

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 20 December 2018

**Public Authority:** Chief Constable of Thames Valley Police  
**Address:** Headquarters South  
Oxford Road  
Kidlington  
Oxfordshire  
OX5 2NX

### Decision (including any steps ordered)

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1. The complainant has requested information about a named officer from Thames Valley Police ("TVP"). TVP would neither confirm nor deny ("NCND") holding the information requested by virtue of section 40(5) (personal information) of the FOIA. The Commissioner's decision is that it was entitled to do so.

### Request and response

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2. On 20 July 2018 the complainant made the following information request via the "What do they know?" website:

*"According to this youtube video:- [link redacted]*

*you have now settled a claim for £3,000 damages and issued a full apology following these scenes of Thames Valley police (TVP) here: [link redacted]*

*The incident appears to have taken place on [date redacted].*

**REQUESTS UNDER FOIA**

**1. Provide all data relating to whether or not TVP follows the ACPO guidance on photography:-**

**<https://www.theiac.org.uk/resourcesnew/f...>**

*"• There are no powers prohibiting the taking of photographs, film or digital images in a public place. Therefore members of the public and press should not be prevented from doing so.*

- We need to cooperate with the media and amateur photographers. They play a vital role as their images help us identify criminals.*
- We must acknowledge that citizen journalism is a feature of modern life and police officers are now photographed and filmed more than ever.*
- Unnecessarily restricting photography, whether for the casual tourist or professional is unacceptable and it undermines public confidence in the police service.*
- Once an image has been recorded, the police have no power to delete or confiscate it without a court order."*

*2.a) Provide any police complaint investigation report into [name redacted]'s or other officers/PCSOs behaviour to the photographer (you are welcome, of course, to redact the ID of the victim). b) Provide all statements, recordings etc. made by any officer present at the incident to TVP in relation to the incident. This includes notebook entries.*

*3. Provide details of all management action/training given/punishment given to [name redacted] or other officers/CSOs as a result of the incident.*

*4. Provide all data showing whether [name redacted] is still comm. police officer of the year since the £3k payout.*

*5. Provide all records/data showing what personal data of the victim photographer [name redacted] or other officers accessed during the search. Clearly, this must be redacted to protect the ID of the victim, the data I want might consist of something like this:-*

*"Name  
Address  
Date of birth  
Check police national computer  
Check police national database"*

*and would consist perhaps of a computerised record.*

*6. Provide TVP policy for use of body worn video recorders ('bodycams') and uniforms in force at time of the incident.*

*7. Provide all data showing whether or not [name redacted]'s (unlawful) actions etc. were taken into account by TVP before he was made comm. police officer of the year.*

*8. Provide all data showing what is required to become comm. officer of the year.*

*9. Provide all data, correspondence, reports etc. provided by TVP to the police and crime commissioner relating to the incident and replies.*

*10. TVP made a very moving video paying tribute to [name redacted] and uploaded it to youtube:- [link redacted]*

*a) how much did the video cost?*

*b) who wrote the script?*

*c) how many people, not working for TVP, voted for [name redacted]?*

*d) provide the email referred to in the video from [name redacted] to [name redacted]*

*11. Provide all data showing how the public can apply to have an officer stripped of the title of comm. police officer of the year.*

*12. Provide the date TVP received a complaint regarding the incident".*

3. TVP responded on 2 August 2018. It provided some information, it advised that some information was not held and it advised that some information was exempt by virtue of section 40(2) of the FOIA. TVP would also NCND holding some of the information by virtue of sections 40(5) and 30(3) of the FOIA.
4. Following an internal review TVP wrote to the complainant on 8 August 2018. It maintained its position.

### **Scope of the case**

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5. The complainant initially contacted the Commissioner on 30 July 2018 to complain about the way his request for information had been handled as TVP originally refused to deal with it; following the Commissioner's intervention it did then respond to him.
6. As he had not actually provided any grounds of complaint, the Commissioner wrote to the complainant on 30 August 2018 asking him to explain which parts of the response he was dissatisfied with so it was clear what he wanted her to investigate.
7. The complainant responded on the same day advising:

*"I am NOT happy with answers 2-5, 7, 9, and 12.*

*These are claimed exempt under personal information and investigations and proceedings. I disagree with the reply".*

8. The complainant also asked the Commissioner to view the "you tube" videos which he provided in his request. The Commissioner has not done so as it is not necessary for her determination in this notice and their provenance is undetermined.
9. As section 40(5) was applied to parts 2-5, 7, 9 and 12 of the request, the Commissioner will therefore consider whether TVP is entitled to NCND whether it holds any information in respect of those parts of the request.

### **Reasons for decision**

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10. By way of background the Commissioner can confirm that TVP has advised her that it has not sourced any of the "you tube" clips referred to by the complainant nor has it ever publically commented on them or their content. It confirmed that it had not made any formal statements with regards to the matter.
11. As TVP's refusal of the request was after 25 May 2018, the date the new Data Protection Act 2018 (DPA 2018) and General Data Protection Regulation (GDPR) legislation came into force, the Commissioner considers that the DPA 2018/GDPR applies.

### **The Law Enforcement provisions**

12. The Commissioner's guidance on law enforcement processing states<sup>1</sup>:

*"Part 3 of the DPA applies if you process personal data for 'law enforcement purposes', although it is unlikely to apply to all processing that you do. It covers processing for the prevention, investigation, detection or prosecution of criminal offences, or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security".*

13. In the case of competent authorities for the purpose of the law enforcement provisions (law enforcement bodies), the Commissioner

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<sup>1</sup> <https://ico.org.uk/for-organisations/guide-to-law-enforcement-processing-part-3-of-the-dp-act-2018/key-definitions/>

considers that, in relation to considering disclosure under the FOIA, or as in this case confirming whether or not the requested information is held, they should be considering the application of principle (a) of the GDPR.

14. The rationale for this is that disclosure to the public under the FOIA by a public authority, including a law enforcement body, is part of its purposes as a public authority, rather than being for law enforcement purposes.
15. The Commissioner has therefore concluded that disclosure to the public under the FOIA, and also confirmation as to whether or not personal data is held by a public authority, including a law enforcement body, is part of its purposes as a public authority, rather than being for law enforcement purposes.

***On what basis is TVP processing the data?***

16. In this case, TVP has law enforcement functions and is designated to be a 'competent authority' for the purposes of Part 3 of the Data Protection Act 2018. A competent authority for the purposes of law enforcement means a person specified in Schedule 7 and any other person if, and to the extent that, the person has statutory functions to exercise public authority or public powers for the law enforcement purposes.
17. However, as explained above, the Commissioner is satisfied that TVP is processing the information (if it is held) as a public authority and not for law enforcement purposes.

**Section 40 - personal information**

18. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held 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 General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.
19. Therefore, for TVP 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 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?***

20. Section 3(2) of the DPA 2018 defines personal data as:-

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

21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
22. 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.
23. As the complainant clearly refers to a named officer, the Commissioner is satisfied that the requested information, if held, would be that officer's personal data.
24. For the reasons set out above the Commissioner is satisfied that if TVP confirmed whether or not it held the requested information this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.
25. 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 TVP 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.
26. The Commissioner agrees that the most relevant data protection principle is principle (a).

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

27. Article 5(1)(a) GDPR states that:-

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

28. 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 – 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) GDPR), be fair, and be transparent.

**Lawful processing: Article 6(1)(f) GDPR**

29. 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” conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
30. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:-

*“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<sup>2</sup>”.*

31. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under 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 confirmation as to whether the requested information is held (or not) 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.

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

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<sup>2</sup> 1 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 2018) 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”.

**(i) Legitimate interests**

33. In considering any legitimate interests in confirming whether or not the requested information is held in response to a FOI request, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.
34. Further, 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
35. In the complainant's view, the confirmation or denial should be given as the subject is a police officer and therefore cannot hold any legitimate expectation that his actions will not be held up for public scrutiny.
36. In making his complaint to the Commissioner the complainant advised:

*"Constables and police staff cannot hold any legitimate expectation that their actions will not be held up for public scrutiny. They occupy a special position like judge's and politicians. They cannot expect their disciplinary data to be exempt. Police forces, the IOPC, courts and media report on police misconduct on a regular basis".*
37. The complainant's view therefore appears to be that the disciplinary / misconduct records of police officers should be available to the public.

**(ii) Is confirming whether or not the requested information is held necessary?**

38. '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 as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
39. The Commissioner cannot envisage how the request can be met without disclosing personal data. This is because the subject is a named party and any such confirmation or denial would necessarily say something about him personally as he is the focus of the request.
40. TVP has accepted that the named officer would have been conducting 'public' duties if he was involved with the incident referred to. However, it has also noted that there is nothing formally in the public domain

which would confirm - or otherwise - as to whether or not he was involved or whether he had subsequently been subject to any related misconduct matters. TVP argued that, as an officer of junior rank, he was: "... entitled to privacy in this respect as is any individual who may be subject to performance or conduct issues in the work place" and added: "Confirmation or denial will impact on the privacy of the officer and it is absolutely necessary to respect his privacy in this situation".

41. The Commissioner understands that there may be some public interest in ascertaining whether or not a particular police officer was personally responsible for a pay-out which allegedly cost the public purse £3,000. However, the grounds for the request are unproven and based on information that the complainant has sourced on line. In this respect TVP has advised the Commissioner as follows:

- *Thames Valley Police have not sourced these youtube clips and never publically commented on them or their content.*
- *We have never made any formal statements publically with regards to this matter.*

42. Therefore, any confirmation or denial would formally place information into the public domain which is not currently available. Whilst the complainant may have sourced some information, it is not information which has been generated by TVP itself. The Commissioner would also like to note here that she has not viewed the "You tube" link which was provided by him in his request. She did not do so as she is able to make a determination in this case without viewing it and, as she is unable to verify its provenance, she could not rely on its authenticity

***(iii) Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms***

43. 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 the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, 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 whether information is held.

44. 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.

45. The Commissioner considers that, in most cases, the very nature of misconduct-related data means it is more likely that disclosing information about it will be unjustified. Information relating to misconduct matters will carry a strong general expectation of privacy for the party concerned and their reasonable expectation is that such information would not be disclosed and that the consequences of any such disclosure could be damaging or distressing to them.
46. The Commissioner acknowledges that the integrity of police officers is of genuine public interest. Their actions need to be lawful and their individual conduct is of paramount importance to the maintenance of the public's trust in the police service as a whole.
47. However, if indeed there are any misconduct issues as suggested by the complainant, then the Commissioner believes that TVP will already be fully aware of any related concerns and they will have dealt with the matters in the correct manner. If the conduct was of relevance to the non-related award that may have been presented at a later date then the Commissioner considers that this will have been taken into account.
48. In respect of disclosure of such matters TVP explained to the Commissioner

*"Although the information would relate to them as an employee, the issue is about whether the officer has been subject to any misconduct matters. This would not be put into the public domain unless it was a case of proven gross misconduct. The confirmation would impact on the individual who whilst conducting a public role does not expect their conduct to be made public following the disclosure of information from an unidentified source who has suggested that they have done something wrong. As a result, any confirmation or deny would ultimately affect the individuals private life.*

*... The individuals expectations would be that we would never discuss an internal matter unless it hit a certain threshold. i.e. Gross Misconduct which was proven".*

49. Therefore, whilst the complainant may be of the opinion that the requested data is not sensitive and that *"police staff cannot hold any legitimate expectation that their actions will not be held up for public scrutiny"* the Commissioner does not agree with his view in this case. The officer concerned is at the lowest rank, ie police constable, and there is nothing formally in the public domain associating him with the matters outlined in the request. TVP has explained that where it is deemed sufficiently serious, ie proven gross misconduct then such matters may be disclosed which, in the Commissioner's opinion, would satisfy the public interest in such matters.

50. Whilst some disciplinary data may be made available to the public on occasion, such as formal statements released to the press in respect of certain disciplinary or misconduct matters, this is done in a measured and balanced way at the time rather as a result of a request made under the FOIA. The police constable named in this request would not expect his personal data to be released in these circumstances.
51. 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, and that confirming whether or not the requested information is held would not be lawful.

***Fairness***

52. Given the conclusion the Commissioner has reached above on lawfulness, the Commissioner considers that she does not need to go on to separately consider whether confirming or denying whether the information is held would be fair and transparent. The Commissioner has therefore decided that TVP was entitled to refuse to confirm whether or not it held the requested information on the basis of section 40(5B)(a)(i) of FOIA.

## Right of appeal

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53. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

54. 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.
55. 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 .....**

**Carolyn Howes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**