Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 August 2020

Public Authority: Independent Office for Police Conduct
Address: PO Box 473
Sale
Manchester
M33 0BW

Decision (including any steps ordered)

1. The complainant requested information relating to the alleged investigation of a named police officer. The Independent Office for Police Conduct (the ‘IOPC’) refused to confirm or deny that the requested information was held, citing section 40(5B)(a)(i) (personal information) of FOIA.

2. The Commissioner’s decision is that the IOPC was not obliged to confirm or deny whether it held the requested information in accordance with section 40(5B)(a)(i) of FOIA.

3. The Commissioner does not require the IOPC to take any steps as a result of this notice.

Background

4. The Commissioner understands that, in response to an earlier FOIA request in May 2017, the IOPC disclosed an investigation report with the majority of the names of the parties concerned redacted. The request under consideration in this notice relates to that report and seeks to find out details about a police officer who the complainant believes to have been subject to a further investigation as a result of that earlier report. The Commissioner notes that the disclosed report did not identify the officer named in the current request.
5. On 8 December 2019, the complainant wrote to the IOPC and requested information in the following terms:

"...I would like to request the following information regarding the investigation by the IOPC relating to DI [name redacted] and other officers of Greater Manchester Police, Rochdale Division in connection with allegations made by [name redacted] in 2011 against [name redacted].

Could you please confirm the investigation has now been completed, a conclusion has been reached and that the final report is in possession of the IOPC.

I would like to be sent a copy of the completed report.

Please provide the information in the form of a digital pdf copy of the report sent via email..."

6. On 8 January 2020, the IOPC responded. It refused to confirm or deny that the requested information was held, citing section 40(5B)(a)(i) (personal information) of FOIA.

7. Following an internal review the IOPC wrote to the complainant on 8 February 2020. It maintained its ‘neither confirm nor deny’ position.

Scope of the case

8. The complainant contacted the Commissioner on 24 February 2020 to complain about the way her request for information had been handled.

9. Her grounds of complaint included the following:

"The IOPC exists to investigate the most serious allegations against the police with a key aim of ‘developing public confidence through sharing learning and recommendations.’

The IOPC refused to confirm or deny whether it holds this report and refused to release the information stating data protection relating to the named individuals. However, all of the individuals that I have named have already had their names published as part of this case..., I am happy for other police officers featured in the report to have their names redacted and replaced with their rank..."
10. The Commissioner has not included here the three links to online articles provided by the complainant (one of which is invalid) about the named police officer. Further, although the IOPC has confirmed the existence of a report into the investigation named by the complainant, it has stated that it did not identify the named police officer and was not the source of any of these online articles.

11. The complainant also asked the Commissioner to consider the following:

"The statement released in the above article as requested by the media makes no effort to make the flaws of the investigation and recommended learning lessons any clearer; and if anything does more damage to public faith in both GMP [Greater Manchester Police] and the IOPC. I feel that there is overwhelming public interest to release this report especially following on from the treatment of the Rochdale Sex Ring victims and #MeToo movement."

12. The Commissioner will consider the citing of section 40(5) of FOIA below.

13. The Commissioner’s duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of FOIA. The FOIA is concerned with transparency and provides for the disclosure of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held by public authorities. The FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.

Reasons for decision

Neither confirm nor deny (‘NCND’)

14. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in a request. This is commonly known as ‘the duty to confirm or deny’. However, there may be occasions when complying with the duty to confirm or deny under section 1(1)(a) would itself disclose sensitive or potentially exempt information. In these circumstances, section 2(1) of FOIA allows a public authority to respond by refusing to confirm or deny whether it holds the requested information.

15. The decision to use an NCND response will not be affected by whether a public authority does or does not in fact hold the requested information. The starting point, and main focus for NCND in most cases, will be
theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held. The Commissioner’s guidance\(^1\) explains that there may be circumstances in which merely confirming or denying whether or not a public authority holds information about an individual can itself reveal something about that individual. For example, where a request is made for information about staff disciplinary records in respect of a particular individual, to confirm or deny that information is held would be likely to indicate that the person was, or was not, the subject of a disciplinary process. This is, of itself, a disclosure of information about that person.

16. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held.

17. The IOPC has taken the position of neither confirming nor denying whether it holds information about the named police officer, citing section 40(5) of FOIA. The issue that the Commissioner has to consider is not one of disclosure of any requested information that may be held, it is solely the issue of whether or not the IOPC is entitled to NCND whether it holds the information requested by the complainant.

18. Put simply, in this case the Commissioner must consider whether or not the IOPC is entitled to NCND whether it holds any investigation-related information about the officer named in the request.

**Section 40 – personal information**

19. 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.

20. Therefore, for the IOPC to be entitled to rely on section 40(5B) of the 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 confirmation or denial that the requested information is held constitute the disclosure of a third party’s personal data?

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

“any information relating to an identified or identifiable living individual”.

22. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

23. 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.

24. The request in this case asked for a report with direct reference to a named individual (ie police officer) in connection with a specified investigation. The Commissioner considers information about whether or not an individual is named in a report to be information which relates to that individual and thus that it is their personal data.

25. The Commissioner is therefore satisfied that, in this case, confirmation or denial that such information is held would involve the disclosure of a third party’s personal data (ie the individual named in the request). The first criterion set out above is therefore met.

26. 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 the IOPC from confirming 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.

27. The Commissioner agrees that the most relevant data protection principle is principal (a).

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

28. 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”

29. 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 IOPC can only confirm whether or not it holds the requested information - if to do so would be lawful (ie it would meet one of the conditions of lawful processing listed in Article 6(1) of the GDPR), be fair, and be transparent.

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

30. 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.

31. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) of the 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”

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”.

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”.


32. In considering the application of Article 6(1)(f) of the 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.

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

34. The IOPC has provided the Commissioner with a confidential submission for her to consider in respect of this three part test. Whilst she has taken it into consideration it has not been cited in her analysis here.

(i) **Legitimate interests**

35. 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.

36. The Commissioner understands that the information being requested relates to at least one named police officer whom the complainant believes was linked to a particular investigation in 2011.

37. The complainant’s legitimate interest arguments are as set out in paragraphs 9 and 10 of this notice.

38. The Commissioner accepts that there is a legitimate interest in the public having confidence in the accountability and transparency of the police.
39. From the information the complainant has provided, the Commissioner is satisfied that the request was made in pursuit of a legitimate interest (ie to establish whether or not the IOPC has completed the specified investigation, which has been identified in the request by reference to named individuals, together with its findings/conclusions).

40. The request is predicated on the assumption that an investigation into the named officer has taken place. The IOPC has advised that it has made no public statement as to whether or not any investigation into the named officer has ever taken place. It said:

"Neither the IOPC nor any other official body has issued publicity confirming that [the named officer] was a subject of this investigation."

41. Clearly the requested information relies on a public confirmation (or denial) that an investigation into the named officer has been undertaken. Were the IOPC to confirm or deny that the information is held, this would place in the public domain personal data as to whether or not it had investigated the alleged commission of any offences or transgressions by the named officer.

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

42. ‘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 the FOIA as to whether the requested information is must therefore be the least intrusive means of achieving the legitimate aim in question.

43. In its refusal, the IOPC told the complainant that:

"Our refusal is consistent with the IOPC’s ‘Policy on the naming of police officers and police staff subject to IOPC investigation, appeal assessment or criminal proceedings’. This is available on our web site and takes into account our functions under the


Police Reform Act 2002, individual privacy rights and the data protection principles.”

44. The IOPC has explained to the Commissioner that the complainant:
"...has not offered any new or persuasive evidence for identifying [the named officer] and none has come to light from any other source. In the circumstances of this case none of the purposes that may be served by naming [the officer] under the request would be sufficient to outweigh her rights and freedoms, when so many years have passed since the relevant events and the requester has not demonstrated how such processing could be necessary for the purposes she has identified.”

45. In the circumstances of this case, the Commissioner considers that confirmation or denial would be ‘necessary’ as she is not aware of any other means of obtaining the information requested. The complainant is seeking confirmation as to whether an investigation into the named officer has concluded and, if so, the outcome of that investigation and a copy of the associated investigation report.

46. Because the Commissioner has found that confirming or denying the information is held is necessary to meet the legitimate interests it is necessary to carry out the third test and balance the legitimate interests against the data subject’s interests or rights and freedoms.

(iii) Do the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject, ie the named officer in this case?

47. In considering the above question, 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 an FOI request, or if such a confirmation or denial would cause unjustified harm, the data subject’s interests or rights are likely to override legitimate interests in confirming or denying whether information is held.

48. In its submission to the Commissioner the IOPC has explained that information it publishes about naming or otherwise of police officers’ subject to conduct investigations are set out in its ‘Policy on the naming of police officers and police staff subject to IOPC investigation, appeal assessment or criminal proceedings’ (see footnote 2 for the link). This policy is clear as to the usual approach as to what information the IOPC publishes, and which type of proceedings usually result in the naming of police officers. This guides the expectations of all parties involved in a complaint.
49. From this the Commissioner is satisfied that the named officer would have the reasonable expectation that their personal data would not be put into the public domain as a result of an FOI request. The personal data that would be released through confirmation or denial concerns that individual in their professional capacity. Nonetheless the Commissioner considers it is likely to cause that individual a considerable degree of distress if their personal data was released, through the IOPC confirming or denying it holds the requested information.

50. In reaching her decision in this case, the Commissioner has also taken into account the confidential submissions from the IOPC.

51. While she recognises that the information, if held, is of interest to the complainant, the Commissioner does not consider it is of sufficient wider public interest such that it overrides the data subject’s rights and freedoms. Thus confirming or denying whether the information specified in the request is held, would not be lawful.

52. Given the above conclusion that confirmation or denial would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether it would be fair or transparent.

**Conclusion**

53. The Commissioner has decided that the IOPC can rely on section 40(5B)(a)(i) to neither confirm nor deny it holds the information the complainant has requested.
Right of appeal

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

55. 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.

56. 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