

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 4 July 2023

**Public Authority:** Chief Constable of Warwickshire Police  
**Address:** Police Headquarters  
Woodcote Drive  
Leek Wootton  
CV35 7QA

#### **Decision (including any steps ordered)**

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1. The complainant requested details of disciplinary hearings for two named police officers. Warwickshire Police refused to confirm or deny whether it held the requested information, citing the 'neither confirm nor deny' ('NCND') provisions within section 30(3) (investigations), section 31(3) (law enforcement) and section 40(5) of FOIA (personal information).
2. The Commissioner's decision is that Warwickshire Police was entitled to rely on section 40(5) of FOIA to refuse to confirm or deny that it holds the requested information. As he has found section 40(5) to be engaged, he does not deem it necessary to consider Warwickshire Police's reliance on the other NCND provisions cited.
3. The Commissioner requires no steps as a result of this notice.

#### **Request and response**

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4. On 18 December 2022, the complainant wrote to Warwickshire Police and requested information in the following terms:

"Please can you supply me with the results of Insp [Inspector's name redacted] and DC [Detective Constable's name redacted] Gross Misconduct hearings. Their hearings were in 2019/2020."

5. On 22 December 2022, the complainant submitted the following additional point:

“In addition [...] the details of the actual findings against their charges would be most helpful”.
6. Warwickshire Police responded on 18 January 2023. It refused to confirm or deny whether it held the requested information, citing the following NCND provisions:

Section 30(3) – investigations

Section 31(3) – law enforcement

Section 40(5) – personal information
7. The complainant sought an internal review on 19 January 2023.
8. Following its internal review, Warwickshire Police wrote to the complainant on 7 February 2023 and maintained an 'NCND' position.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 16 April 2023 to complain about the way his request for information had been handled.
10. The Commissioner also spoke to the complainant at his request on 27 June 2023 so he could provide context to his complaint, which the Commissioner has taken into account.
11. The Commissioner has also received a 'closed' submission from Warwickshire Police which he has taken into account, details of which cannot be included in this notice.
12. The Commissioner has first considered Warwickshire Police's reliance on section 40(5B)(a)(i) of FOIA – the NCND provision for personal information.

### **Reasons for decision**

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#### **Section 40(5) - neither confirm nor deny**

13. 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'.

14. 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.
15. The decision to use a 'neither confirm nor deny' (ie '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.
16. Warwickshire Police has taken the position of neither confirming nor denying whether it holds any of the requested information in its entirety, citing 40(5) of FOIA (as well as other NCND provisions). 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 Warwickshire Police is entitled to 'NCND' whether it holds any information of the type requested by the complainant.
17. Therefore, for Warwickshire Police to be entitled to rely on section 40(5B)(a)(i) of FOIA to refuse to confirm or deny 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?**

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

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

19. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
20. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an

identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

21. 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.
22. Two police officers are specifically named in the request. As the complainant is already aware of the identities of those individuals named in his request, confirmation or denial as to whether Warwickshire Police held information specific to those individuals would reveal information that is about them, linked to them, has biographical significance for them or has them as its main focus.
23. The Commissioner is, therefore, satisfied that if Warwickshire Police was to either confirm or deny it held the information, it would involve the disclosure of personal data of a third party ie it would reveal something about those named police officers and whether they were the subject of any disciplinary procedures or hearings.
24. There is no formal statement about the named parties available in the public domain. Therefore, confirmation or denial would reveal something about them to the general public. The first criterion set out is therefore met.
25. Whilst the Commissioner accepts that the complainant, may have personal reasons for wanting to access the requested information, the Commissioner has to take into account the fact that disclosure under FOIA, ie confirmation or denial in this case, is effectively an unlimited disclosure to the public. He must therefore consider the wider public interest issues and fairness to the named police officers when deciding whether or not confirmation or denial is necessary.

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

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 Warwickshire Police from refusing to confirm whether 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. The most relevant DP principle in this case is principle (a).

**Would a confirmation or denial contravene principle (a)?**

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 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 public authority 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) 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" lawful bases for processing listed in the Article applies.

30. 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".<sup>1</sup>

31. 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;

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<sup>1</sup> 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) 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".

- ii) **Necessity test:** Whether disclosure of the information (or confirmation or 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.
32. 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**

33. In considering any legitimate interests in confirming whether or not the requested information is held in response to a FOIA request, 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.
34. Having considered his concerns, the Commissioner accepts that the complainant has a legitimate personal interest in seeking the requested information.
35. The Commissioner also acknowledges that there may be a wider legitimate interest in the transparency of Warwickshire Police's procedures when handling disciplinary issues.
36. The Commissioner therefore agrees that confirming or denying whether information is held in this case would go some way towards informing the public about Warwickshire Police's accountability in its disciplinary procedures, and to increasing public confidence in the integrity and accountability of serving police officers.
37. Therefore, the Commissioner recognises there is a legitimate interest in providing a confirmation or denial in this case.

### **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 that the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.

39. The Commissioner understands from Warwickshire Police's website that some misconduct hearings are held in public<sup>2</sup>. The website states:

"We employ many people. Taking that and the nature of our operation into consideration, alleged transgressions of accepted practice or unlawful activity, whether or not they've passed through the legal courts system, are bound to arise. It's our duty to investigate each case, which may result in a public misconduct hearing."

40. He is also aware that, where hearings are held in public, Warwickshire Police may publish misconduct outcomes on its website<sup>3</sup>. Warwickshire Police advised the Commissioner that:

"The Force publishes the outcomes of all cases which are conducted in public and where there is no restriction imposed on the Force by the independent panel".

41. The Commissioner understands that the Legally Qualified Chair ('LQC') in police officer disciplinary hearings determines whether a hearing will be held in public or remain private; LQCs are independent parties appointed from a list held by the Local Policing Body. The LQC can determine whether details of those private hearings should remain private.
42. Within the Home Office Guidance for LQCs, they are required to have in mind the wider public interest in the proceedings and the desirability of the transparency of police misconduct processes. Therefore, a balancing act is undertaken by the LQCs when determining whether the public interest in accessing information relating to alleged police misconduct outweighs the rights of individuals in certain circumstances to have private hearings.

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<sup>2</sup> <https://www.warwickshire.police.uk/advice/advice-and-information/mis/misconduct-hearings/>

<sup>3</sup> <https://www.warwickshire.police.uk/foi-ai/warwickshire-police/misconduct-outcomes/misconduct-outcomes/>

43. The Commissioner notes the wider societal benefits that may flow from transparency in Warwickshire Police's procedures when handling disciplinary issues.
44. The Commissioner acknowledges that there is no formal statement in the public domain about any complaints or allegations against the named individuals.
45. The Commissioner is satisfied that confirmation or denial would be necessary in this case in order to meet the legitimate interest in confirmation or denial of whether the requested information was held.

**Balance between legitimate interests and the data subjects' interests or fundamental rights and freedoms**

46. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if a data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to an FOIA 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.
47. As referred to above, the Commissioner understands that sometimes disciplinary proceedings are considered to be private and details may not be published in a public forum. Therefore, the fact that nothing is formally published about the named officers may indicate that this is the case here. The Commissioner notes that, in such circumstances, the named police officers would have no reasonable expectations that Warwickshire Police would confirm or deny whether it held the requested information.
48. Moreover, the Commissioner accepts that disclosure of information concerning such matters could cause a significant invasion of privacy for such individuals, particularly if they are cases where the LQC has determined that the disciplinary proceedings should remain private. There is no presumption that openness and transparency of the activities of public authorities should take priority over personal privacy.
49. Each request for information has to be considered on its own merits. The Commissioner considers that there is some legitimate interest in disclosing whether a disciplinary hearing occurred, since this would inform the public whether a disciplinary issue was raised about the named police officers. He also considers that there is a legitimate interest in the public being able to scrutinise whether Warwickshire



Police has undertaken appropriate disciplinary action in particular cases and this stems from the interest in public authorities' accountability.

50. However, it is also noted that, in particular circumstances, not all disciplinary hearing outcomes are made public.
51. On this occasion, the Commissioner is satisfied that the named police officers would have no reasonable expectations that Warwickshire Police would confirm or deny whether it held the information that has been requested in this case. The Commissioner is aware that in proceedings deemed private by an LQC, it would not be in the public domain whether or not disciplinary proceedings had been carried out or not. If the LQC had previously made this determination, the Commissioner considers that it would be unfair to the named officers to confirm or deny under FOIA whether they were subject to any disciplinary matters.
52. The Commissioner is also satisfied that confirming or denying whether or not information is held may potentially cause reputational harm or professional embarrassment to the named police officers. He has therefore 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. From information relayed to him by the complainant, the Commissioner understands that the complainant has explored other avenues to try to secure the requested information.
53. Based on the above factors, the Commissioner has determined that, there is insufficient legitimate interest to outweigh the named individuals' fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful. The Commissioner is not persuaded that revealing under FOIA whether Warwickshire Police carried out disciplinary proceedings in relation to the named officers is necessary in order to maintain public confidence. He is also satisfied that confirming or denying whether or not information is held may potentially cause damage and distress to the named police officers.
54. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
55. Consequently, the Commissioner has decided that Warwickshire Police is able to rely on section 40(5B)(a)(i) of FOIA to refuse to confirm whether or not it held the requested information.
56. As the Commissioner has found that Warwickshire Police is entitled to rely on section 40(5B)(a)(i) of FOIA in this case, he does not deem it necessary to consider its reliance on sections 30(3) or 31(3) of FOIA.

## Right of appeal

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

58. 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.

59. 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**