

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 October 2023

Public Authority: Chief Constable of Merseyside Police
Address: Merseyside Police HQ
15 Cazneau St
Liverpool
L3 3AN

Decision (including any steps ordered)

1. The complainant has requested information about incidents he believes may have been reported to Merseyside Police. Merseyside Police would neither confirm nor deny holding the requested information citing section 40(5) (Personal information) of FOIA.
2. The Commissioner's decision is that Merseyside Police was entitled to rely on section 40(5B)(a)(i) of FOIA. He does not require further steps.

Request and response

3. On 16 May 2023, the complainant wrote to Merseyside Police and requested the following information:

"In 2010 I made a complaint to the Police against a [redacted] who taught at [redacted] college Prep school in [redacted] from the 1970's till the 1990's. His name was [redacted].

I tried to find other witnesses who could come forward and make statements, but didn't have much luck. I called the Police 10 years later to ask if anyone else had come forward apart from myself and the Officer I spoke to at the time said no other complaints had been received.

The individual concerned died [redacted] and was buried behind [redacted] with all the praise and religious trappings that come with these ceremonies.

Anecdotally I recently came to understand that 11 other witness statements were indeed gathered by Merseyside Police, (including one from an ex-pupil who is also an ex-police officer who served in another force area.), but it appears my complaint and the others were not connected in terms of pooling the information.

The crimes that have been alleged are serious and any chance to interview this individual has gone.

If what I'm told about the other witness statements is true - why was this man not interviewed? Corporal Punishment in schools was legal at the time, but my allegation describes physical attacks on children by a man who was clearly drunk and out of control at times, and goes far beyond reasonable chastisement.

... The crime reference number that has been supplied to me is: [redacted]. In summary, I would like to know if the other reports were looked at in conjunction with mine, as I feel this could have motivated the Police to make further enquiries if they knew there was more than one complainant".

4. On 18 May 2023, Merseyside Police responded. It would neither confirm nor deny holding the requested information, citing section 40(5) of FOIA.
5. The complainant requested an internal review on 8 June 2023. He said:
"I disagree that the exemption applies because I'm not asking for anyone's personal details. Additionally, I'm not asking for anything more than I have asked for, and been provided in the past - in that case over the phone".
6. Merseyside Police provided an internal review on 27 June 2023 in which it maintained its position.

Scope of the case

7. The complainant contacted the Commissioner on 3 July 2023 to complain about the way his request for information had been handled. His grounds were as follows:

"I'm writing regarding a complaint I made to Merseyside Police about an individual who taught me in a private junior school in the

1980 [sic]. The allegations I made were that this individual physically abused children in a way that went well beyond the accepted norms of corporal punishment that was legal in private schools at the time.

I contacted the Police 10 years later and asked if anything else had transpired regarding other complaints [sic]. I discussed the complaint at length with a male Police officer who said that while he was sympathetic, there had been no other complaints against the said individual and no action would be taken.

The individual died ... and after a full ... funeral with all the trappings, ... I then found out that at least three others had made witness statements to Merseyside Police. I asked the Police to explain why no action had been taken.

The Police advised me to send an FOI request regarding how many witness statements had been collected so I could perhaps subsequently ascertain why this individual was not even questioned.

The request was denied and I appealed.

Upon appeal Merseyside Police emailed me to say that they could not give me any information about the case due to the possibility of 'personal information' being divulged.

I asked the Police where in my correspondence i had requested seeing personal information but was told the definition is 'very broad'. It appears they cannot supply examples as to where I had requested 'personal information'.

The Police were quite happy to discuss my complaint over the phone in 2020 - yet are now claiming an FOI dispensation regarding this matter. This seems, at best, rather suspicious to me.

I don't wish to see anyone's private information regarding this matter. I simply wish to know how many complaints were made to the Police".

8. The Commissioner would initially like to note that a conversation with a police officer about a private matter that is of a personal nature is not the same as a formal request under FOIA. A request under FOIA must be dealt with as if it is an information request from an unknown party and any response must be deemed suitable for disclosure to the general public. Accordingly, the Commissioner does not agree that Merseyside Police's response is 'suspicious', rather it is a formal response to a formal information request.

9. The Commissioner will consider the citing of section 40 of FOIA below.

Reasons for decision

Section 40 - Personal information

10. 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'.
11. 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 ('UK GDPR') to provide that confirmation or denial.
12. For Merseyside 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.
13. The issue that the Commissioner has to consider here is not one of the disclosure of any requested information that may be held, it is solely the issue of whether or not Merseyside Police is entitled to 'NCND' whether it holds any information of the type requested by the complainant. The Commissioner does not actually know whether or not Merseyside Police holds any information, he does not think this is necessary in order to reach a decision in such cases.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

14. Section 3(2) of the DPA 2018 defines personal data as: "any information relating to an identified or identifiable living individual".
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.
16. 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.

17. 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.
18. Whilst the complainant has made it clear that he is not asking for the name of anyone who may have complained to Merseyside Police, their name is not the only way in which they may be identifiable. The Commissioner will consider this below.

Motivated intruder

19. A test used by both the Commissioner and the First-tier tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of reidentification of an individual from information which, on the face of it, appears truly anonymised.
20. The ICO's Code of Practice on Anonymisation¹ notes that:

"The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA".
21. In summary, the motivated intruder test is that if the risk of identification is "reasonably likely" the information should be regarded as personal data.
22. In his grounds of complaint, the complainant has advised the Commissioner that he has "... found out that at least three others had made witness statements to Merseyside Police". On this basis, the Commissioner has presumed it reasonably likely that those parties are either already known to the complainant or he would be able to make further enquiries in order to ascertain who these parties are.

¹ <https://ico.org.uk/media/fororganisations/documents/1061/anonymisation-code.pdf>

23. Whilst the provision of a NCND response in this case may appear to be only minimal, theoretically, were Merseyside Police to advise that it held no details of any other recorded complaints, this would show the complainant that none of these parties had in fact submitted a formal complaint. Therefore, confirmation or denial in this case would reveal something to the complainant about individuals that were identifiable to him. By the same rationale, if it had only received one complaint, he would know that only one person had complained, and so on. As mentioned above, the Commissioner would again like to stress that he does not know whether or not there are any other complaints.
24. In the circumstances of this case, the Commissioner is satisfied that the risk of identification by the complainant is reasonably likely. Confirmation or denial in this case would disclose information which relates to the other individuals he has referred to. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA. 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 Merseyside Police 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 principal (a).

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

27. Article 5(1)(a) UK 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 (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) UK GDPR), be fair, and be transparent.

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

29. Article 6(1) of the UK 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) UK 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.

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

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) and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019)

provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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. The Commissioner considers that the test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.

(i) Legitimate interests

33. 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.
34. Clearly the complainant has a private interest in the subject matter as he wishes to know whether other pupils complained about the same behaviour that he reported to Merseyside Police. The Commissioner also recognises that there is a wider public interest in knowing whether or not Merseyside Police adequately investigated any allegations that it may have received.

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

35. ‘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.
36. The Commissioner is unaware of any alternative avenue for the complainant to formally ascertain what he has requested. The only possible way would be for him to directly ask the other parties for specific details of the crimes they reported, assuming this was the case, which they may or may not wish to share. Confirmation or denial under FOIA is therefore the only option that is realistically available to him.

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

37. 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 an 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.

38. The Commissioner considers that anyone who has made a complaint to Merseyside Police, or indeed any police force, would not expect this information to be disclosed to the world at large via FOIA; this is something which he does not think is the complainant's intention, but it is a necessary factor when considering FOIA requests. In this case, even confirming that no information is held, which may or may not be the case, would disclose something to the complainant about the other parties. For example, the complainant may have been told that these individuals raised complaints, perhaps by the parties themselves, but they may actually have decided not to do so but don't want him to know. The personal impact that this may have on those involved could be substantial and is not something they would expect to have to deal with because of a public disclosure via FOIA.
39. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful.

Fairness

40. Given the conclusion the Commissioner has reached above on lawfulness, the Commissioner considers that he 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's decision

41. The Commissioner has therefore decided that Merseyside Police 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

42. 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

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

43. 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.

44. 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**