

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 October 2021

Public Authority: Chief Constable of West Yorkshire Police

Address: PO BOX 9
Laburnum Road
Wakefield
WF1 3QP

Decision (including any steps ordered)

1. The complainant requested information, including information relating to entries on a spreadsheet which had been supplied to him in response to a previous request for information.
2. West Yorkshire Police provided some information within the scope of the request but refused to confirm or deny holding the remaining requested information, citing section 40(5) (personal information) of FOIA.
3. The Commissioner's decision is that West Yorkshire Police was entitled, by virtue of section 40(5A) of FOIA, to neither confirm nor deny holding the requested information relating to the spreadsheet entries.
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 18 November 2020, the complainant wrote to West Yorkshire Police and requested information in the following terms:

"Following my latest communication with the ICO, it has been established that as of December 2019, WYP [West Yorkshire Police] report "only on full/valid requests received (as opposed to incomplete requests) as this is a more accurate representation of demand on the force".

1. Can you please provide a copy of the official documentation and all paperwork in relation to this policy change with respect to the reporting of SAR [subject access request] data.

It is now established that the listings of data supplied under FOI 914/20 (version 2) on 29th July 2020 and earlier under FOI 914/20 (version 1) on 6th March 2020 did not include so-called "incomplete requests", despite my request for "data relating to the number of SARs received" at the outset.

That said, I understand such "incomplete request" data is held by WYP following the information supplied on 2nd April 2020 under IR 1609/20, namely that "We have been able to backdate this change".

2. Please could you therefore now provide an analogous listing of the data supplied on both 29th July 2020 and 6th March 2020 (in 2 distinct spreadsheet files) but specifically including only those entries relating to "incomplete requests". Please provide the data in the same format as before: one column for "date received" and one column for "date closed".

*3. Following the disclosure of FOI 914/20 on 29th July 2020, and further communication with the ICO, please can you now state **which rows** in that excel spreadsheet correspond to the following SAR reference requests. A screenshot of the data set in context would suffice for evidential purposes. Thank you.*

(a) DP 5/47295 from September 2015;

(b) DP 1246/16 from April 2016;

(c) DP 3546/19 from May 2019;

(d) DP 3750/19 from June 2019;

(e) DP 5374/19 from August 2019;

(f) DP 5730/19 from August 2019;

(g) DP 1283/20 from February 2020".

6. West Yorkshire Police responded on 17 December 2020. It responded to parts (1) and (2) of the request but refused to confirm or deny that it held information within the scope of part (3) of the request. It told the complainant:

"The West Yorkshire Police Service can neither confirm nor deny, that it holds the information you requested, as the duty in s1(1)(a)

of the Freedom of Information Act 2000 does not apply by virtue of Section 40 (5) Personal Information”.

7. The complainant requested an internal review on 17 December 2020. Specifically he requested clarification of the response to part (1) of the request and disputed that the exemption applied to part (3).
8. West Yorkshire Police sent him the outcome of its internal review on 22 January 2021. It confirmed its application of section 40(5) to part (3) of the request.
9. It also advised that it had passed a copy of part (3) of the request to the Right of Access team, to consider under the UK GDPR [UK General Data Protection Regulation] and DPA [Data Protection Act] 2018 as a right of access to the complainant’s personal data.

Scope of the case

10. The complainant contacted the Commissioner on 8 February 2021 to complain about the way his request for information had been handled.
11. He explained that he had simply selected seven rows of interesting data from the information previously provided to him. He disputed West Yorkshire Police’s application of section 40(5), arguing that no personal information is involved. He told the Commissioner:

“The general public are not able to identify who this data is connected with, since internal ref nos. have been used.... Even if the data did apply to one individual, that individual could not be identified”.
12. He also told the Commissioner that he did not think it was appropriate that West Yorkshire Police treated his request as a subject access request.
13. He subsequently advised the Commissioner that he had received further correspondence from West Yorkshire Police, namely a response dated 22 February 2021 entitled ‘Right of Access by the data Subject’. He also provided her with evidence of further correspondence between himself and West Yorkshire Police since that date regarding its handling of this request.
14. During the course of the Commissioner’s investigation, West Yorkshire Police clarified its position. It told the Commissioner:

"West Yorkshire Police (WYP) has previously relied on section 40(5B)(a)(i) of the FOIA to NCND whether it holds information falling within the scope of this part of the request.

WYP would like to amend this to rely on section 40(1) which states that 'As such, no duty to confirm or deny if the information requested is held or not applies'".

15. The Commissioner acknowledges that her guidance¹ states:

"If the requested information is the requester's personal data, it is exempt under section 40(1) of FOIA. Furthermore, under section 40(5A), you are not required to confirm or deny if you hold the information".

16. In light of the above, the Commissioner considers that West Yorkshire Police is seeking to rely on section 40(5A) to neither confirm nor deny (NCND) whether it holds information falling within the scope of part (3) of the request.

17. When considering a 'neither confirm nor deny' response, the single issue the Commissioner must determine is whether the public authority was correct neither to confirm nor deny whether it holds the requested information.

18. Accordingly, this notice considers whether West Yorkshire Police is entitled, on the basis of section 40(5A), to refuse to confirm or deny whether it holds information within the scope of part (3) of the request. The Commissioner has not considered whether the requested information – if held – should be disclosed.

Reasons for decision

19. In her guidance to public authorities, the Commissioner states:

"When you receive a request for information, you normally have a duty under FOIA section 1(1)(a) to tell the requester whether you

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>

hold the information. This is called "the duty to confirm or deny". However, in certain circumstances, this duty does not apply and you are not obliged to say whether or not you hold the information. Instead, you can give a "neither confirm nor deny" response".

Section 40 – personal information

20. Section 40(1) of FOIA states that:

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

21. Section 40(5A) of FOIA states that:

"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)".

22. In other words, while section 40(1) of FOIA provides an exemption from the right to information if the requested information is the requester's personal data, section 40(5A) of FOIA provides an exemption from the duty to confirm or deny whether requested information is held, if to do so would disclose personal data of which the applicant is the data subject.

Would the confirmation or denial that the requested information is held constitute the disclosure of personal data?

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

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

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

25. 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 or an online identifier; or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

26. 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.

27. The Commissioner acknowledges that the context of the request in this case is subject access requests (SARs). Specifically, the complainant's request seeks to establish which rows in an excel spreadsheet, previously disclosed to him, correspond to SARs with the reference numbers cited in the request.

28. The Commissioner recognises that the complainant told her:

"I accept the exemption may possibly have been relevant had I asked for all the cases identified by a specific named individual. However, that is not the case here. A false assumption has been made. Even if the data did apply to one individual, that individual could not be identified".

29. The Commissioner notes that while the requester of the SARs is not named in the request, the request does specify distinct reference numbers.

30. In its correspondence with the complainant, West Yorkshire Police told him:

"The references provided within this request are in the same format of those that West Yorkshire Police assign to Right of Access requests, which by there [sic] nature are personal. Therefore, in confirming or denying under FOI the existence of these specific references would inadvertently be a disclosure of personal information".

31. Similarly, in its submission to the Commissioner, West Yorkshire Police explained that the numbers specified in the request are in the format it uses to log subject access requests on its systems.

32. The Commissioner recognises that, by its very nature, a SAR constitutes personal data relating to the individual who made the request and could be combined with other information to reveal their identity. In that respect, she understands that the unique reference number, allocated to a subject access request made by an individual for access to their own personal data, is logged on West Yorkshire Police's systems under the name of the individual making the subject access request. Therefore, in the hands of West Yorkshire Police, the reference numbers relate to specific identifiable individuals.

33. In the circumstances, the Commissioner is satisfied that the requested information, if held, relates to and identifies individual(s). The information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

34. West Yorkshire Police argued that confirmation or denial in this case would lead to disclosure of the requester's personal information.
35. In her guidance entitled '*Neither confirm nor deny in relation to personal data*', the Commissioner states:

"If the requested information is the requester's personal data, it is exempt under section 40(1) of FOIA. Furthermore, under section 40(5A), you are not required to confirm or deny if you hold the information.

You can therefore respond to the freedom of information (FOI) request by saying that you neither confirm nor deny that you hold the personal data. This applies whether or not you do actually hold it. The issue to consider is not whether you hold it but rather, if you did hold it, would confirming or denying that it was held in itself disclose personal data relating to the requester?

...

Therefore, if you receive an FOI or EIR request where confirming or denying whether you hold the information would involve disclosing the requester's personal data, you should treat this as a data protection subject access request. You should tell the requester that you will deal with the request under the data protection legislation, rather than FOIA or the EIR. You should carefully word any refusal notice to avoid implying whether you do or do not hold the information and to avoid inadvertently disclosing any personal data".

36. The Commissioner is mindful that the complainant told her that he simply wanted to know whether or not the data exists.
37. However, the Commissioner is satisfied that confirmation or denial that the requested information is held would disclose personal data relating to the requester, namely whether or not he had made SARs to West Yorkshire Police which it had logged on its system under the reference numbers cited in the request.
38. There is no right of access to an individual's own personal data under FOIA. The information, if it were held, would be exempt from disclosure under section 40(1) and therefore, under section 40(5A), the public authority is not required to confirm or deny that they hold it.
39. The Commissioner has therefore decided that West Yorkshire Police was entitled to refuse to confirm whether or not it held the requested information on the basis of section 40(5A) of FOIA.

Other matters

40. The Commissioner acknowledges that West Yorkshire Police has considered the request as a SAR and provided the complainant with its response.
41. Under section 50 of FOIA, the Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part I of FOIA. It is not within her remit in this decision notice to consider the response provided to the complainant under the DPA.

Right of appeal

42. 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

43. 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.
44. 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

Laura Tomkinson
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF