

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 February 2024

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

Decision (including any steps ordered)

1. The complainant has requested confirmation as to whether a number of individuals are employed by the Metropolitan Police Service (the "MPS") and whether it knew the location of one individual in particular.
2. The Commissioner's decision is that the MPS was entitled to rely on section 40(5B) (personal information) of FOIA when refusing to confirm or deny holding the requested information. To the extent that any of the data, if held, would relate to the requester, the MPS was entitled to rely on section 40(5A) to refuse to confirm or deny holding this potential element of the requested information.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 7 August 2023, the complainant wrote to the MPS and requested information in the following terms:

"I do have a further FOI to make to the Met Police, the first SAR pertaining to a [location, name and warrant number redacted] On the 18/02/2008, the morning of my trial at Kingston Crown Court, a Met detective from [location redacted] police announced in open court which is on record that detective [name redacted] had without giving notice or warning dropped [their] case and gone to Australia where [they] couldn't be located or contacted.

When a serving Met detective flees the country without giving notice or warning is obviously cause for concern and deserves an explanation. I would also like to know if [name redacted] has since returned to England?

In regards to the second part of my FOI, SAR I would like to know if any of the following persons named have been serving police officers, special constables, police workers or have held employment connected to the police, the courts, prison services of the Ministry of Justice?

[names redacted]"

5. The MPS responded on 14 August 2023. It stated that it could neither confirm or deny holding the requested information citing section 40(5) of FOIA.
6. Following an internal review the MPS wrote to the complainant on 7 November 2023. It stated that it was maintaining its original position.

Scope of the case

7. The complainant contacted the Commissioner on 1 December 2023 to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of his investigation is to consider whether confirming or denying whether the requested information is held would reveal personal data.

Reasons for decision

Neither confirm nor deny ("NCND")

9. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request. This is commonly known as "the duty to confirm or deny". However, there are exemptions to this duty, whereby a public authority may NCND whether it holds the requested information
10. The decision to use a 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.

11. 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.
12. The MPS has taken the position of neither confirming nor denying whether it holds the requested information, 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 MPS is entitled to NCND whether it holds any information of the type requested by the complainant

Section 40 - Personal information

13. 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 UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.
14. Therefore, for the MPS to be entitled to rely on section 40(5B) of 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 the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

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

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

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
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. The MPS advised that, to confirm or deny whether the requested information was held, would constitute disclosure of a third party's personal data and therefore contravene one of the data protection principles.
19. The Commissioner is satisfied that in the circumstances of this matter, if the information was held and was disclosed, this could lead to individual(s) being identified and would constitute personal data of the subject of the request. It would also lead to confirmation of whether the MPS employed the individual in question, whether they had left the country without notice and whether they had since returned. To confirm whether the requested information is held, would likely reveal information about individual(s) in question to the public.
20. Furthermore, the Commissioner agrees with the MPS' position that if it confirmed or denied whether or not the information was held, some of this could potentially also reveal details which may relate directly to the complainant.
21. The Commissioner will firstly consider the third party personal data implications of a confirmation or denial. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party (or parties) does not automatically prevent the MPS from refusing to confirm or deny 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.
22. The Commissioner considers 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?

23. 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".
24. In the case of a 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) of the UK GDPR), be fair and be transparent.

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

25. 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.
26. 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 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”¹.
27. In considering the application of Article 6(1)(f) of the 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.
28. 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

¹ 1 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”.

29. In considering any legitimate interest(s) in the confirmation or denial of holding 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.
30. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, confirmation or denial to the general public is unlikely to be proportionate. Interests may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
31. The Commissioner accepts that there will be a public interest in transparency from the MPS regarding its employees and that therefore there is both a legitimate public interest and a legitimate individual interest on the part of the complainant. As the Commissioner is satisfied that the complainant and the public have a legitimate interest in the requested information, he will now consider whether confirmation or denial is necessary.

Necessity test

32. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make confirmation or denial of whether the requested information is held unnecessary. Confirmation or denial under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
33. The Commissioner is satisfied that there is no less intrusive way of achieving the legitimate interests.

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

34. In the Commissioner's opinion, at this stage, the confirmation or denial of information held in relation to the request, could result in the rights and freedoms of anyone involved/identified as a past/present employee being undermined. The Commissioner considers that those members of staff would not have any expectation that the MPS would potentially reveal personal information about their careers and country of residence via a confirmation or denial of holding any requested information.
35. Disclosing whether or not the information requested is held may cause unwarranted harm or distress to the interests of the individual(s). The Commissioner also notes that the individual(s) would have no

reasonable expectation of their personal information being placed into the public domain, even inadvertently

36. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh a data subjects' fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful.
37. The Commissioner has therefore decided that the MPS was entitled to refused to confirm whether or not it held the requested information on the basis of section 40(5B)(a)(i) of FOIA.
38. To the extent that any information, if held, relates to the requester themselves, the MPS was correct to refuse to confirm or deny holding the requested information on the basis of section 40(5A) of FOIA.

Right of appeal

39. 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

40. 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.
41. 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

Michael Lea
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