

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 June 2022

Public Authority: Independent Office for Police Conduct
Address: 90 High Holborn
London
WC1V 6BH

Decision (including any steps ordered)

1. The complainant requested information from the Independent Office for Police Conduct ("IOPC") relating to email correspondence sent or received by a number of named IOPC staff members, and a list concerning a matter about issues raised under the Public Interest Disclosure Act 1998 ("PIDA"). The IOPC stated it can neither confirm nor deny that information is held by virtue of section 40(5B)(a)(i) of FOIA. It subsequently decided to also apply section 40(5A) (personal data of the requester) of FOIA to the request.
2. The Commissioner's decision is that the IOPC is entitled to rely on sections 40(5B)(a)(i) and 40(5A) of FOIA to refuse to confirm or deny that it holds the information requested. Therefore, the Commissioner does not require the IOPC to take any steps as a result of this decision.

Request and response

3. On 29 January 2021 the complainant wrote to the IOPC and requested information in the following terms:

"By way of the Freedom of Information Act, please disclose all emails and held electronically on IOPC systems in relation to the disclosures made to [names redacted] in relation to this matter where [names redacted] is the sender or recipient.

Relevant dates: 15th October 2018 until 23rd September, 2020.

Regarding the IOPC claims the material held in the file destroyed by [name redacted] were copies of documents already preserved elsewhere. Please disclose an itemised list of the material contained in the file handed to [name redacted] and how and where they are preserved.

Please also disclose the section of the data protection act on which the IOPC rely, to justify the destruction of the file presented to [name redacted]."

4. On 25 February 2021 the IOPC responded. It considered the request is seeking information about matters the complainant had been personally involved with, and which concerned allegations of a whistleblowing complaint. The IOPC stated its formal stance to neither confirm nor deny that relevant information is held.
5. On the same day the complainant asked the IOPC to provide him with a formal refusal notice in response to his FOI request.
6. On 26 February 2021 the IOPC provided its refusal notice. It decided that it can neither confirm nor deny that any relevant information is held by virtue of section 40(5B)(a)(i) of FOIA.
7. On 2 March 2021 the complainant asked for an internal review.
8. On 30 March 2021 the IOPC provided its internal review response and maintained its original position to rely on section 40(5B) of FOIA in refusing to comply with his request.

Scope of the case

9. The complainant contacted the Commissioner on 28 April 2021 to complain about the way his request for information had been handled.

10. During the Commissioner's investigation of this case, the IOPC decided to also apply section 40(5A)(personal data of the requester) of FOIA to the request.
11. The following analysis focuses on whether the IOPC is entitled to rely on sections 40(5B)(a)(i) and 40(5A) of FOIA to refuse to neither confirm nor deny whether it holds information falling within scope of the request.

Reasons for decision

Section 40 – personal information

12. Section 40(5B)(a)(i) of 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 UK General Data Protection Regulation EU2016/679 ('UK GDPR') to provide that confirmation or denial.
13. Therefore, for the IOPC to be entitled to rely on section 40(5B)(a)(i) of FOIA to refuse to confirm or deny 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?

14. Section 3(2) of the Data Protection Act 2018 (the DPA 2018) defines personal data as: 'any information relating to an identified or identifiable living individual'.
15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.
17. In this case, the request is regarding communications about a specific matter which involves some individuals.

18. The IOPC stated that confirming or denying whether relevant information is held involves information that qualifies as personal data. The IOPC explained that this would disclose information that would reveal whether or not issues had been raised under PIDA by a number of individuals, all of whom could be indirectly identified.
19. The IOPC informed the Commissioner that the request relates to a matter that the complainant was personally involved in, and which he had raised concerns during a meeting with the Director General in October 2018. The IOPC said that the meeting involved 'whistleblowing' allegations regarding the management of the independent investigation.
20. The Commissioner notes the IOPC's explanation to the complainant in which it said;

"that there are clear sensitivities around the raising of issues under PIDA. Such that it is important to maintain a consistent stance so that any individual that may wish to raise such concerns would not be discouraged from doing so by the fear that they may be identified to the 'world at large' as being involved in such a matter because of disclosure under FOIA. A failure to provide consistent responses may result in the inadvertent disclosure of information because a change of stance between requests on a similar theme could itself be taken as indication that relevant information is held."

The Commissioner also acknowledges that the IOPC had provided information to the complainant regarding channels via which he may wish to consider pursuing a personal agenda.

21. The Commissioner is satisfied that if the IOPC were to either confirm or deny it held the requested information, it would involve the disclosure of personal data of a third party i.e. it would be possible for an individual to be identified, if the information was held. Given the nature of the request, this would be a disclosure of personal data about the individuals. The first criterion set out 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 the IOPC 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 considers 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) UK GDPR states that:

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

26. 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 (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) UK GDPR), be fair and be transparent.

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

27. Article 6(1) of the UK 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.

28. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) UK 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.

29. In considering the application of Article 6(1)(f) UK GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

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 UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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”.

(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.

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

Legitimate interests

31. In considering any legitimate interests in confirming whether or not the requested information is held in response to a FOI request, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
32. 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.
33. In this case, the complainant believes that there is “a pressing social need that the information is released, that is a public expectation that public figures paid for out of the public purse should be transparent and accountable for their actions. In the case of the IOPC there is no outside scrutiny or oversight of the actions or behaviour of its staff.”
34. It is clear from the complainant’s correspondence that he is seeking information which he considers to be in the public interest.
35. The IOPC said it could be argued that the public has a legitimate interest in knowing and being reassured that internal grievances and ‘whistleblowing’ type concerns are taken seriously and acted upon. However, the IOPC said that as a matter of practice it does not share details about individual employment related matters and ‘Raising Concerns’ allegations or investigation with the public. It believes that members of the public would expect and be aware that a large public authority would have processes in place for its staff to raise internal grievances and concerns, without the need to acknowledge that concerns have or have not been raised within a specific circumstance. It added that there is no wider legitimate interest that confirmation or denial that the information is held would satisfy.

36. The IOPC considers that individuals would have a legitimate expectation that the IOPC, as an employer, would not disclose information about whether or not an investigation in relation to them had or had not been carried out, nor whether they had raised concerns under its 'Raising Concerns Policy'. The release of such matters into the public domain, the IOPC said, would lead to unwarranted distress of individuals identified as it would be outside of their expectations and unfair.
37. The IOPC also considers that confirming or denying that 'Raising Concerns' meetings had taken place, may discourage other individuals from coming forward, which the IOPC said, is not in the public interest.
38. The Commissioner accepts that there may be a wider legitimate interest in the transparency of the IOPC's procedures and how it processes complaints and conducts investigations.

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

39. '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; 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 held must therefore be the least intrusive means of achieving the legitimate aim in question.
40. The IOPC is of the view that the request was made with a personally motivated interest. It believes that confirmation or denial would be to acknowledge whether or not concerns were raised about an independent investigation within the parameters of its Raising Concerns Policy. The IOPC said that as the complainant has received disclosure on a personal basis as part of its process, it meets his personal legitimate interest.
41. The IOPC explained the consequences of confirmation or denial and said that it may discourage staff from raising concerns in the future, due to the fear that they may be identified as a 'whistle-blower' through FOI disclosures.
42. The IOPC also said that any personal legitimate aim held by the complainant in confirming or denying that the requested information exists, has been met by less intrusive means by following the IOPC's Raising Concerns Policy. Therefore the IOPC consider that it is not necessary to confirm or deny to 'the world at large' under the FOIA.

43. The Commissioner agrees with the IOPC that public disclosure of this type of information (if held) is a balanced approach, which would take into account the need for transparency, accountability and the rights of those (if any) concerned.
44. The Commissioner is satisfied that the IOPC has robust processes in place, therefore, any investigations, if conducted, have effective oversight and any relevant findings would be released.

Balance between legitimate interest and the data subject's interests or fundamental rights and freedoms

45. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject(s)' interests, 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.
46. The IOPC does not view it to be of reasonable necessity to confirm or deny whether or not an investigation or a meeting took place, either for the public to have sufficient information to have confidence that it is dealing with internal grievances and employment related contractual matters, or to ascertain what processes were followed in this specific case.
47. The IOPC stated that a confirmation or denial would directly and indirectly identify IOPC staff members involved in raising concerns, if information was held. It reiterated that in the 'Raising Concerns Policy' such information is considered sensitively and handled with appropriate care and safeguards. The IOPC concluded that the individuals involved would have had a reasonable expectation of privacy. It said that it would be unfair to place information in the public domain that may identify them as 'whistle-blowers' in these circumstances.
48. The Commissioner is satisfied that the data subjects would have no reasonable expectation that IOPC would confirm or deny whether it held the information requested in this case. He is also satisfied that confirming or denying whether or not information is held may potentially cause damage and distress to the data subjects. The Commission has therefore weighed this against the legitimate interests in disclosure in this case.

49. However, while the Commissioner considers there is a legitimate interest in maintaining public confidence in how the IOPC deals with complaints, he is not persuaded that revealing under the FOIA whether or not concerns were raised about an independent investigation (within the parameters of its Raising Concerns Policy) is necessary in order to maintain that public confidence.
50. Based on the circumstances of this case, the Commissioner has determined that there is insufficient legitimate interest to outweigh the individuals' fundamental rights and freedoms. He has therefore determined that confirming whether or not the requested information is held would not be lawful.

Fairness/Transparency

51. Given the above conclusion the Commissioner has reached on lawfulness, which included consideration of fairness, he does not need to go on to separately consider whether confirming or denying whether the information is held would be fair and transparent.
52. As confirmation or denial would be unlawful, such processing would breach the first data protection principle. The Commissioner has therefore determined that the IOPC was entitled to refuse to confirm whether or not it held the requested information on the basis of section 40(5B)(a)(i) of FOIA.

Section 40(5A) – Personal data of the applicant and Section 40(1)

53. Section 40(5A) of FOIA excludes a public authority from complying with the duty to confirm or deny in relation to information which, if held, would be exempt information by virtue of section 40(1) of FOIA.
54. Section 40(1) 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.”
55. Therefore, where the information requested is the requester's own personal data within the meaning of section 40(1) of FOIA, the effect of section 40(5A) is that a public authority is not required to confirm or deny whether it holds the information.

56. 'Personal data' is defined in sections 3(2) and (3) of the Data Protection Act 2018 and means 'any information relating to an identified or identifiable living individual'. 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.
57. The IOPC considered the exemptions under section 40(1) and 40(5A) are engaged. It said that information within the scope of the request qualifies as the complainant's personal data, and that compliance with the duty to confirm or deny that any of the specified information is held, would necessarily involve the disclosure of the complainant's personal data. The IOPC confirmed its position that compliance with the duty to confirm or deny would unavoidably result in the processing of the personal data of the complainant and others.
58. The Commissioner notes that the First Tier Tribunal in *Kenneth Heywood v Information Commissioner* (EA/2021/0031P) recently upheld a decision notice in which the Commissioner had proactively applied section 40(5A) of the FOIA in respect of a personal data premise-based request.²
59. Given the nature and context of the request, the Commissioner is satisfied, that if any information were held by the IOPC, it would potentially be the personal data of the complainant and, as such, he is satisfied that section 40(1) of FOIA is engaged.
60. The Commissioner considers it important to provide a reminder that responses provided under FOIA are considered to be provided to the world at large and not just to the individual who has made the request.
61. The Commissioner's decision is that the IOPC could not confirm or deny holding information within the scope of this request without potentially disclosing personal information relating to the complainant. The information would be exempt from disclosure under section 40(1) and, therefore, under section 40(5A), the IOPC is not required to confirm or deny whether it holds it.

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[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2822/Decision%20Haywood,%20Kenneth%20Michael%20\(EA-2021-0031\)%20Dismissed.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2822/Decision%20Haywood,%20Kenneth%20Michael%20(EA-2021-0031)%20Dismissed.pdf)

62. As section 40(5A) of FOIA is an absolute exemption, there is no requirement for the Commissioner to consider the balance of the public interest.

Conclusion

63. The Commissioner's conclusion is that the IOPC was entitled to refuse the request under sections 40(5B)(a)(i) and 40(5A) of FOIA.

Right of appeal

64. 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

65. 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.
66. 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

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