

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 December 2016

Public Authority: Chief Constable Cumbria Constabulary
Address: Police Headquarters
Carleton Hall
Penrith
Cumbria
CA10 2AU

Decision (including any steps ordered)

1. The complainant requested information regarding the outcome of an interview he believed was held regarding an allegation of misconduct in public office.
2. Cumbria Constabulary (the Constabulary) neither confirmed nor denied holding the requested information citing section 40(5) of the FOIA (personal information).
3. The Commissioner's decision is that the Constabulary was correct to neither confirm nor deny holding information within the scope of the request.
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 27 March 2016, the complainant wrote to Cumbria Constabulary and requested information in the following terms:

"1. What was the brief given to Cumbria Constabulary from the then MP for Workington, Sir Tony Cunningham, in referring the matter on my behalf.

2. What was the outcome of the interview in respect of misconduct in public office, of the former Cumbria County Council [role and

name redacted]. The interview referred to by Detective Constable [name redacted] in his meeting with me on October 28 2009.

3. Any instruction or brief not to investigate this matter for political reasons”.

6. Cumbria Constabulary responded on 20 June 2016. It refused to confirm or deny that it held the requested information citing section 40(5) of the FOIA (personal information).
7. Following an internal review Cumbria Constabulary wrote to the complainant on 26 July 2016 upholding its position.

Scope of the case

8. The complainant contacted the Commissioner on 20 August 2016 to complain about the way his request for information had been handled.
9. He disputed the Constabulary's application of section 40(2). In that respect, the Commissioner notes that the Constabulary told the complainant that it was relying on sections 40(5)(a) and 40(5)(b)(i) of the FOIA to neither confirm nor deny holding the requested information, on the basis that, if held, the information would be exempt under sections 40(1) and 40(2) of the FOIA. It explained that, if held, the information would constitute the complainant's own personal data and the personal data of a third party.
10. The requested information in this case relates to an allegation of misconduct in public office and a police interview that the complainant believes was held with an employee of Cumbria County Council.
11. The analysis below considers the Constabulary's application of section 40(5) of the FOIA to the requested information. In particular, the Commissioner has considered the Constabulary's application of section 40(5)(b)(i) to information within the scope of the request which, if held, would constitute third party personal information.
12. The Commissioner has referred to the Constabulary's application of section 40(5)(a) of the FOIA in relation to the complainant's own personal data in the Other matters section of the decision notice.

Reasons for decision

Section 40 - personal information

13. Section 40(5)(b)(i) of the FOIA excludes a public authority from complying with the duty imposed by section 1(1)(a) - confirming whether or not the requested information is held - in relation to information which, if held by the public authority, would be exempt information by virtue of subsection (1).
14. Consideration of section 40(5) involves two steps: first, whether providing the confirmation or denial would involve the disclosure of personal data, and secondly, whether disclosure of that personal data would be in breach of any of the data protection principles.

Is the information personal data?

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. 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.
16. The complainant disputes that the information constitutes personal data as his request was directed at the Constabulary – an organisation, not a living individual. In his view, he is seeking to know "*What did the police do following the interview*"?
17. The disputed information in this case relates to the outcome of an interview the complainant believes was held with a member of council staff. In that respect, the Constabulary told the complainant it was satisfied that he had requested personal data relating to a third party.
18. In correspondence with the Commissioner, the Constabulary confirmed its view that the requested information, if held, would constitute the personal information of the individual named in the request as the potential interviewee.
19. The Commissioner is satisfied that complying with section 1(1)(a) in this case would effectively confirm or deny whether the requested information is held in connection with the individual named in the request. Clearly this information would relate to that individual and so would be their 'personal data'.

Is the information sensitive personal data

20. Sensitive personal data is personal data which falls into one of the categories set out in section 2 of the DPA. In this case, given that the request relates to information about an allegation of misconduct in public office in relation to the named individual, the Commissioner considers that the relevant category is 2(g):

"the commission or alleged commission by him of any offence".

21. The Constabulary told the complainant that, given the wording of his request, the information, if held, would relate to the commission, or alleged commission, of a criminal offence.
22. The Commissioner is satisfied that to confirm or deny whether information was held relating to an interview with a named member of council staff regarding an allegation of misconduct in public office would reveal their sensitive personal data.

Would confirmation or denial breach the first data protection principle?

23. Having accepted that the request is for the sensitive personal data of a living individual other than the applicant, the next step is to address whether disclosure of that personal data – in this case the confirmation or denial that information is held - would be in breach of any of the data protection principles.
24. The data protection principles are set out in Schedule 1 of the DPA. The Commissioner considers that the first data protection principle is relevant in the circumstances of this case.
25. 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.”

26. In the case of a 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 fair, lawful and would meet one of the DPA Schedule 2 conditions and, in this case, one of the Schedule 3 conditions. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.
27. The Commissioner’s considerations below have focussed on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of disclosure against the legitimate public interest in disclosing information.

Reasonable expectations

28. The Constabulary told the complainant that, in its view, the person to whom the information would relate, if it were held, would have no

expectation that their personal data would be released into the public domain in response to an FOI request.

29. In its submission to the Commissioner, the Constabulary argued that the employee named in the request "*would quite legitimately have no expectation*" that the Constabulary would release any information it may hold into the public domain, particularly given the length of time that has elapsed since the date of any interview which may or may not have taken place.
30. In this case, the Commissioner is satisfied that the data subject would have the reasonable expectation that their personal data, if held, would not be disclosed.
31. Furthermore, the Commissioner considers that, in most cases, the very nature of sensitive personal data means it is more likely that disclosing it will be unfair. The reasonable expectation of the data subject is that such information would not be disclosed and that the consequences of any disclosure could be damaging or distressing to them.
32. In light of the above, the Commissioner considers that information relating to an allegation of misconduct in public office will carry a strong general expectation of privacy for those parties concerned.

Consequences of disclosure

33. As to the consequences of disclosure upon a data subject, the question – in respect of fairness - is whether disclosure would be likely to result in unwarranted damage or distress to that individual.
34. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the withheld information. She will also take into account the fact that disclosure under the FOIA is effectively an unlimited disclosure to the public at large, without conditions.
35. Given the nature of the request, the Commissioner considers that disclosure in this case could lead to an intrusion into the private life of the individual named in the request and the consequences of any disclosure could cause damage and distress to the individual concerned.

General principles of accountability, transparency and legitimate public interest in disclosure

36. Notwithstanding a data subject's reasonable expectations or any damage or distress caused, it may still be fair to disclose information, or in this case confirm or deny whether information is held, if there is a more compelling public interest in doing so. Therefore the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of

the data subject against the public interest in confirming or denying if the information is held.

37. The Commissioner would stress that this is a different balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Given the importance of protecting an individual's personal data the Commissioner's 'default position' is in favour of protecting the privacy of the individual. The public interest in confirming if information is held must outweigh the public interest in protecting the rights and freedoms of the data subject if providing confirmation or denial is to be considered fair.
38. The interest in disclosure must be a public interest, not the private interest of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.
39. In correspondence with the Constabulary, the complainant accepted that the requested information would constitute personal data. However, he considered that the legitimate public interest in disclosure would outweigh any damage or distress which may result from disclosure.
40. The Commissioner acknowledges the complainant's concern about what he describes as:

"the collapse of integrity and accountability of public life in Great Britain for the past twenty years".
41. The Commissioner appreciates that there is a general public interest in accountability and transparency.
42. On the other hand the Commissioner recognises that this legitimate interest must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of any individual who would be affected by confirming or denying that the requested information is held.

Conclusion

43. In considering whether the exemption contained within section 40(5)(b)(i) was correctly applied, the Commissioner has taken into account that disclosure under the FOIA should be considered in its widest sense – which is to the public at large.
44. In light of the nature of the information and the reasonable expectations of the individual concerned, the Commissioner is satisfied that confirming or denying if the requested information is held would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the data subject. She considers these arguments outweigh any legitimate interest in disclosure. She has therefore

concluded that confirmation or denial in this case would breach the first data protection principle. She therefore finds the exemption at section 40(5) engaged and the duty to confirm or deny did not arise.

45. As the Commissioner has determined that it would be unfair to confirm or deny if the information is held, it has not been necessary to go on to consider whether this is lawful or whether one of the schedule 2 or schedule 3 DPA conditions is met.

Other matters

46. As noted above, the Constabulary told the complainant that it considered that the exemption in section 40(5) applied on the basis that, if held, the information would constitute his own personal data and the personal data of a third party.
47. An applicant wishing to access their own personal data is able to pursue this right under the DPA. Furthermore, the Commissioner considers that it is appropriate that any decision as to whether or not a data subject is entitled to be told if personal data about them is being processed should be made in accordance with the scheme of that Act.
48. In that respect, the Commissioner is satisfied that the Constabulary explained clearly to the complainant what information it required from him in order to proceed with a subject access request.

Right of appeal

49. 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

50. 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.

51. 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

Jon Manners
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