

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 August 2021

Public Authority: Chief Constable of Hertfordshire Constabulary
Address: Hertfordshire Constabulary Headquarters
Stanborough Road
Welwyn Garden City
Hertfordshire
AL8 6XF

Decision (including any steps ordered)

1. The complainant has requested from Hertfordshire Constabulary information about someone he believes to be a police officer. Hertfordshire Constabulary would neither confirm nor deny whether it held the requested information, under section 40(5B)(a)(i) (Personal information) of the FOIA.
2. The Commissioner's decision is that Hertfordshire Constabulary was entitled to rely on section 40(5B)(a)(i) to neither confirm nor deny whether it held the information.
3. The Commissioner requires no steps as a result of this decision.

Request and response

4. On 22 September 2020, the complainant wrote to Hertfordshire Constabulary and requested information in the following terms:

"What's is [sic] the i) substantive rank and ii) temporary rank of [name redacted] and what team does he work?"
5. On 21 October 2020, Hertfordshire Constabulary responded. It would neither confirm nor deny whether it held the requested information, citing section 40(2) of the FOIA.

6. Following an internal review, Hertfordshire Constabulary wrote to the complainant on 19 November 2020, confirming this position.

Scope of the case

7. The complainant contacted the Commissioner on 19 November 2020 to complain about the way his request for information had been handled. He stated the following in support of his complaint:

"I don't believe my FOI request should be refused under personal information grounds as:-

1) the fact he is a police officer is already in the public domain as shown in the link [to a local news report from 2013] in my follow up to the refusal. Hertfordshire Constabulary have previous already released that information themselves.

2) he is a crown servant and as such holds a public office. The office of constable attracts statutory powers dependant on the rank that is held. The public should be entitled to know what rank he is and by extension what powers he has. For example an Inspector holds greater powers than a Constable and a Superintendent holds greater powers than Inspector. If the public aren't allowed to know what rank they hold how can they ever be held to account for an abuse of power. I am not asking for any personal information nor would the answer enable me to identify any other personal information."

8. Although Hertfordshire Constabulary cited section 40(2) of the FOIA, it is section 40(5B)(a)(i) which creates the 'neither confirm nor deny' exemption in respect of third party personal data.
9. The analysis below therefore considers whether Hertfordshire Constabulary was entitled to rely on section 40(5B)(a)(i) of the FOIA to neither confirm nor deny whether it held the requested information.

Reasons for decision

Neither confirm nor deny ('NCND')

10. Section 1(1)(a) of the FOIA requires a public authority to inform a requester whether it holds the information specified in a request.
11. 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 a particular type of information is held.

12. A public authority will need to use the 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.
13. Hertfordshire Constabulary has taken the position of neither confirming nor denying whether it holds any of the requested information in its entirety, citing section 40(5) of the FOIA. The issue that the Commissioner has to consider is not one of disclosure of any requested information that may be held, it is solely the issue of whether or not Hertfordshire Constabulary is entitled to NCND whether it holds the information requested by the complainant.
14. Put simply, in this case the Commissioner must consider whether or not Hertfordshire Constabulary is entitled to NCND whether it holds any information about the named party, their substantive rank, temporary rank and the team (the complainant believes) this officer works with.

Section 40 – personal information

15. 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 in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.
16. Therefore, for Hertfordshire Constabulary 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 would constitute the disclosure of a third party's personal data; and
 - Providing this confirmation or denial would contravene one of the data protection principles.

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

17. Section 3(2) of the Data Protection Act 2018 defines personal data as:-

"any information relating to an identified or identifiable living individual".

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. 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.
20. The request asked for information about a named, living person. Confirmation or denial as to whether the requested information is held would reveal something about that individual (ie whether or not, at the time of the request, they were employed as a police officer by Hertfordshire Constabulary).
21. For the reasons set out above the Commissioner is satisfied that if Hertfordshire Police confirmed whether or not it held the requested information this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.
22. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent Hertfordshire Constabulary from refusing to confirm whether or not it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.
23. The Commissioner agrees that the most relevant data protection principle is principal (a).

Would confirming whether or not the requested information is held contravene one of the data protection principles?

24. Article 5(1)(a) GDPR states that:-

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

25. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed – or, as in this case, the public authority can only confirm whether or not it holds the requested information - if to do so would be lawful (ie it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), be fair, and be transparent.

Lawful processing: Article 6(1)(f) GDPR

26. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that “*processing shall be lawful only if and to the extent that at least one of the*” conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.

27. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:-

“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.

28. In considering the application of Article 6(1)(f) 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 confirmation as to whether the requested information is held (or not) 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.

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 2018) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the 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”.

29. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

(i) Legitimate interests

30. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test
31. The complainant's arguments for wanting Hertfordshire Constabulary to comply with the request are set out at paragraph 7. He has not provided any information about why he has made the request. However, the Commissioner accepts that there is a legitimate interest in the public having confidence in the accountability and transparency of the police, which would be served by it confirming whether or not it employed a named individual.

(ii) Is confirming whether or not the requested information is held necessary?

32. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA as to whether the requested information is must therefore be the least intrusive means of achieving the legitimate aim in question.
33. As the legitimate interest the Commissioner has identified relates to the police being open and transparent about the individuals it employs, the Commissioner considers that confirmation or denial would be 'necessary' to meet this legitimate interest.

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

34. It is necessary to balance the legitimate interests in confirming whether or not the requested 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 the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.

35. Hertfordshire Constabulary say that it is not within the reasonable expectation of its staff that their identities will routinely be disclosed into the public domain.
36. On that point, the Commissioner notes that the codes of practice established under the Police and Criminal Evidence Act 1984 ('PACE') specify certain circumstances in which a police officer should provide their name and/or the police station to which they are attached, to a member of the public. Outside of this, there is no legislative requirement for a police officer to provide their name and/or station and the public has no absolute right to this information.
37. The Commissioner has seen nothing which suggests that the request in this case was made under the particular circumstances set out under PACE.
38. The complainant believes that the data subject named in the request is already identified as a Hertfordshire Constabulary officer in the public domain, by dint of a local newspaper article naming him as such. The Commissioner notes that the report in question is from August 2013, seven years before this request was submitted. She has conducted an online search and was able to locate a further article in which he was identified as an officer by Hertfordshire Constabulary. However, it was published six years ago. The Commissioner has been unable to locate any more recent information in the public domain which identifies the data subject as an officer of Hertfordshire Constabulary and it is therefore not known whether he remains a current employee.
39. In view of the time that has passed, and the possibility that his circumstances will have changed in that time (including moving on from the areas of work highlighted in the media reports, or even leaving the force entirely), the Commissioner does not consider these previous disclosures by Hertfordshire Constabulary to carry any weight in terms of the expectation that the data subject would have regarding the disclosure into the public domain of information about his current employment status with the force.
40. The Commissioner understands that being identified to the world at large as a police officer can have implications for an individual's personal safety, particularly if they have been involved in sensitive areas of

policing. Aside from the circumstances covered by PACE (in which disclosure would be mandatory), it is therefore information which it is reasonable for a police officer to expect to be able to exercise some control over.

41. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful.

Fairness

42. Given the conclusion the Commissioner has reached above on lawfulness, the Commissioner considers that she does not need to go on to separately consider whether confirming or denying whether the information is held would be fair and transparent. The Commissioner has therefore decided that Hertfordshire Constabulary was entitled to NCND whether or not it held the requested information on the basis of section 40(5)(B) of FOIA.

Right of appeal

43. 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

44. 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.
45. 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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