

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

### **Decision notice**

**Date:** 23 April 2024

**Public Authority:** Chief Constable of West Yorkshire Police  
**Address:** PO Box 9  
Laburnum Road  
Wakefield WF1 3QP

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

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1. The complainant has requested information relating to a named police officer.
2. West Yorkshire Police ("WYP") refused to confirm or deny that it held the requested information, citing sections 40(5) (personal information) and 38(2) (health and safety) of FOIA.
3. The Commissioner's decision is that WYP was entitled to rely on section 40(5B)(a)(i) of FOIA to refuse to confirm or deny holding the requested information.
4. The Commissioner does not require further steps to be taken.

#### **Request and response**

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5. On 29 September 2023, the complainant made the following request for information under FOIA:

"From the 8th of August 2023 until today the 29th of September 2023, I would like the dates and time [police officer's name and collar number, redacted] of BD Adult Safeguarding Team 2 West Yorkshire Police (WYP) has been on duty?"
6. WYP responded on 27 October 2023 and refused to confirm or deny that it held the requested information, citing sections 40(5) and 38(2)

of FOIA, the 'neither confirm nor deny' ("NCND") provision within the 'personal information' and 'health and safety' exemptions.

7. Following an internal review, WYP wrote to the complainant on 22 November 2023. WYP maintained its reliance on sections 40(5) and 38(2) to NCND whether the information was held.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 4 December 2023 to complain about the way their request for information had been handled.
9. In this case, 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**

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

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. There are, however, exemptions from the duty to confirm or deny.
12. 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 (the "DP Principles") set out in Article 5 of the UK General Data Protection Regulation EU2016/679 ("UK GDPR") to provide that confirmation or denial.
13. 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 to the wider public.<sup>1</sup>

14. Therefore, for the Council to be entitled to rely on section 40(5B)(a)(i) of FOIA to NCND whether it holds information falling within the scope of the request, the following two criteria must be met:
  - a. Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
  - b. Providing this confirmation or denial would contravene one of the DP Principles.
15. 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 the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?**

16. Section 3(2) of the Data Protection Act 2018 ("DPA") defines personal data as:

"any information relating to an identified or identifiable living individual".
17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. 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.
19. In the circumstances of this case, as the request refers to a named police officer, the Commissioner is satisfied that all the requested information both relates to and identifies a particular individual. The requested information therefore falls within the definition of "personal data" in section 3(2). (The individual will be referred to in this notice as "the data subject").

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<sup>1</sup> [When can we refuse a request for information? | ICO](#)

20. It should be noted that 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 WYP was to confirm that it holds the requested information, it would place in the public domain specific information about the data subject - i.e. it would enable inferences to be made as to whether or not they were a police officer with WYP. This is information which, as far as the Commissioner can ascertain, is not currently in the public domain.
21. For the reasons set out above, the Commissioner is satisfied that, if WYP confirmed or denied that it held the requested information, this would result in the disclosure of the data subject's personal data. The first criterion set out in paragraph 14 is therefore met.
22. 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 WYP 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.
23. In the Commissioner's opinion, the most relevant DP Principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

24. 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".

25. 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/deny whether it holds the requested information) if to do so would be lawful, fair, and transparent.
26. 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**

27. 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" lawful bases for processing listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information (or, as in this case,

confirming or denying whether the requested information is held) in response to the request would be considered lawful.

28. 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>2</sup>

29. 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 disclosure of the information (by way of confirming/denying) is necessary to meet the legitimate interest in question;
- iii) Balancing test: Whether the above legitimate interests override the interests or fundamental rights and freedoms of the data subject.

30. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

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<sup>2</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 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”.

## **Legitimate interests**

31. In considering any legitimate interest(s) in the confirmation or denial of holding the requested information under FOIA, the Commissioner recognises that such 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, confirmation or denial to the general public is unlikely to be proportionate.
32. Further, 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
33. The complainant has argued that:

"The dates that a publicly funded Officer or servant is at work and on duty at a Public Authority is not personal data and it remains of public interest, especially since such Officers engage with members of the public as part of their professional duties."
34. WYP accepts that many police officers have public-facing roles and are expected to be open and transparent with the communities they are working with, if and when appropriate.
35. The Commissioner accepts that the legitimate interest in transparency (albeit narrow) would be served by confirming/denying whether the information is held
36. As the Commissioner is satisfied that a legitimate interest is being pursued in the request for information, he will now consider whether confirmation or denial is necessary.

## **Is confirmation or denial necessary?**

37. '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 unnecessary. Confirmation or denial under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
38. The Commissioner is satisfied that there is no less intrusive way of achieving the legitimate interests and has therefore gone on to consider the balancing test between the legitimate interests and the interests or fundamental rights and freedoms of the data subject.

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

39. 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.
40. 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 provide the public with some transparency as regards WYP employees, although only to a small degree.
41. The Commissioner recognises that individuals have a clear and strong expectation that their personal data will be held in accordance with data protection laws. In this case, based on information provided to the Commissioner in confidence, the Commissioner is satisfied that the data subject would not reasonably expect WYP to confirm to the world at large whether it held the requested information.
42. The Commissioner further notes that confirmation or denial would effectively reveal whether or not the data subject is an employee of WYP, working in a particular team. This is, itself, sensitive information, which, particularly if held, 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 and is mindful that the particular team mentioned in the request would be carrying out work of a highly sensitive nature with vulnerable adults.
43. 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.

44. 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 the requested information under FOIA would further WYP'S openness and transparency with the public to an extent which justifies the impact on the data subject's expectations of privacy. Based on information provided in confidence, he is also satisfied that confirming or denying that the information is held may potentially cause damage and distress to the data subject.
  45. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh a data subject's fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful. Therefore, it does not meet the requirements of principle (a) of the DPA.
  46. The Commissioner has therefore decided that WYP 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.
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## Right of appeal

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47. 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)

48. 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.
49. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**