

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 April 2023

Public Authority: Commissioner of Police of the Metropolis
Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant requested from the Metropolitan Police Service ("the MPS") information relating to a specific incident which allegedly occurred on the road where they live. The MPS would neither confirm nor deny (NCND) holding the requested information citing section 40(5) (Personal information) of FOIA.
2. The Commissioner's decision is that the MPS is entitled to rely on section 40(5) to NCND whether it holds the information.
3. The Commissioner does not require the MPS to take any further steps.

Request and response

4. On 5 October 2022, the complainant wrote to the MPS to request information in the following terms:

"I am a resident of a property on XXX.

On the morning of Wednesday, 28 September, shortly before 9am, violent arrests were made on XXX, across the road from my home, by heavily-armed Counter-Terrorism Specialist Firearms Officers.

The arrests began with an explosion. This was followed by discharges of semi-automatic/automatic firearms.

Residents who left their properties to ascertain the cause of the disturbance were told to return to their homes.

No explanation has been given as to why this operation was conducted, endangering the lives of residents of the area.

So far as I could see, three males were arrested. Two cars were later removed from the property, apparently for forensic analysis.

I wish to know:

(1) what the general nature of these arrests was.

(a) Was it a terrorism arrest? Did the arrests relate to suspected espionage?

(b) What the nature of the offence(s) was, of which the arrestees were/are suspected;

(c) Who was arrested. I appreciate that personal data may not be disclosable. But information relating to ages and nationalities of those arrested can presumably be given.

(2) why it was felt necessary for the CTSFOs to discharge their weapons and a grenade; and

(3) whether anyone was killed or injured in the operation.

Thank you."

5. The MPS responded on 10 October 2022 and would NCND holding the requested information, citing section 40(5) of FOIA – as its basis for doing so.
6. The complainant did not receive the MPS' response and sent chasers on 4 November 2022 and 5 December 2022. Again, the complainant received no response from the MPS and subsequently complained to the Commissioner on 13 February 2023 about the MPS' lack of response.
7. The Commissioner wrote to the MPS on 22 February 2023 and the MPS provided copies of all the responses it had sent to the complainant, including an internal review conducted on 4 January 2023 which, again, the complainant had not received.
8. The internal review dated 4 January 2023 upheld the MPS' original decision, giving further guidance on how it had reached its conclusion.

Scope of the case

9. The complainant does not consider that the MPS is entitled to rely on section 40(5) of FOIA. They also consider that the MPS did not cite the correct subsection of section 40 of FOIA in its responses and, in their view, they have not requested personal data.
10. The Commissioner considers that the matter to be decided is whether the MPS is entitled to rely on section 40(5) to NCND holding the requested information.

Reasons for decision

Section 40 – personal information

11. Section 1(1)(a) of FOIA provides that where a public authority receives a request for information, it is obliged to tell the applicant whether it holds that information. This is commonly known as the 'duty to confirm or deny'.
12. There are however exemptions from the duty to confirm or deny. It should be noted that when applying an exemption from the duty to confirm or deny, a public authority is not restricted to only considering the consequences of the actual response that it would be required to provide under s1(1)(a). For example, if it does not hold the information, the public authority is not limited to only considering what would be revealed by denying the information was held, it can also consider the consequences if it had to confirm it did hold the information and vice versa.
13. 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 EU2016/679 ('UK GDPR') to provide that confirmation or denial.
14. 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 an NCND response in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not particular information is held. The Commissioner's guidance 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.

15. The MPS has taken the position of neither confirming nor denying whether it holds any of the requested information in its entirety, citing section 40(5) of the FOIA. The issue that the Commissioner has to consider is not one of the disclosure of any requested information that may be held, it is solely the issue of whether or not the MPS is entitled to NCND whether it holds any information of the type requested by the complainant.
16. Therefore, for the MPS to be entitled to NCND holding 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?

17. 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."
18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
19. 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.
20. The MPS has explained:

"The wording of your request is such that it pertains to a specific event at a named location and is therefore related to identifiable individuals. Your request relies on the MPS confirming or denying the existence of information held for policing purposes. There is the need for consistency when neither confirming nor denying whether information is held in order to protect policing information and in addition, personal data".
21. It further explained:

"FOIA disclosures are placed into the public domain and disclosures which appear harmless, pieced together with other disclosures can be used in a 'mosaic effect' to give a fuller picture to those wishing to evade detection and valuable intelligence to criminals. Third parties may have access to additional information that would enable them to link the requested information to an individual. Disclosure may enable them to ascertain new information such as who is the subject of a police investigation, who has contacted police and / or sought the help of police or other bodies and organisations".

22. Clearly the complainant is familiar with the address, which is close to their home, and it is likely that they, or their neighbours, would know the identity of its occupants. Furthermore, confirmation or denial about information held relating to the address may provide identification of the its occupant/s, and their possible association with the police, to a wider audience. Therefore, for the MPS to confirm or deny whether information is held would disclose whether or not an individual(s) is, or has been linked to contact with the police.
23. The Commissioner is satisfied that, if the MPS were to either confirm or deny it held the information, it would involve the disclosure of personal data. The first criterion set out above is therefore met.

If held, would the information be criminal offence data?

24. Although not directly referred to by the MPS, the Commissioner has also considered if confirming or denying whether it holds the requested information would result in the disclosure of information relating to the criminal convictions and offences of a third party/parties.
25. Information relating to criminal convictions and offences is given special status in the UK GDPR. Article 10 of UK GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to-:
 - (a) The alleged commission of offences by the data subject; or
 - (b) Proceedings for an offence committed or alleged to have been committed by the data subject of the disposal of such proceedings including sentencing.
26. Clearly the wording of the request relates to an alleged criminal offence. For the MPS to confirm publicly whether or not it holds any information would therefore result in the disclosure of information relating to criminal convictions and/or offences of an identifiable third party/parties.

27. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes confirming or denying whether the information is held in response to an FOIA request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.
28. The MPS has explained to the complainant that:

“... disclosure of the requested information (if held) may cause unwarranted harm to the interests of individuals. In light of the nature of the information and reasonable expectations of individuals, the review does not believe there is any reasonable expectation of interested parties' that information, if held, pertaining to any police investigation / police contact they are linked to being publicly disclosed under the Freedom of Information Act as this could potentially cause unnecessary and unjustified distress.”.
29. The Commissioner has considered the MPS's position and the conditions attached to Schedule 1, Parts 1 to 3. Taking into account the arguments advanced by the MPS and having regard to the restrictive nature of the conditions, he has concluded that none can be met.
30. As none of the conditions required for processing criminal offence data are satisfied there can be no legal basis for confirming whether or not the requested information is held; providing such a confirmation or denial would breach data principle (a) and therefore the second criterion of the test set out above is met. It follows that the MPS is entitled to refuse to confirm or deny whether it holds the requested information on the basis of section 40(5)(B) of FOIA.

Right of appeal

31. 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

32. 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.
33. 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