

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 March 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 information about a named individual from the Metropolitan Police Service (the "MPS"). The MPS would neither confirm nor deny holding any information, citing section 40(5B)(a)(i) (Personal information) of FOIA.
2. The Commissioner's decision is that section 40(5B)(a)(i) is properly engaged. No steps are required.

Request and response

3. On 22 September 2023, the complainant wrote to the MPS and requested the following information:

"Please send to me your full statement following the allegations against [name redacted]. Although he was not mentioned by name, reference was reportedly made to an article in The Sunday Times and alluded to someone coming forward regarding an incident in 2003. This statement (or extracts thereof) were reported in the press around 20/09/23".
4. On 27 September 2023, the complainant made a further request as follows:

"Please send to me your full statement following the allegations against [name redacted]. This statement was reported in the press 25/09/23 (though may have come earlier). This is an identical request to [the request of 22 September 2023] but a different date".

5. On 4 December 2023, the MPS responded to both requests. It would neither confirm nor deny holding the requested information, citing section 40(5B)(a)(i) of FOIA.
6. The complainant requested an internal review on 4 December 2023. He said:

"I think there has been a misunderstanding about what it is I am requesting.

I did not request any personal data or any information about the case.

I am only asking for a copy of the statements you have already released. Basically, I am trying to check whether the way the press reported your statements was complete and accurate.

To reiterate, I am not seeking confirmation on whether the statements relate to [name redacted] or anything else which may identify anyone of any new detail related to the case.

I only wish for a copy of statements you already made, which presumably was for public consumption as the press reported on it without issue".

7. The MPS provided an internal review on 2 January 2024 in which it maintained its position.

Scope of the case

8. On 17 January 2024, the complainant wrote to the Commissioner with the following grounds of complaint:

"I wish to complain about the Metropolitan Police's handling of my FOI request.

They seem to be under the impression I am asking for information on the case itself. I am not. I am only asking for copies of statements that they have already made to the press about the case (this is so I can verify the accuracy of what the press then reported).

To put this in context, I made a very similar request to Thames Valley Police, who answered it without issue”.

9. The Commissioner will consider the application of section 40(5B)(a)(i) of FOIA to the request below.

Reasons for decision

Neither confirm nor deny (“NCND”)

10. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request.
11. 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.
12. 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.
13. The MPS has taken the position of neither confirming nor denying whether it holds the requested information citing section 40(5B)(a)(i) 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.
14. Put simply, in this case the Commissioner must consider whether or not the MPS is entitled to NCND whether it holds any information about an alleged criminal investigation into a named party.

Section 40 - personal information

15. 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.

16. The Commissioner's guidance on personal data¹ 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.
17. 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.

18. The MPS has explained to the complainant that:

"Your request requires the MPS to indirectly confirm that a named individual has been subject to an investigation by the MPS, this constitutes personal data. I will now explain fully why the MPS is unable to comply with your request for information under the Freedom of Information Act".

19. It also advised him:

"In general, MPS press statements do not name individuals who are subject to investigation by the MPS. To confirm that a MPS Press statement relates to a specific individual would in effect be disclosing information related to an identifiable individual. Additionally, to confirm that information is held by way of a FOIA disclosure must be considered as an acknowledgement to the world as a whole. Whilst it could be argued that it would be in the public interest to inform the public that the MPS has an interest in a particular individual, there are many factors which indicate that it is not in the public interest to acknowledge the existence or otherwise of such information in instances such as this.

To confirm or deny whether or not investigations have been conducted concerning specific individuals / groups, would clearly indicate the nature and scale of police involvement in the area of preventing and detecting crime".

¹ <https://ico.org.uk/for-organisations/foi/section-40-and-regulation-13-personal-information/>

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

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

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

21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

22. 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.

23. The Commissioner notes that the complainant has stated that he does not want any information “on the case itself” and that he only wants copies of statements “already made to the press about the case”. In this regard, the Commissioner notes that “the case” referred to is necessarily about a named individual, as stated by the complainant in the wording of his request. The MPS has not made any formal reference to having any interest in this named individual, something which the complainant himself acknowledges in the wording of the request, as he states “he was not mentioned by name”. Whilst Thames Valley Police may have handled a similar request differently, that is its prerogative, and there may have been other circumstances to the case here.

24. In the Commissioner's view, clearly the request relates to a named, living person. Therefore, 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 in paragraph 17 above is therefore met.

If held, would the information be criminal offence data?

25. The MPS has also argued that confirming or denying whether it holds the requested information would result in the disclosure of information relating to the criminal convictions and offences of a third party.

26. Information relating to criminal convictions and offences is given special status in the UK GDPR. Article 10 of UK GDPR defines ‘criminal offence data’ as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA 2018 personal data relating to criminal convictions and offences includes personal data relating to:-

(a) The alleged commission of offences by the data subject; or

(b) Proceedings for an offence committed or alleged to have been committed by the data subject of the disposal of such proceedings including sentencing.

27. Having considered the wording of the request, the Commissioner finds that it clearly relates to an allegation of a criminal offence committed by a named individual. Therefore, were the MPS to confirm publicly whether or not it holds any information, this would inevitably result in the disclosure of information relating to the alleged commission of an offence by the named party.
28. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes confirming or denying whether the information is held in response to a FOIA request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA 2018 can be met.
29. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under FOIA are the conditions at Part 3 paragraph 29 (consent from the data subject) or Part 3 paragraph 32 (data made manifestly public by the data subject).
30. The Commissioner has seen no evidence or indication that the individual concerned has specifically consented to a confirmation or denial being disclosed to the world in response to an FOIA request or that they have deliberately made such a confirmation or denial public themselves.
31. As none of the conditions required for processing criminal offence data are satisfied, there is no legal basis for confirming whether or not the requested information is held. Providing such a confirmation or denial would breach data principle (a) and therefore the second criterion of the test set out in paragraph 17 above, is also met.
32. It follows that the MPS was entitled to neither confirm nor deny whether it holds the requested information, on the basis of section 40(5B)(a)(i) of FOIA.

Right of appeal

33. 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

34. 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.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Carolyn Howes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF