

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 19 September 2016

**Public Authority:** Chief Constable of West Midlands Police

**Address:** Lloyd House  
Colmore Circus  
Queensway  
Birmingham  
B4 6NQ

### Decision (including any steps ordered)

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1. The complainant requested personal information about persons cautioned for or charged with committing alleged offences against her.
2. During the Commissioner's investigation West Midlands Police, who had relied on the section 40(5) (a) and (b) FOIA (personal information) exemptions, instead relied solely on section 40(5)(a) FOIA. This was on the grounds that the requested information, if held, would be the complainant's own personal data. The Commissioner decided that West Midlands Police were correct to rely on 40(5)(a) FOIA and that no further steps are required to comply with the legislation.

### Request and response

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3. On 30 April 2016, the complainant wrote to West Midlands Police (the police) and requested information in the following terms:

*"Please send to me within the next 20 days any and all information you hold about persons who have received police cautions for saying I've said things which they have admitted I have not, incriminating innocent people for serious crimes including that of rape.*

*Also the names and addresses of persons who have been cautioned/charged with abuse/harm they have inflicted upon me and the results of any such charges"*

4. The police responded on 9 May 2016 refusing to confirm or deny holding the requested information and relying on the section 40(5) FOIA (personal information) exemption.
5. Following an internal review the police wrote to the complainant again on 8 June 2016 upholding their earlier reliance on the section 40(5) FOIA exemption. The police explained in more detail that their reliance was on the section 40(5)(a) and 40(5)(b)(i) FOIA exemptions.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 6 July 2016 to complain about the way her request for information had been handled. She said she had been a victim of crimes of abuse and wanted to know who had been cautioned or charged with abusing her.
7. The Commissioner considered the application to the request of the section 40(5) FOIA exemptions which empower a public authority to neither confirm nor deny whether or not information requested is held.
8. During the Commissioner's investigation the police revised their position. The police said that if the requested information was held it would be withheld in its entirety under section 40(1) FOIA. They therefore neither confirmed nor denied that the requested information was held by virtue of 40(5)(a) FOIA.
9. Following the decision in the combined cases of the Home Office v Information Commissioner (GIA/2098/2010) and DEFRA v Information Commissioner (GIA/1694/2010) in the Upper Tribunal, a public authority is able to claim a new exemption before either the Commissioner or the First-tier Tribunal and both must consider any such new claims.

### **Reasons for decision**

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10. Under section 1(1)(a) FOIA, a public authority is obliged to advise an applicant whether or not it holds the requested information. This is known as the "duty to confirm or deny". However, the duty to confirm or deny holding information does not always apply and authorities may refuse to confirm or deny through reliance on certain FOIA exemptions.

### **Section 40(5) – personal information**

11. The exemption at section 40(5) FOIA provides that a public authority does not have to confirm or deny whether requested information is held if to do so would itself constitute a disclosure of personal data.

12. Section 40(5)(a) provides that the duty to confirm or deny does not arise in relation to information that, if held, would fall within the scope of section 40(1) FOIA. Section 40(1) provides that information which is the personal data of the applicant is exempt from disclosure under FOIA. This is because individuals may request their personal data under a separate legislative access regime, the right of subject access under section 7 of the Data Protection Act 1998 (DPA).

13. Section 40(1) FOIA is an absolute exemption, meaning that if it applies there is no requirement to go on to consider whether disclosure would nevertheless be in the public interest.

*Would confirming or denying that the requested information is held constitute a disclosure of personal data?*

14. Section 1(1) DPA defines personal data as:

*"...data which relate to a living individual who can be identified –  
(a) from those data, or  
(b) from those data and other information which is in the possession of, or likely to come into the possession of, the data controller,  
and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual".*

15. In her guidance on section 40 FOIA the Commissioner expands on what constitutes personal data:

*"For data to constitute personal data, it must relate to a living individual, and that individual must be identifiable. In considering whether information requested under FOIA is personal data, the public authority must decide whether the information satisfies both parts of the definition."*

[https://ico.org.uk/media/fororganisations/documents/1206/neither\\_confirm\\_nor\\_deny\\_in\\_relation\\_to\\_personal\\_data\\_and\\_regulation\\_foi\\_eir.pdf](https://ico.org.uk/media/fororganisations/documents/1206/neither_confirm_nor_deny_in_relation_to_personal_data_and_regulation_foi_eir.pdf)),

16. The complainant's request is for information about perpetrators of alleged offences against her. The Commissioner considers that this is an approach for information which can be linked to a named, living individual - the complainant herself.

17. The Commissioner, in her published guidance, "Personal data of both the requester and others" (<https://ico.org.uk/media/1209/personal-data-of-both-the-requester-and-others-foi-eir.pdf>) makes clear that in circumstances where, if the requested information were to be held it

would be very closely linked to the personal data of other data subjects, ie it would be 'mixed' personal data, there is no requirement to assess the relative extent and/or significance of the different sets of personal data in order to establish the 'dominant' data subject. This is because there is no basis for regarding the individual whose data is more extensive or significant than the others as being the only data subject.

18. Where a request is made for information which, if held, would be the personal data of the applicant, the public authority should consider the information in its entirety under section 40(1) FOIA. If the requested information would, if held, be exempt under section 40(1), there is no requirement for the public authority to say whether or not it holds the requested information. This derives from section 40(5)(a).
19. It follows from this that to comply with section 1(1)(a) of FOIA (that is, to either confirm or deny holding the requested information) would put into the public domain information about alleged offences against the complainant; this would constitute disclosure of her personal data.
20. In considering whether the police should have applied section 40(5)(a), the Commissioner has taken into account that FOIA is applicant blind and that any disclosure would be to the world at large. That is, if the information were to be disclosed, it would be available to any member of the public, not just the complainant. Confirmation or denial in the circumstances of this case would reveal to the general public information about the complainant which is not already in the public domain and which is not reasonably accessible to it. The Commissioner therefore considers that the police correctly relied on the section 40(5)(a) FOIA exemption in this case.
21. Where information, if held, would be exempt on the basis of section 40(1) FOIA, a public authority should consider it as a subject access request in accordance with section 7 DPA. The police have written to the complainant to tell her of her rights under the DPA.

## Right of appeal

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22. 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: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

23. 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.
24. 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** .....

**Gerrard Tracey**  
**Principal Adviser**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**