

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 September 2024

Public Authority: Chief Constable of West Mercia Police

Address: Police Headquarters
Hindlip Hall
Hindlip
Worcester
WR3 8SP

Decision (including any steps ordered)

1. The complainant has requested information about employees placed on performance improvements plans. West Mercia Police (WMP) relied on section 40(5B) of FOIA (third party personal information) to refuse to confirm or deny that the information was held.
2. The Commissioner's decision is that WMP has correctly relied on section 40(5B) of FOIA to refuse to confirm or deny that the information was held.
3. The Commissioner does not require WMP to take any further steps.

Request and response

4. On 18 April 2024, the complainant wrote to WMP and requested information in the following terms:

"How many people in my department SPI (or failing this the Partnership Analyst Team within SPI) are on performance improvement plans or have been put on one in the period between December 2021 and December 2023."
5. WMP responded on 3 May 2024. It refused to confirm or deny that the information was held and relied on section 40(5B) of FOIA in order to do so. It upheld its position following an internal review.

Scope of the case

6. The complainant contacted the Commissioner on 13 May 2024 to complain about the way their request for information had been handled.
7. The Commissioner considers that the scope of his investigation is to establish whether WMP is entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny that the requested information is held.

Reasons for decision

Section 40 - personal information

8. Section 40(5B) of the FOIA allows a public authority to refuse to confirm or deny that particular information is held. It will apply where the mere act of confirming or denying would itself reveal the personal data of an individual other than the requester and that revelation would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
9. The first step for the Commissioner is to determine whether just confirming or denying that the information is held would reveal personal data as defined by the Data Protection Act 2018 ('DPA'). If it would not, section 40(5B) of FOIA cannot be relied upon.
10. Secondly, and only if the Commissioner is satisfied that confirming or denying would reveal personal data, he must establish whether that revelation would breach any of the DP principles.

Would confirmation or denial reveal personal data?

11. Section 3(2) of the DPA defines personal data as:
"any information relating to an identified or identifiable living individual".
12. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
13. 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.

14. 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.
15. In the circumstances of this case, having considered the requested information, the Commissioner is satisfied that providing a confirmation or a denial that the information is held would reveal personal data. A performance improvement plan, or Development Plan as they are referred to by WMP, relates to the individual who is subject to that plan. Therefore, the Development Plan itself is clearly personal information. However, the mere fact of whether or not any individual is subject to a Development Plan also constitutes that individual's personal information.
16. WMP went on to explain that the structure of the department that is the subject of the request, combined with the specific timeframe that the complainant is interested in, would be highly likely to result in anyone with knowledge of the department being able to determine which of their colleagues or peers the confirmation or denial relates to.
17. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
18. The fact that confirming or denying that information is held would reveal the personal data of an identifiable living individual does not automatically prevent the public authority from doing so. The second element of the test is to determine whether confirming or denying that the information is held would contravene any of the DP principles.
19. The most relevant DP principle in this case is principle (a).

Would confirming or denying that the information is held contravene principle (a)?

20. 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”.
21. In the case of an FOIA request, the personal data is processed when the confirmation or the denial is provided. This means that confirmation or denial can only be provided where it would be lawful, fair and transparent to do so.
22. 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

23. 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”¹.

24. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the 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 confirming or denying that 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.

25. 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

26. In considering any legitimate interest(s) in confirming or denying that the information is held, 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.

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) 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 confirming or denying that the information is held 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”.

27. 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.
28. From the information provided by the complainant it is clear that they have an interest in understanding the use of performance improvement plans by WMP, and specifically within their own department. Whilst the subject of their request is a legitimate interest for them to have, it is also very much a private interest for them, with less wider interest to the general public. There is, however, a legitimate interest in a public authority such as WMP demonstrating that it is open and transparent.

Is confirming or denying that the information is held necessary?

29. 'Necessary' means more than desirable but less than indispensable or absolute necessity.
30. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the above interests. Therefore, to address the above interests, it would be necessary for WMP to disclose personal information by way of providing a confirmation or denial that it holds the requested information.

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

31. It is necessary to balance the legitimate interests in confirming or denying that the 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 confirming or denying that the information is held. For example, if the data subject would not reasonably expect that the public would be told that such information was or was not held, or if confirming or denying that the information is held would cause unjustified harm, their interests or rights are likely to override any legitimate interests in confirming or denying that the information is held.
32. The Commissioner is satisfied that any individual who may be subject to a Development Plan would have a reasonable expectation that their personal information wouldn't be revealed to the world at large under FOIA – by WMP confirming or denying that it holds the requested information. Revealing it would therefore cause any concerned individuals harm or distress due to the invasion of their privacy.
33. Given that there is little wider public interest in the use of development plans by WMP, the Commissioner considers that the public interest in

WMP being open and transparent is outweighed, in this case, by the data subjects' rights and freedoms.

34. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so confirming or denying that the information is held would not be lawful. WMP was therefore correct to apply section 40(5B) of FOIA to neither confirm nor deny that it holds the requested information.

Right of appeal

35. 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

36. 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.
37. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Michael Lea
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