

## **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)**

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1. The complainant requested the audio or transcripts of telephone calls between specified parties during a specified timeframe.
2. West Yorkshire Police neither confirmed nor denied holding the requested information, citing sections 40(5) (personal information) and 30(3) (investigations and proceedings) of FOIA.
3. The Commissioner's decision is that West Yorkshire Police was entitled to rely on section 30(3) of FOIA to neither confirm nor deny whether it held the requested information.
4. The Commissioner requires no steps to be taken as a result of this decision.

### **Request and response**

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5. Following earlier correspondence, the complainant wrote to West Yorkshire Police on 5 October 2020 and requested information in the following terms:

*"I seek either the audio or transcripts of telephone calls between NPS [National Probation Service] Wakefield and [name redacted] at PPU [public protection unit] Normanton Police Station, Havertop Lane. These would be dated 22.5.20. However I would appreciate if all the calls from two days earlier could also be searched. I seek the same in relation to calls from The Ministry of Justice to [redacted] and vice versa (likely calls were made from the National*

*Compliance and Enforcement Service at Liverpool Crown Court to Normanton Police Station PPU) on the same date. This would be several calls to this officer and also to Custody Suite at Normanton also on the same date. These calls will have been recorded on Airwave".*

6. West Yorkshire Police responded on 26 October 2020. It refused to confirm or deny that it held the requested information, citing section 40(5) (personal information).
7. Following an internal review, West Yorkshire Police wrote to the complainant on 14 December 2020, maintaining its original position.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 15 December 2020 to complain about the way his request for information had been handled.
9. He told the Commissioner:

*"In this matter they are clearly misapplying the law to attempt to avoid production of data showing misconduct".*
10. He also raised issues relating to timeliness which the Commissioner addresses in 'Other matters' below.
11. During the course of the Commissioner's investigation, West Yorkshire Police revisited its handling of the request. It confirmed its application of section 40(5) and additionally cited section (30)(3) (investigations and proceedings conducted by public authorities) of FOIA. It wrote to the complainant accordingly.
12. The complainant remained dissatisfied, arguing that there were insufficient grounds for the new exemption to apply.
13. The Commissioner accepts that a public authority has the right to claim an exemption for the first time before the Commissioner or the Tribunal. The Commissioner does not have discretion as to whether or not to consider a late claim.
14. The analysis below considers whether West Yorkshire Police was entitled to neither confirm nor deny holding the requested information.

### **Reasons for decision**

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*Neither confirm nor deny*

15. 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, in itself, disclose sensitive or potentially damaging information that falls under an exemption. In these circumstances, FOIA allows a public authority to respond by refusing to confirm or deny whether it holds the requested information.
16. The decision to use a neither confirm nor deny [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.
17. A public authority will need to use the neither confirm nor deny 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.
18. It is sufficient to demonstrate that either a hypothetical confirmation, or a denial, would engage the exemption. In other words, it is not necessary to show that both confirming and denying information is held would engage the exemption from complying with section 1(1)(a) of FOIA.
19. West Yorkshire Police has taken the position of neither confirming nor denying whether it holds any of the requested information, under sections 40(5B)(a)(i) (personal information) and 30(3) (investigations and proceedings) of FOIA. The issue for the Commissioner 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 West Yorkshire Police is entitled to NCND whether it holds any information of the type requested by the complainant.
20. The Commissioner first considered West Yorkshire Police's application of section 30(3) to the requested information.

*Section 30 investigations and proceedings*

21. Section 30(3) of FOIA provides an exclusion from the duty to confirm or deny in relation to any information which, if it were held, would fall within any of the classes described in sections 30(1) or 30(2) of FOIA. West Yorkshire Police confirmed that, in this case, section 30(1)(a) was the appropriate limb of section 30.

22. Section 30(1)(a) of FOIA states:

*"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,*

23. The Commissioner considers the phrase "at any time" to mean that information can be exempt under section 30(1)(a) if it relates to a specific ongoing, closed or abandoned investigation. The information requested (if it were held) must be held for a specific or particular investigation and not for investigations in general.

24. Her guidance<sup>1</sup> also states:

*"Any investigation must be, or have been, conducted with a **view** to ascertaining whether a person should be charged with an offence, or if they have been charged, whether they are guilty of it.*

*It is not necessary that the investigation leads to someone being charged with, or being convicted of an offence. However, the purpose of the investigation must be to establish whether there were grounds for charging someone, or if they have been charged, to gather sufficient evidence for a court to determine their guilt".*

25. Consideration of section 30(3) is a two-stage process. First, the exemption must be shown to be engaged. Secondly, as section 30 is a qualified exemption, it is subject to the public interest test: whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in confirming or denying whether the requested information is held.

26. The first step is to address whether, if West Yorkshire Police holds information falling within the scope of the complainant's request, it would fall within the classes specified in section 30(1)(a) of FOIA.

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1205/investigations-and-proceedings-foi-section-30.pdf>

27. In correspondence with both the complainant and the Commissioner, West Yorkshire Police explained its reasons for applying section 30(3) in this case. For example, it said:

*"As a police force WYP has a duty to investigate offences and allegations of offences. In this case the requested information would, if held, become exemptable when created and then become exempt, if held, when it was looked at by WYP in order to determine if the information could be used to ascertain whether to charge or decide if someone is guilty of an offence".*

28. It also advised:

*"WYP have not confirmed possession of, or interest in, any information in relation to the specific investigation.*

*WYP are under no obligation to confirm or substantiate information published by the complainant through his FOI request".*

29. The Commissioner is satisfied that, as a police force, West Yorkshire Police has a duty to investigate criminal offences and allegations of offences.
30. Referring to the wording of the request and to the explanation provided by West Yorkshire Police, the Commissioner is satisfied that any information, if it were held, would be held in relation to an investigation into an alleged criminal offence and that, regardless of the outcome of the investigation, it would fall within the class described in section 30(1)(a).
31. The exemption provided by section 30(3) is, therefore, engaged.

*Public interest test*

32. Section 30(3) is a qualified exemption. This means that the Commissioner must consider the public interest test contained at section 2 of FOIA and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in confirming or denying whether the requested information is held.
33. In accordance with her guidance, when considering the public interest in maintaining exemptions, the Commissioner considers that it is necessary to be clear what they are designed to protect.
34. In broad terms, the section 30 exemptions exist to ensure the effective investigation and prosecution of offences and the protection of confidential sources. They recognise the need to prevent disclosures that would prejudice either a particular investigation or set of proceedings, or

the investigatory and prosecution processes generally, including any prejudice to future investigations and proceedings.

*Public interest arguments in favour of confirming whether or not the requested information is held*

35. The complainant considered that the consequence of the calls between the parties mentioned in the request, was wrongful arrest. Accordingly, he told West Yorkshire Police, albeit in relation to its application of section 40(5):

*"As such there is a public interest aspect to this matter in the exposure of two bodies tasked with upholding the law who have sought to breach it to their own advantage".*

36. He explained his reasons for believing that the public interest test is met in his correspondence with the Commissioner.
37. West Yorkshire Police recognised that confirmation or denial in this case would meet the public interest in transparency and accountability.

*Public interest arguments in maintaining the exclusion from the duty to confirm or deny whether the requested information is held*

38. Arguing in favour of maintaining the exclusion from the duty to confirm or deny in this case, West Yorkshire Police told the complainant:

*"WYP will only disclose information concerning investigations when it considers that no harm will be caused to the investigative process or any individual involved in the investigation. It is a public interest to allowing investigators the necessary space to determine the course of investigations that they have a duty to conduct [sic]. Disclosure of the information even in an investigation that is not ongoing may undermine the future prosecution of individuals and the role of the criminal courts as the sole forum for determining guilt".*

39. It stressed the public interest in the integrity of police investigations and operations. In that respect, it told the complainant:

*"The purpose of section 30 is to preserve the ability of the police carry out effective investigations".*

*Balance of the public interest*

40. The purpose of section 30 is to preserve the ability of the police (and other applicable public authorities) to carry out effective investigations. Key to the balance of the public interest in cases where this exemption is found to be engaged, is whether the act of confirming or denying

whether the requested information is held could have a harmful impact on the ability of the police to carry out effective investigations.

41. This does not mean 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. Clearly, it is not in the public interest to jeopardise the ability of the police to investigate crime effectively.
42. The Commissioner considers that there is a public interest in the transparency and accountability of public authorities. She recognises that confirming or denying whether the requested information is held in this case would meet the public interest in transparency and accountability of West Yorkshire Police.
43. The Commissioner also acknowledges that confirmation or denial is of particular interest to the complainant. She is mindful that he believes that he was the subject of the calls referenced in the request.
44. With respect to private interests, the Commissioner's guidance on the public interest test<sup>2</sup> advises:

*"FOIA section 2(2) refers to the public interest; furthermore, disclosures of information under FOIA are in effect to the world at large and not merely to the individual requester. So the requester's private interests are not in themselves the same as the public interest and what may serve those private interests does not necessarily serve a wider public interest".*
45. In considering the balance of the public interest in this case, the Commissioner recognises that there is a significant public interest in the need to prevent disclosure, by way of confirmation or denial, that would prejudice either a particular investigation or set of proceedings, or the investigatory and prosecution processes generally, including any prejudice to future investigations and proceedings.
46. This goes to the heart of what the section 30 exemption is designed to protect.

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<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1183/the\\_public\\_interest\\_test.pdf](https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf)



47. The Commissioner also considers that significant weight has to be given to the need to protect West Yorkshire Police's ability to adopt a consistent approach when responding to similar requests in the future.
48. The Commissioner recognises that confirmation or denial in relation to an investigation might be harmful to West Yorkshire Police's ability to manage its investigations effectively. She considers that it could undermine West Yorkshire Police's present and future investigations and therefore hinder its ability to conduct its policing functions, which would not be in the public interest.
49. Having considered the issues in this particular case, the Commissioner's view is that the public interest arguments in favour of maintaining the refusal to either confirm or deny whether information is held outweigh those in favour of West Yorkshire Police issuing such a confirmation or denial.
50. Therefore, the Commissioner finds that West Yorkshire Police was entitled to rely on the refusal to confirm or deny provided by section 30(3) of FOIA.
51. In light of her finding, the Commissioner has not gone on to consider whether West Yorkshire Police was also entitled to apply section 40(5) to the requested information.

## **Other matters**

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52. In this case the complainant requested an internal review on 27 October 2020 and West Yorkshire Police responded on 14 December 2020.
53. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of FOIA. Rather, they are matters of good practice which are addressed in the code of practice issued under section 45 of FOIA which suggests that internal reviews should be responded to within 20 working days, and if complex it is best practice for any extension to be no longer than a further 20 working days.



## Right of appeal

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

55. 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.
56. 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**