

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 March 2019

Public Authority: Chief Constable of West Yorkshire Police
Address: West Yorkshire Police
PO Box 9
Laburnum Road
Wakefield
WF1 3QP

Decision (including any steps ordered)

1. The complainant has requested information relating to an alleged assault. West Yorkshire Police neither confirmed nor denied holding any information by virtue of sections 30(3) (Investigations and proceedings), 31(3) (Law enforcement) and 40(5) (Personal information) of the FOIA.
2. The Commissioner's decision is that West Yorkshire Police has applied section 30(3) appropriately to the requested information. However, the Commissioner considers that West Yorkshire Police has breached sections 10(1) (Time for compliance) and 17(1) (Refusal of request) of the FOIA.
3. The Commissioner does not require West Yorkshire Police to take any steps as a result of this decision.

Request and response

4. On 22 February 2018, the complainant wrote to West Yorkshire Police (WYP) and requested information in the following terms:

"I would like to request, to know how the police resolved a report of violent assault by a sixty two year old man against two workmen half his age. Made by the manager of the Piazza shopping centre Huddersfield at 06.41 on the ninth of April 2015. Which was incorrectly in-coded by police as violent assault, and later corrected."

5. WYP responded on 23 February 2018. It explained that disclosure under the FOIA was disclosure to the world and not just the individual requesting the information. It also explained to the complainant that if he was directly involved in the incident in question, it was possible to acquire information by way of a subject access request, which entitles the requester to any and all information held about them by it. WYP also provided him with a link to relevant information.
6. Following an internal review WYP wrote to the complainant on 25 July 2018. It acknowledged that it had not responded to his request fully and provided him with a full response. It explained that it was neither confirming nor denying whether it held the requested information by virtue of sections 30(3) (Investigations and proceedings) and 40(5) (personal information) of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 9 August 2018 to complain about the way his request for information had been handled. He explained that WYP had made reference to section 30 but no offence had been committed. He also explained that whether there was or was not an investigation was not relevant as the request was for the procedure that was followed by the police in response to a report of an incident.
 8. The complainant also explained that he believed that section 30 has a 'public interest' clause. He reiterated that the incident in question involved members of the public, in a public place using a public facility, and that the information could be disclosed publicly.
 9. The Commissioner has considered the wording of the request. She considers that this is not a request for any procedure followed regarding any investigation, as the complainant has provided a date and time regarding an alleged incident and details relating to that alleged incident.
 10. During the Commissioner's investigation, WYP also explained that it was relying on section 31(3) to neither confirm nor deny whether it held any of the requested information.
 11. The Commissioner will consider WYP's application of sections 30(3), 31(3) and 40(5) and the time taken to deal with the request.
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Reasons for decision

Section 1(1)(a) – confirming or denying that information is held

12. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request. However, there may be occasions when complying with the duty to confirm or deny under section 1(1)(a) would itself disclose sensitive or potentially damaging information that falls under an exemption. In these circumstances, the FOIA allows a public authority to respond by refusing to confirm or deny (NCND) whether it holds the requested information.
13. The decision to use a NCND response will not be affected by whether a public authority does or does not hold the requested information. The starting point and main focus in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.
14. WYP explained that if held, the information would be exempt under section 30(3) by virtue of section 30(1)(a)(i) and (ii) and section 30(2)(a)(i)(ii) of the FOIA.

Section 30(3) – Investigations and proceedings conducted by public authorities

15. Sections 30(1)(a) and (b) of the FOIA state:

“(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained –

(i) whether a person should be charged with an offence, or

(ii) whether a person charged with an offence is guilty of it.

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct...”
16. The Commissioner considers that the phrase “at any time” means that information can be exempt under section 30(1) if it relates to a specific ongoing, closed or abandoned investigation.
17. Section 30(2)(a)(i) and (ii) of the FOIA states:

“(2) Information held by a public authority is exempt information if –

(a) it was obtained or recorded by the authority for the purposes of its functions relating to-

(i) investigations falling within subsection (1)(a) or (b),

(ii) criminal proceedings with the authority has power to conduct ..."

18. For information to be exempt under section 30(2) it must both relate to the public authority's investigations or proceedings and relate to confidential sources, as set out in section 30(2)(b):

"(b) it relates to the obtaining of information from confidential sources."

19. The Commissioner considers that for the purposes of section 30(2), a confidential source is a person who provides information on the basis that they will not be identified as the source of that information. She also considers that confidential sources include informants who are recruited by the authorities, often from within the criminal community, to provide intelligence on criminal activity. These informants provide information secretly and could be operational for many years or for only a short period. Clearly they would have an expectation that the authority would keep their relationship confidential.
20. Additionally, confidential sources can also include witnesses who only provided information about a particular crime on the understanding that their identity would not be revealed and have declined to give a formal statement.
21. Section 30(3) of the FOIA states:
- "The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2)."
22. Section 30(3) therefore provides an exclusion from the duty to NCND whether information is held in relation to requested information which, if it was held, would fall within sections 30(1) and/or 30(2).
23. Consideration of section 30(3) involves two stages; first, the information described in the request must fall within the class described in sections 30(1) and/or (2). Secondly, the exemption is qualified by the public interest. This means that if the public interest in maintaining the exemption does not outweigh the public interest in confirming or denying whether information is held, then confirmation or denial must be provided.
24. WYP explained that police have general common law powers to allow them to fulfil their common law and policing purposes to prevent and

detect crime, apprehend and prosecute offenders and to protect life and assist the public. It also explained that there are a number of statutory powers available to police generally, for example: The Police Act 1996 and the Crime and Disorder Act 1998.

25. In addition, WYP explained that if held the requested information would have been recorded by it in relation to and for the purpose of a criminal investigation, with a view to ascertaining whether a person should be charged with an offence or was guilty of an offence and in relation to bringing criminal proceedings.
26. The Commissioner is satisfied that as a police force, WYP has a duty to investigate offences and allegations of offences. She considers that information held for the purposes of a police investigation will generally fall within the description at sections 30(1)(a)(i) and(ii).
27. The Commissioner therefore accepts that the requested information, if held, would be held by WYP for the purposes of an investigation and therefore would fall within the class described in section 30(1)(a)(i).
28. The Commissioner is therefore satisfied that section 30(3) is engaged.
29. As section 30 is a class-based qualified exemption it is subject to public interest considerations: in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information.

Public interest arguments in favour of maintaining the exclusion of the duty to confirm or deny holding the requested information

30. WYP explained that by confirming or denying whether it held the requested information in relation to a specific investigation would itself constitute a disclosure. It argued that to disclose the information would undermine future investigations as it considered that it would be possible to identify the names of the victim and witnesses from the wording of the present request. WYP explained that it would put witnesses at risk and that the result would mean that other victims and witnesses may be less forthcoming out of fear they too will be identified by the police.
31. Additionally, WYP argued that confirming or denying whether the information is held would be confirming the assertions made in the statement by the requester. It pointed out that even if it held any information about the alleged assault, it had not released any of it into the public domain. It also argued that the request includes information which, if held, would lead to the identification of a witness which would put that person at risk.

32. WYP also argued confirmation or denial that any information is held in this case would suggest that it took its responsibility to appropriately handle and manage information provided by individuals to assist with criminal investigations, flippantly and dismissively. It argued that this would result in the prevention and detection of crime being hampered. It also explained that the apprehension or prosecution of offenders would be jeopardised.

Public interest arguments in favour of confirming or denying whether the requested information is held

33. WYP acknowledged that confirmation or denial that the requested information exists could provide reassurance to the complainant and the general public that such investigations are conducted thoroughly and appropriately.
34. The complainant explained that as no offence had been committed this was not a request for personal information. He did not offer any arguments regarding why it would be in the public interest for WYP to either confirm or deny whether it holds the requested information.

Balance of public interest arguments

35. WYP argued that the balance of public interest arguments in this case, lies in favour of neither confirming nor denying that any information is held. It explained that it considered that confirming or denying whether the information is held could provide assurances that investigations are conducted thoroughly and appropriately. It also acknowledged that it would provide transparency regarding the manner in which such investigations are conducted.
36. However, WYP also explained confirming or denying whether it held the requested information in this case, would deter other victims and witnesses from coming forward and greatly undermine the public's trust in the police to maintain the duty of confidentiality in relation to criminal investigations.
37. The Commissioner has also considered the balance of the public interest in this case, including what public interest there is in WYP confirming or denying whether or not it holds any of the requested information. In addition, the Commissioner has considered whether such confirmation or denial would be likely to harm any investigation, which would be counter to the public interest. She has also considered what weight to give to these competing public interest factors.
38. The purpose of section 30 is to protect the effective investigation and prosecution of offences. The Commissioner considers that it is not in the public interest to jeopardise the ability of the police to investigate crime effectively.

39. However, the Commissioner also recognises the importance of the public having confidence in public authorities whose role is to uphold the law. She considers that confidence will be increased by allowing scrutiny of their performance, which may involve revealing whether or not any actions have been necessary, or are potentially ongoing, in particular cases such as this one.
40. The Commissioner also recognises that a confirmation or denial in relation to an investigation might be harmful to WYP's responsibility to manage its investigations effectively. She considers that disclosure of information that could identify potential victims and witnesses could undermine WYP's present and future investigations and therefore hinder its ability to conduct its policing functions, which would not be in the public interest.
41. The Commissioner also accepts that a public authority may issue a NCND response consistently, over a series of separate requests, regardless of whether 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. For example, were no information held in this case then it would be a simple matter for WYP to confirm this. However, when a similar request is made and information is held and WYP does not wish to reveal this to be the case, by taking a NCND stance on that occasion only, it may be inferred that information is held.
42. This does not mean however, that public authorities should use a NCND response in a blanket fashion. They should base their decision on the circumstances of the particular case with regard to the nature of the information requested and with appropriate consideration given to the public interest test.
43. The Commissioner acknowledges that there is general public interest in how allegations of violent assault are handled by the police.
44. However, the Commissioner also considers that confirming or denying would not allow the public to draw reliable conclusions about WYP's conduct. For example, confirmation that information was held could indicate that allegations of a violent assault had been received by the police. The Commissioner notes that in this case, the complainant has alleged that although the alleged incident had been recorded as a violent assault, it was later corrected.
45. In the circumstances of this case, the Commissioner has accorded greater weight to the arguments surrounding the public interest in protecting the ability of WYP to conduct effective investigations.
46. The Commissioner considers that confirmation or denial in this case could create a perception among the wider public that individuals who

cooperate with WYP (or any police force), whether as victim, witness or suspect, risk having this fact disclosed into the public domain, and that communications with the police may prove not to be truly confidential.

47. She also considers that it is vital that WYP is able to give a guarantee of confidentiality to anyone who wishes to complain or give evidence to it or who may be willing to cooperate with it about criminal matters. This guarantee extends to suspects who are entitled to expect that, at least until formally charged, information about them will not be disclosed for reasons not directly to do with and necessary for, the police investigation.
48. If the credibility of such guarantees is undermined, the Commissioner considers that the perception that information provided to the police may be disclosed to the world at large might deter people from coming forward and cooperating with prosecuting authorities. This would be likely to disrupt the flow of information and intelligence to WYP and there would be an inevitable impact on its ability to conduct efficient and well evidenced criminal investigations which would be strongly against the public interest.

Conclusion

49. Taking all of the above into account, the Commissioner is satisfied that section 30(3) has been applied appropriately in this case and that the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information.
50. The Commissioner has therefore not gone on to consider the other exemptions cited.

Procedural matters

51. The complainant submitted his request on 22 February 2018. WYP did not confirm that it was applying section 30(3) until it carried out an internal review on 25 July 2018, or that it was relying on section 31(3) until the Commissioner's investigation.

Section 10 – Time for compliance

52. Section 10(1) provides that a public authority must respond to a request promptly and in any event no later than 20 working days after the date of receipt.
53. The Commissioner considers that WYP has breached section 10(1) as it took longer than 20 working days to answer the request properly.

Section 17 – Refusal of request

54. Section 17(1) provides that if a public authority wishes to refuse a request it must issue a refusal notice within the 20 working day time for compliance, citing the relevant exemption(s).
55. The Commissioner considers that WYP has breached regulation 17(1) as it took longer than 20 working days to inform the requester that it was relying on exemptions.

Other matters

56. The complainant requested an internal review on 24 May 2018. WYP responded on 25 July 2018.
57. Part VI of the section 45 Code of Practice (the code) makes it good practice for a public authority to have a procedure in place for dealing with complaints about its handling of requests for information.
58. While no explicit timescale is laid down in the code, the Commissioner has decided that a reasonable time for completing an internal review should normally be within 20 working days of receipt of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
59. The Commissioner notes that WYP did not provide her with any reasons regarding exceptional circumstances. She is concerned that it took approximately 2 months for it to complete the internal review.

Right of appeal

60. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

61. 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.
62. 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

Andrew White
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