

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 February 2024

Public Authority: Chief Constable of South Yorkshire Police
Address: South Yorkshire Police Headquarters
Carbrook House
Carbrook Hall Road
Sheffield
S9 2EH

Decision (including any steps ordered)

1. The complainant has requested copies of employment references supplied to South Yorkshire Police ('SYP') for a named individual. SYP would neither confirm nor deny ('NCND') whether it held the requested information, citing section 40(5) (Personal information) of FOIA.
2. The Commissioner's decision is that SYP was entitled to apply section 40(5B)(a)(i) of FOIA to issue an NCND response. However, it breached section 17(1) of FOIA by failing to issue a valid refusal notice within the 20 working day time for compliance.
3. The Commissioner requires no steps as a result of this decision.

Request and response

4. On 10 August 2023, the complainant wrote to SYP and requested information in the following terms:

"Any references provided and/or purportedly provided by and/or on behalf of and/or purportedly by and on behalf of [company name redacted] to South Yorkshire Police in 2021, 2022, or 2023 in relation to [individual's name redacted] of [individual's address redacted]."

5. SYP responded on 21 September 2023. It provided an NCND response, citing section 40(5) of FOIA.
6. Following an internal review, SYP wrote to the complainant on 9 October 2023. It maintained its NCND response, stating that it was relying on section 40(5)(b)(i) of FOIA because confirming/denying would involve the disclosure of personal data which would breach the first data protection principle.

Scope of the case

7. The complainant contacted the Commissioner on 26 October 2023 to complain about the way their request for information had been handled.
8. The issue for the Commissioner to consider is whether SYP was entitled to NCND, by virtue of section 40(5B)(a)(i) of FOIA¹, whether it holds the information requested by the complainant. Whether or not the actual material that has been requested (if it exists) is suitable for disclosure under FOIA, is a different matter, and not one that is considered in this decision notice.
9. The Commissioner notes that underpinning the request is a private dispute between the complainant and the individual named in the request. He has been unable to locate any official information about the matter, in the public domain.

Reasons for decision

Section 40 – Personal information

10. Under section 1(1)(a) of FOIA, anyone who requests information from a public authority is entitled to be told if it holds the requested information. This is referred to as 'the duty to confirm or deny'.
11. However, under section 40(5B)(a)(i) of FOIA, the duty to confirm or deny does not arise if it would contravene any of the data protection principles set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial. The

¹ Section 40(5)(b)(i) of FOIA is no longer in effect, having been amended by the Data Protection Act 2018

Commissioner's guidance² on personal data explains that merely confirming or denying that a public authority holds information about an individual, can itself reveal something about that individual to the wider public.

12. For SYP to be entitled to rely on section 40(5B)(a)(i) of FOIA to NCND that it holds the requested information, the following criteria must be met:
 - confirming or denying whether the requested information is held must constitute the disclosure of a third party's personal data; and
 - providing the confirmation or denial would contravene one of the data protection principles.
13. It is not necessary to show that **both** confirming and denying would each result in the disclosure of personal data. The exemption will be engaged if confirming alone would meet the above criteria, and it may be applied even where the requested information is not, in fact, held.

Would confirming or denying constitute the disclosure of a third party's personal data?

14. 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".
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 their name. 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.
17. The request asks for information about a named individual, and it states an address for them. The Commissioner is satisfied that the subject of the request is a living individual who is identifiable from their name and address. This information therefore falls within the definition of 'personal

² <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-40-and-regulation-13-personal-information/>

data' in section 3(2) of the DPA. (The individual will be referred to in this notice as 'the data subject'.)

18. As noted in paragraph 9, the request stems from a private concern the complainant is pursuing. However, disclosure under FOIA is not a private matter between the requester and the public authority; rather, it is considered as being disclosure 'to the world at large'. Therefore, if SYP was to confirm that it holds the requested information, it would place in the public domain specific information about the data subject (ie that they were the subject of an employment reference, ostensibly supplied to SYP by a particular party, and, by inference, that they might be employed by SYP). This is information which, as far as the Commissioner can ascertain, is not currently in the public domain.
19. For the reasons set out above, the Commissioner is satisfied that, if SYP confirmed or denied that it held the requested information, this would result in the disclosure of a third party's personal data. The first criterion set out in paragraph 12 is therefore met.
20. The second element of the test is to determine whether confirming or denying would contravene any of the data protection principles.

Would confirming or denying contravene principle (a)?

21. Article 5(1)(a) of the UK GDPR states that:

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

22. In the case of an FOIA request, 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/deny that it holds the requested information) if to do so would be lawful, fair and transparent.
23. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

24. 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”³.

25. In considering the application of Article 6(1)(f) of the UK GDPR, 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/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.
26. 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

27. When considering any legitimate interests in confirming/denying that the requested information is held, 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 interests 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.

³ 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”.

28. From the information provided to him, the Commissioner recognises that the complainant has a legitimate personal interest in seeking the requested information. He cannot elaborate further on those reasons in this decision notice, as to do so risks disclosing information which is itself exempt under section 40.
29. As regards SYP's position, it noted that the public might have a general interest in knowing about recruitment processes for people applying to work for the Force, to be assured that they are sufficiently robust.
30. Therefore, the Commissioner recognises there is a legitimate interest in providing confirmation or denial in this case.

Is confirming/denying that the requested information is held, necessary?

31. '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; 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.
32. From the information provided to him, the Commissioner considers that SYP confirming or denying whether it holds the requested information would not satisfy the complainant's personal legitimate interests. This is because simply having formal confirmation of whether or not SYP holds the particular references described in the request would not be sufficient to further his particular, stated aims. If the complainant believes that there have been flaws in SYP's recruitment process, this could be raised with SYP as a service complaint. It would be dealt with outside of FOIA, and disclosure into the public domain would not be necessary.
33. However, the Commissioner considers that confirmation or denial would satisfy the broader legitimate interest in the public knowing more about SYP's vetting processes, albeit, he considers the benefit that would flow from this information being made available for this purpose, to be minimal.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

34. 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 confirmation or denial. For example, if the data subject would not reasonably expect the public authority to

confirm, in response to an FOIA request, whether or not it held the requested information, 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 that information is held.

35. Each request for information must be considered on its own merits. As set out above, the Commissioner considers that there is some legitimate interest in confirming/denying that the requested information is held, since this would inform the public's understanding of SYP's recruitment processes, although only by a small degree.
36. The Commissioner recognises that data subjects have a clear and strong expectation that their personal data will be held in accordance with data protection laws. Noting that the request relates to a private dispute, the Commissioner is satisfied that the data subject would not reasonably expect SYP to confirm to the world at large whether or not it had received employment references for the data subject, from a particular source.
37. The Commissioner further notes that confirmation or denial could reveal, by inference, whether or not the data subject is an employee of SYP. This is, itself, sensitive information, which the data subject might reasonably expect would not be placed in the public domain without their consent, or unless required by the context of their job. The Commissioner accepts that such a disclosure could cause a significant invasion of privacy for the data subject.
38. The Commissioner has weighed these concerns against the legitimate interests in disclosure in this case, mindful that information released under FOIA is to the wider public and not just to the complainant, for private use. He notes there is no presumption under FOIA that public authority openness and transparency should take priority over personal privacy.
39. Based on the above factors, the Commissioner has determined that the legitimate interests he has identified in confirmation/denial are not sufficiently strong to outweigh the data subject's fundamental rights and freedoms. The Commissioner is not persuaded that revealing, under FOIA, whether or not the data subject received references from a particular source, would further the public's understanding of SYP's recruitment processes to an extent which justifies the impact on the data subject's expectations of privacy. He is also satisfied that confirming or denying that the information is held may potentially cause damage and distress to the data subject.
40. As the Commissioner has concluded that the legitimate interests are not sufficiently strong to override the data subject's rights and freedoms, his decision is that confirming whether or not the requested information is

held by SYP would not be lawful. Therefore, it does not meet the requirements of principle (a) of the DPA.

41. It follows that SYP was entitled to NCND whether it holds the requested information, on the basis of section 40(5B)(a)(i) of FOIA.

Procedural matters

42. Section 17(1) of FOIA requires a public authority to communicate its reasons for refusing a request within the 20 working day time for compliance.
43. In this case, SYP took 29 working days to respond to the request. Therefore, the Commissioner has found a breach of section 17(1) of FOIA. This has been logged for monitoring purposes.

Right of appeal

44. 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

45. 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.
46. 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

Samantha Bracegirdle
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