answer. I would like to see

the Appropriate Authority's decision report (suitably anonymised), including the rationale for arriving at this decision.”

5. CoLP responded on 1 August 2023. It cited “section 40(2)(3)(4)” of FOIA to refuse the request.
6. The complainant requested an internal review on 6 August 2023, disputing that he had requested any personal data.
7. CoLP provided the outcome of the internal review on 18 August 2023, revising its position. It issued an NCND response, citing sections 40(5A) and (5B), and 30(3) of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 22 August 2023 to complain about the way his request for information had been handled. He challenged the application of the cited exemptions.
9. The analysis below considers whether CoLP was entitled to rely on any of the cited exemptions to NCND whether it held the requested information.

Reasons for decision

Section 40 – Personal information

10. Under section 1(1) of FOIA, anyone who requests information from a public authority is entitled, under subsection 1(1)(a), to be told if the authority holds the requested information – this is referred to as ‘the duty to confirm or deny’.
11. However, section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the UK General Data Protection Regulation (‘UK GDPR’) to provide that confirmation or denial. The Commissioner's guidance¹ on personal data explains that there may be circumstances in which merely confirming or

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-40-and-regulation-13-personal-information/>

denying that a public authority holds information about an individual can itself reveal something about that individual to the wider public.

12. For CoLP to be entitled to rely on section 40(5B)(a)(i), the following two criteria must be met:
 - confirming or denying whether the requested information is held must constitute the disclosure of a third party's personal data; and
 - providing the confirmation or denial would contravene one of the data protection principles.
13. It is not necessary to show that both confirming **and** denying would each result in the disclosure of personal data. The exemption will be engaged if confirming alone would meet the above criteria, and it may be applied even where the requested information is not, in fact, held.

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

14. Section 3(2) of the Data Protection Act 2018 ('the DPA') defines personal data as:-

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

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier, such as their name. 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.
17. The request asks for information about a particular person, referring to them by job title. Because of the seniority of the post in question, it is held by one individual at CoLP. The identity of the post holder will be known by the requester, by CoLP's officers and staff, and it may be ascertained by the general public with relative ease, through an internet search using the job title. The Commissioner is therefore satisfied that the subject of the request is a living individual who is indirectly identifiable from their job title. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA. The individual is henceforth referred to in this notice as "the data subject".
18. If CoLP was to confirm that it holds the requested information, it would reveal information that is about the data subject, is linked to them, has

biographical significance for them and has them as its main focus (ie whether or not they were the subject of an internal complaint investigation). This is information which, as far as the Commissioner can ascertain, is not currently in the public domain.

19. For the reasons set out above, the Commissioner is satisfied that, if CoLP confirmed or denied that it held the requested information, this would result in the disclosure of a third party's personal data. The first criterion set out in paragraph 12 is therefore met.
20. The second element of the test is to determine whether confirming or denying would contravene any of the data protection principles.

Would confirming or denying contravene principle (a)?

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

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

22. In the case of an FOIA request, 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/deny that it holds the requested information) if to do so would be lawful, fair and transparent.
23. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

24. 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”².

² 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”.

25. In considering the application of Article 6(1)(f) of the UK GDPR, 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 confirmation/denial as to whether the information is held 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.
26. 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

27. In considering any legitimate interests in confirming/denying that the requested information is held, 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 interests 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.
28. From the information provided to him, the Commissioner understands that the complainant has a legitimate personal interest in seeking the requested information. He cannot elaborate further on those reasons in this decision notice, as to do so risks disclosing information which is itself exempt under section 40.

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".

29. As regards CoLP's position, in its internal review response, it stated:

"Confirming or denying that information exists relevant to this request would lead to a better informed public, improving their knowledge and understanding of how the police service and the CoLP undertake internal investigations from complaints made."

30. The Commissioner acknowledges that there is a wider legitimate interest in transparency, regarding CoLP's handling of internal disciplinary matters. The Commissioner therefore agrees that confirming/denying that information is held in this case would go some way towards informing the public about CoLP's response to internal complaints, and about the accountability of senior police officers.
31. Therefore, the Commissioner recognises there is a legitimate interest in providing confirmation or denial in this case.

Is confirming/denying that the requested information is held, necessary?

32. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA that the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
33. From the information provided to him, the Commissioner considers that confirmation or denial would not satisfy the complainant's personal legitimate interests.
34. However, as the Commissioner has found no formal statement in the public domain about any investigation involving the data subject, he is satisfied that confirmation or denial would be necessary in order to meet the legitimate interest in knowing whether a complaint against a particular senior officer was actually made, and formally investigated.

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 confirming whether or not the requested information is held against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm, in response to an FOIA request, whether or not it held the requested information, or if such a confirmation or denial would cause

unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying that information is held.

36. Each request for information must be considered on its own merits. As set out above, the Commissioner considers that there is some legitimate interest in confirming/denying that the requested information is held, since this would inform the public as to whether a complaint against a senior officer was made, and formally investigated.
37. However, as stated above, the Commissioner has been unable to locate official information about any alleged complaint, in the public domain. The Commissioner recognises that data subjects have a clear and strong expectation that their personal data will be held in accordance with data protection laws. CoLP says that the data subject has not been informed about the request. That being the case, the Commissioner is satisfied that the data subject would not reasonably expect CoLP to disclose to the world at large whether or not they had been the subject of a formal complaint by fellow officers, particularly one which, according to the complainant, had been investigated and "dismissed with no case to answer".
38. The Commissioner accepts that the disclosure of information concerning such matters could cause a significant invasion of privacy for the data subject, particularly if, as a result of any investigation, the complaint was dismissed. It may also potentially cause reputational harm or professional embarrassment to them.
39. The Commissioner has weighed this against the legitimate interests in disclosure in this case, mindful that information released under FOIA is to the world at large and not just to the complainant, for private reasons. He notes there is no presumption under FOIA that public authority openness and transparency should take priority over personal privacy.
40. Based on the above factors, the Commissioner has determined that the legitimate interests he has identified in confirmation or denial are not sufficient to outweigh the data subject's fundamental rights and freedoms; thus, confirming whether or not the requested information is held would not be lawful. The Commissioner is not persuaded that revealing, under FOIA, whether or not a complaint about a senior officer was made and investigated by CoLP, is necessary in order to maintain public confidence. He is also satisfied that confirming or denying that the information is held may potentially cause damage and distress to the data subject.
41. As disclosure (by way of confirmation/denial) is not necessary, there is no lawful basis for this processing and it would be unlawful. It therefore does not meet the requirements of principle (a).

42. It follows that CoLP was entitled to NCND whether it holds the requested information, on the basis of section 40(5B)(a)(i) of FOIA.
43. As the Commissioner has found that CoLP is entitled to rely on section 40(5B)(a)(i) of FOIA in this case, he does not deem it necessary to also consider its reliance on section 30(3) of FOIA.

Procedural matters

44. Section 17(1) of FOIA requires a public authority to communicate its reasons for refusing a request within the 20 working day time for compliance.
45. In this case, CoLP took 41 working days to respond to the request. As a result, the Commissioner has found breaches of sections 17(1)(a), (b) and (c) of FOIA.
46. These breaches have been logged for monitoring purposes.

Right of appeal

47. 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

48. 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.

49. 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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