

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

### **Decision notice**

**Date:** 18 November 2024

**Public Authority:** Chief Constable of Nottinghamshire Police  
**Address:** Nottinghamshire Police Headquarters  
Sherwood Lodge  
Arnold  
Nottingham  
NG5 8PP

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

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1. The complainant has requested information about any misconduct proceedings brought against a named party during his time as a Police officer for Nottinghamshire Police (the Police).
2. The Commissioner proactively applied section 40(5B) of FOIA (third party personal information) to the request, which allows the Police to refuse to confirm or deny whether the requested information is held.
3. The Commissioner's decision is that section 40(5B) of FOIA does apply to the requested information. He does not require steps to be taken.

#### **Request and response**

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4. On 14 August 2024, the complainant wrote to the Police and requested information in the following terms:

"I would like to know whether any misconduct proceedings were brought against former Nottinghamshire Police officer [name redacted] during his service with the force and if so, what the outcome of those proceedings were. I would like this information to cover the entirety of [name redacted]'s service with Nottinghamshire Police and to include the reason for misconduct proceedings being launched if any were. I would also like the date provided for when any misconduct proceedings were concluded."

5. The Police responded on 15 August 2024. It stated that it was not obliged to disclose the requested information under section 40(2). A position which it maintained during its internal review.

## **Scope of the case**

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6. The complainant contacted the Commissioner on 30 September 2024 to complain about the way their request for information had been handled.
7. In this case, the Commissioner has exercised his discretion and proactively applied section 40(5B)(a)(i) of FOIA to the request. The reason for the Commissioner's decision is explained below.

## **Reasons for decision**

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### **Section 40 - personal information**

8. Section 40(5B) of FOIA allows a public authority to refuse to confirm or deny that particular information is held. It will apply where the 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 decision to use a 'neither confirm nor deny' ("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 a 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 confirming or denying whether or not a public authority holds information about an individual can itself reveal something about that individual.
10. The first step for the Commissioner is to determine whether 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.
11. The Commissioner has to take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public. He must therefore consider the wider public interest issues and fairness to the named party when deciding whether or not to confirm or deny the

information is held. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.

### **Would confirmation or denial reveal personal data?**

12. Section 3(2) of the DPA defines personal data as:

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

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

14. 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.

15. 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. 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. This is because the person concerned is named in the request and the request is for information relating to them.

17. Specifically, the Commissioner is satisfied that, if the Police were to confirm or deny whether it held any of the information, this would result in the disclosure of personal data of a third party i.e. it would reveal something about the named party and whether they had been the subject of any complaints received and investigated by the Police.

18. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.

19. The fact that confirming or denying that information is held would reveal the personal data of an identifiable living individual does not automatically prevent a 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.

20. The most relevant DP principle in this case is principle (a).

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

21. 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”.

22. 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.

23. 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**

24. 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>1</sup>.

25. 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;

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<sup>1</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 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”.

- 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.
26. 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**

27. In considering any legitimate interest(s) in confirming or denying that the information is held, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
28. 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.
29. The Police informed the Commissioner that, in its view, disclosure would be of no political, historic, economic or personal interest to the wider public.
30. The complainant argued that because the named party now has an important public role, disclosure of the requested information would allow for them to be held accountable for any misconduct.
31. As the named party does now hold the role of Police and Crime Commissioner (PCC), the Commissioner agrees with the complainant that in this public role, it is likely that there would a wider public interest in the information being requested. However, he also notes that any misconduct-related information that may be held would have likely been made available and taken into account when the party was considered for their new role.
32. The Commissioner also notes that as a PCC is responsible for scrutinising performance, holding their force to account and ensuring that their police force is function effectively, it is probable that members of the public would want to be assured that the PCC is and has previously worked to the same high standards.
33. For the above reasons, the Commissioner is satisfied that there is a legitimate interest in the Police confirming or denying whether the requested information is held.

### **Is confirming or denying that the information is held necessary?**

34. '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 confirming or denying that the information is held unnecessary. Confirming or denying that the information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
35. The Commissioner is satisfied that in this case that there is no less intrusive means of achieving the legitimate aims identified.

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

36. 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.
37. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that confirming or denying that the information is held may cause;
  - whether the information that would be revealed by a confirmation or a denial is already in the public domain;
  - whether the information that would be revealed by a confirmation or a denial is already known to some individuals;
  - whether the individual expressed concern about the possible confirmation or denial that the information is held; and
  - the reasonable expectations of the individual.
38. In the Commissioner's view, a key issue is whether the individual concerned would have a reasonable expectation that the public authority would reveal whether this type of information was or was not held. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the

purpose for which they would have provided their personal data (if indeed any was provided).

39. It is also important to consider whether confirming or denying that the information is held would be likely to result in unwarranted damage or distress to that individual.
40. The Commissioner acknowledges that confirming or denying whether the information is held would be of interest to members of the public, in that they would be able to understand whether a PCC has previously worked to a high standard. He also acknowledges that as a PCC, the named party plays a significant role in public life and can therefore expect a higher degree of scrutiny compared to junior members of staff.
41. However, the Commissioner has also been informed by the Police that disclosure without consent, which has previously been sought and refused by the named party, would undermine the trust placed in it by someone who would have no reasonable expectation that this type of information would be placed in the public domain.
42. The Police outlined to the Commissioner that disclosure without consent would not be proportionate, it advised that it would be likely to lead to ramifications in the professional relationship between the Police and the PCC.
43. The Police concluded that, whilst a serving Police officer may have a reasonable expectation that any misconduct allegations may involve disclosure under certain circumstances, this is not the same as disclosure (or confirmation / denial in this case) when they are no longer a serving officer. The Commissioner is satisfied that confirming or denying if the requested information is held, without consent, would amount to disclosing private and personal information and be against their reasonable expectations.
44. 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.
45. Given the above conclusion that confirming or denying that the information is held would be unlawful, the Commissioner considers that he does not need to go on to consider whether confirming or denying that the information is held would also be fair or transparent.

## **Right of appeal**

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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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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.

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