

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 April 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 from the Metropolitan Police Service (the "MPS") information about any relationship it has with a named Imam. The MPS would neither confirm nor deny ("NCND") holding any information, citing section 40(5) (Personal information) of FOIA as its basis for doing so.
2. The Commissioner's decision is that section 40(5B)(a)(i) of FOIA was properly engaged. No steps are required.

Request and response

3. On 7 December 2023, the complainant wrote to the MPS and requested the following information:

"Please provide details of any relationship between the Metropolitan Police and [name redacted], head Imam of [location redacted] Mosque.

Please provide details of any occasion where [name redacted], head Imam of [location redacted] Mosque, has provided services or consultancy to the Metropolitan Police.

Please provide details of any event involving the Metropolitan Police where [name redacted], head Imam of [location redacted] Mosque, has participated as a speaker or organiser.

Please confirm whether [name redacted], head Imam of [location redacted] Mosque, has ever provided chaplaincy services to, or in cooperation with, the Metropolitan Police”.

4. On 11 January 2024, the MPS 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 21 January 2024.
6. The MPS provided an internal review on 6 February 2024 in which it maintained its position.

Scope of the case

7. The complainant contacted the Commissioner on 11 March 2024 to complain about the way his request for information had been handled. His grounds of complaint were as follows:

“In its internal review the Metropolitan Police Service recognised ‘that there will only be a slight legitimate public interest in confirming or denying that information is held pertaining to particular individuals in the sense that it may enhance the transparency of police action’. This is not acceptable, because the requested information relates to the MPS’ relationship with an individual associated with extremism and antisemitic narratives. The relationship is therefore of the utmost seriousness, and potentially undermines public confidence in policing. The public interest is therefore significant, not slight as the MPS describes”.

And:

“As well as there being a significant public interest in the disclosure of this information, which relates to a formal relationship between an individual who is credibly accused of promoting extremism and antisemitic narratives and the Metropolitan Police, I dispute the MPS’ claim that the ‘subject of this request would have no reasonable expectation that the MPS would place their personal information into the public domain as this could lead to unsolicited contact’.

The individual in question is a public figure, who has promoted and advertised their relationship and involvement with the MPS. As such, this relationship is not private, and has been disclosed in part

by the subject. It is therefore reasonable for the MPS to reveal further details of their involvement with the individual named in the FOI request”.

8. The Commissioner will consider whether the MPS was entitled to NCND holding any information by virtue of section 40(5) of FOIA.
9. The MPS has provided the Commissioner with a confidential submission in support of its position.

Reasons for decision

10. It is initially noted that although the complainant believes that the MPS has had involvement with the named party, the MPS has advised him:

“Whilst there is information in the public domain concerning a named individual mentioned in your request, the MPS has not put out a confirmation or denial statement concerning any information described in your request nor what is in the public domain in an official capacity”.

11. Therefore, there is no official confirmation of any contact between the parties in the public domain.

Section 40 - Personal information

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 set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.
13. Therefore, for the MPS to be entitled to rely on section 40(5B)(a)(i) 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?

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. 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.
16. Clearly the request focuses on a named party. Therefore, were the MPS to confirm or deny holding any of the requested information this would result in it revealing something about any contact that it may, or may not, have had with that named party.
17. For the reasons set out above, the Commissioner is satisfied that if the MPS confirmed whether or not it held the requested information, this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.
18. In this case, the Commissioner also considers it appropriate to consider whether confirming or denying it holds the requested information would result in the disclosure of 'special category' data of a third party.
19. Article 9 of the UK GDPR defines 'special category data' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
20. Clearly, the named party is an Imam and the request, to at least some extent, seeks information about him which is likely to be in a religious capacity, eg provision of chaplaincy services. The Commissioner has accepted that confirming or denying would result in the disclosure of personal data. It follows that the data in question would be special category data.
21. Special category data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes confirming whether or not information is held in response to a FOI request, if one of the stringent conditions of Article 9 can be met¹.

¹ More information can be found on the Commissioner's website:
<https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/lawful-basis/a-guide-to-lawful-basis/lawful-basis-for-processing/special-category-data/>

22. The Commissioner has introduced the consideration of special category data rather than the MPS, and he has not found it necessary to ask it for its views. Whilst the complainant is of the opinion that the named party has promoted his involvement with the MPS, the Commissioner has not found anything in the public domain to formally substantiate this comment and the MPS itself has denied issuing any such confirmation. Having regard for the restrictive nature of the Article 9 conditions, which can be found via the footnote below, the Commissioner considers that none of these can be met.
23. As none of the conditions required for processing special category data are satisfied there can be no legal basis for the MPS confirming whether or not it holds any special category information; such a confirmation or denial would breach the principle (a) and therefore the second criterion of the test set out above is met. It follows that the MPS is entitled to refuse to confirm or deny whether it holds any special category information on the basis of section 40(5)(B) of FOIA.
24. To the extent that any of the requested information may not fall within the remit of special category information (which it is not possible to accurately ascertain without revealing whether or not any information is held), the Commissioner will now consider that separately.
25. It has already been determined that confirmation or denial would reveal personal information about the named party. The fact that confirming or denying whether the requested is held would reveal the personal data of a third party does not automatically prevent the MPS 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 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) 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;

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”.

- (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.

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 interest(s) in the disclosure of the requested information under FOIA, or confirmation or denial as is the case here, 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. The complainant’s views can be found in paragraph 7 above. The Commissioner accepts that there is a legitimate interest in ascertaining whether or not the MPS is liaising with an individual who, according to the complainant, may hold some controversial views.

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 must therefore be the least intrusive means of achieving the legitimate aim in question.
36. The Commissioner is unaware of any other avenue by which the complainant could obtain this information. Therefore, confirmation or denial under FOIA is the only viable option open to him.
37. However, it is noted that, were the complainant to consider that he has evidence that the named party has in some way committed a crime,

then this is something which he could report to the police for them to consider whether or not to take any action.

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

38. 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 a 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.

39. The MPS advised the complainant:

"Confirmation of whether or not the information requested is held may cause unwarranted harm to the interests of named individual [sic]. In light of the nature of the information and reasonable expectations of named individual [sic], I do not believe there is any reasonable expectation of interested parties. Information (if held) being publicly disclosed under the Freedom of Information Act could also potentially cause unnecessary and unjustified distress. (If held) the subject of this request would have no reasonable expectation that the MPS would place their personal information into the public domain as this could lead to unsolicited contact, intrusion and distress".

40. Whilst the Commissioner does not doubt that the complainant has a genuine interest in any involvement that the named person may have with the MPS, the Commissioner can find nothing formally available in the public domain to demonstrate that any such connection has ever been formally publicised. On this basis, the Commissioner does not consider that such an intrusion into the named party's fundamental rights and freedoms is justifiable.

41. The Commissioner considers that the named party would not have any expectation that the MPS would potentially reveal personal information about any connection that he may, or may not, have with the force.

42. The Commissioner has also taken into account the confidential submission that he has referred to above.

43. 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

44. 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

45. The Commissioner has therefore decided that the MPS 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

46. 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

47. 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.
48. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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