

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 February 2020

Public Authority: Chief Constable of Northamptonshire Police
Address: Wootton Hall
Wootton Park
Northampton
Northamptonshire
NN4 0JQ

Decision (including any steps ordered)

1. The complainant has requested to know whether Northamptonshire Police forced entry to a property that he owns. Northamptonshire Police said that it could not respond to the request because of the Data Protection Act 2018.
2. The Commissioner's decision is that, under section 40(5B)(a)(i) (personal information) of the FOIA, Northamptonshire Police was not obliged to confirm or deny whether it held the requested information. However, she found that because Northamptonshire Police failed to specify the exemption on which it was relying, it breached section 17(1)(b) of the FOIA.
3. The Commissioner requires no steps as a result of this decision.

Request and response

4. On 30 July 2019, the complainant wrote to Northamptonshire Police and requested information in the following terms:

"Re: [property address redacted]

Hi, I am the legal owner of the above property which has a tenant in place and I have been informed that it was forcibly entered in the last couple of weeks by the Police who suspected the property contained drugs.

I am having to contact the Police because the tenant ... is refusing to give my letting agent the documentation they need to find out from the police anymore details.

...I do not expect to get sensitive or confidential information about the occupants or the entry itself but I am concerned about the property and any damage caused, how that has happened and what if anything is being done about it.

The tenant themselves are saying very little if anything to my agent and when I spoke to them on the phone much of what they said could not be confirmed and I strongly suspect was lies.

I know from information from my agent that the front door was damaged, presumably beyond repair because a temporary door has replaced it.

...

If you can give me any further information I would be grateful or alternatively if you require any further information from me, please ask."

5. Northamptonshire Police responded on 31 July 2019 as follows:

"If Northamptonshire Police have carried out a warrant under the Misuse of Drugs Act 1971 at your property and the front door was damaged in the process then we will not be liable for the cost of the damage.

Unfortunately, Northamptonshire Police will not share any information relating to your tenant without their consent due to it being a breach of the Data Protection Act 2018."

6. The complainant responded on 3 August 2019, expressing dissatisfaction with the response, stating:

"Would you please confirm whether my property was entered by Northamptonshire Police and whether they will be responsible for compensating me for the damage and if not, why not?"

7. Northamptonshire Police responded on 7 August 2019, reiterating that it could not confirm whether or not it attended the address in respect of the tenant.
8. The complainant wrote to Northamptonshire Police again on the same day, explaining that he was not requesting information about any person, but wanted to know whether Northamptonshire Police was the cause of the damage to his property. Northamptonshire Police

responded on 8 November 2019, advising him to complain to its Professional Standards Department and Civil Litigation Team if he remained unhappy. It concluded:

"It is the case that if a warrant had been carried out at a property and Northants Police were to release any data relating to that warrant it would by default be releasing personal data about a third party whether it was the tenant or somebody associated with them as the property itself would not attract a warrant of its own accord.

Under GDPR and the Data Protection Act 2018, any data relating to an individual, including location data is considered to be personal identifying data. Further details related to that would be associated with the individual."

Scope of the case

9. The complainant contacted the Commissioner on 17 August 2019 to complain about the way his request for information had been handled. He explained that he only wanted to know whether or not Northamptonshire Police had forcibly entered the property.
10. During her investigation, the Commissioner asked Northamptonshire Police to cite specific grounds under the FOIA for refusing to comply with the request, commenting that its repeated referral to the Data Protection Act 2018 ('the DPA') suggested that it believed that the 'neither confirm nor deny' provisions of section 40 of the FOIA applied. However, Northamptonshire Police failed to do this. Instead, on 29 November 2019, it told the complainant that "...Northamptonshire Police does not hold any information relative to your request".
11. In addition to the FOIA, the Commissioner is responsible for regulating data protection legislation. As such, she takes account of the need to protect personal data when considering whether such information may be disclosed under the FOIA. Accordingly, she may intervene and apply exemptions herself where she considers it necessary.
12. Having considered the request, and in view of the information provided by Northamptonshire Police and by the complainant, the Commissioner has considered whether Northamptonshire Police should have maintained the position it originally communicated to the complainant, and cited section 40(5B)(a)(i) of the FOIA to neither confirm nor deny whether or not it held the requested information.

Reasons for decision

Neither confirm nor deny ('NCND')

13. Section 1(1)(a) of the FOIA requires a public authority to inform a requester whether it holds the information specified in the request. This is commonly known as 'the duty to confirm or deny'. However, there may be occasions when complying with the duty to confirm or deny under section 1(1)(a) would in itself disclose sensitive or potentially exempt information. In these circumstances, section 2(1) of the FOIA allows a public authority to respond by refusing to confirm or deny whether it holds the requested information.
14. 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 particular information is held. The Commissioner's guidance¹ explains that there may be circumstances in which merely confirming or denying whether or not a public authority holds information about an individual can itself reveal something about that individual. For example, where a request is made for information about staff disciplinary records in respect of a particular individual, to confirm or deny that that information is held would be likely to indicate that the person was, or was not, the subject of a disciplinary process. This is, of itself, a disclosure of information about that person.
15. A public authority will need to issue a 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. The issue that the Commissioner has to consider is not one of the disclosure of any requested information that may be held, it is solely the issue of whether or not the public authority is entitled to NCND whether it holds the information requested by the complainant.

Section 40 (personal information)

16. Section 40(5B)(a)(i) of the 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

¹ <https://ico.org.uk/media/for-organisations/documents/2614719/neither-confirm-nor-deny-in-relation-to-personal-data-section-40-5-and-regulation-13-5-v20.pdf>

in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.

17. For Northamptonshire Police to be entitled to rely on section 40(5B)(a)(i) of the FOIA to NCND 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 must constitute the disclosure of a third party's personal data; and
- providing this confirmation or denial must contravene one of the data protection principles.

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

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

19. 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.

20. 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.

21. The request in this case asked to know whether Northamptonshire Police recently forced entry at a specific property on suspicion that drugs may be present. The Commissioner considers that whether or not the police have forced entry at the property will be information which relates to its occupant. The Commissioner notes that no individual is explicitly named in the request. However, a residential address is specified in the request, and its occupant is identified by the complainant as being his tenant. The tenant is therefore identifiable to the complainant.

22. The Commissioner is therefore satisfied that confirmation or denial in this case would involve the disclosure of a third party's personal data (ie the tenant's). The first criterion set out above is therefore met.

Would confirming or denying that the requested information is held contravene one of the data protection principles?

23. Article 5(1)(a) of the GDPR ('principle (a)') states that:-

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

24. In the case of an FOI request, personal data is processed when it is disclosed in response to the request. This means that the information may only be disclosed – or, in this case, the public authority may only confirm or deny whether it holds the requested information - if to do so would be lawful, fair and transparent.
25. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
26. In addition, if the requested data comprises 'criminal offence data', in order for disclosure to be lawful and compliant with principle (a), it must also meet the requirements of Article 10 of the GDPR.

Is the information 'criminal offence data'?

27. Information relating to criminal convictions and offences is given special status in the GDPR. Article 10 of the GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA, 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.

28. Having considered the particular wording of the request, the Commissioner finds that it is a request for criminal offence data within the meaning of section 11(2)(a) of the DPA. She has reached this conclusion on the basis that the request refers to the alleged forced entry by Northamptonshire Police on suspicion of the presence of drugs in the property. Confirmation or denial in this case would therefore disclose that the tenant's house either had, or had not, been raided by Northampton Police in connection with the alleged commission of a criminal offence.
29. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed (which includes the disclosure that would occur as a result of confirming or denying whether information is held) if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.
30. 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).

31. The Commissioner has seen no evidence or indication that the data subject (the tenant) had specifically consented to personal data about them being disclosed to the world in response to this FOIA request, or that they have deliberately made the requested information public. On the contrary, the complainant has made this FOIA request precisely because he has been unable to obtain information about how the damage to the property was caused from other sources.
32. As a general rule, the Commissioner considers that individuals who are suspected by the police of committing criminal offences will have the reasonable and legitimate expectation that any personal data collected by the police, for the purposes of law enforcement, will not be used or disclosed for purposes not directly to do with law enforcement (unless expressly permitted by law) and that processing such data for an unrelated purpose would not be fair.
33. As none of the conditions required for processing criminal offence data are satisfied, there is no legal basis for the disclosure which would result from confirmation or denial. The Commissioner is therefore satisfied that processing this criminal offence data would breach principle (a). It follows that, in the particular circumstances of this case, Northamptonshire Police should have relied on section 40(5B)(a)(i) of the FOIA to NCND whether or not it held the requested information.

Section 17 – Refusal of request

34. Section 17(1) of the FOIA states:

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,*
- (b) specifies the exemption in question, and*
- (c) states (if that would not otherwise be apparent) why the exemption applies."*

35. The Commissioner is satisfied that Northamptonshire Police communicated to the complainant that it was not obliged to confirm or deny whether it held the requested information, due to the constraints of the Data Protection Act 2018, and thus that it complied with subsections (a) and (c). However, in failing to specify the exemption on which it was relying, Northamptonshire Police breached section 17(1)(b) of the FOIA.

Right of appeal

36. 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@justice.gov.uk

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

37. 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.
38. 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

Samantha Bracegirdle
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