

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 19 June 2012

**Public Authority:** The Chief Constable of Lincolnshire Police

**Address:** Police Headquarters  
PO Box 999  
Lincoln  
LN5 7PH

### Decision (including any steps ordered)

---

1. The complainant requested details as to whether Lincolnshire Police (the Police) had received any complaints – other than the two which he had apparently made to the Police himself - about Lincolnshire County Council staff or Councillors between the dates of January 2006 and February 2011. The Police refused to confirm or deny whether it held any information falling with the scope of this request, initially relying on section 40(5) – the personal data exemption - of the Freedom of Information Act (FOIA). During the course of the Commissioner's investigation the Police also sought to rely on the exemptions contained at section 30(3) and 31(3) which relate to the conduct of investigations and matters of law enforcement respectively. The Commissioner has concluded that the Police are not entitled to rely on the exemption contained at 40(5) to refuse to confirm whether or not it holds the information requested but are entitled to do on the basis of section 30(3) of FOIA. The Commissioner has also concluded that the Police breached section 17 of FOIA by failing to issue its refusal notice within 20 working days.

### Request and response

---

2. On 27 February 2011 the complainant wrote to the Chief Constable of Lincolnshire Police (the Police). This letter, in addition to addressing a number of other matters, specifically included the following two information requests:

*'1. Could you please forward me the reference and incident numbers of the two complaints I made regarding Misuse of Public Funds and Alleged Racist remarks Distributed by LCC [Lincolnshire County Council].*

*2. Could you please forward me the details of any other incident where the Police were contacted regarding issues with Lincolnshire County Council Officers their Assistants or Councillors between the dates of January 2006 to present'.*

3. The complainant received a response from the Chief Constable on 3 March 2011 which addressed the other points he raised in his letter of 27 February. However, the response did not make any reference to the complainant's information requests.
4. Following further correspondence from the complainant enquiring about the lack of a response to his information requests, the Police contacted him on 15 August 2011, apologised for the delay in providing a response and confirmed that the requests had now been passed to its 'Data Protection Department' to deal with.
5. The Police issued a substantive response on 13 September 2011. In relation to request 1 the Police explained to the complainant that it considered this request to be seeking access to information (which if held) would constitute his own personal data. The Police explained that the right of access under FOIA does not provide requestor's with a right of access to their own personal data; rather such requests should be dealt with under the Data Protection Act (the DPA) as subject access requests. Under FOIA, the Police therefore refused to confirm or deny whether it held the information requested, relying on section 40(5) of the FOIA to do so. This exemption allows a public authority to refuse to confirm whether or not it holds information if the requested information (if held) would be the requestor's personal data. However, the Police explained that if the complainant provided it with the necessary identification documentation and a £10 fee it would process this request under the DPA as a subject access request. (It emphasised that this suggested course of action should not be taken as a confirmation or a denial that it held the information that had been requested.)
6. In relation to request 2, the Police explained that it was also refusing to confirm or deny whether it held the information falling within the scope of this request, again relying on section 40(5) of the FOIA to do so, albeit a different sub-section of the exemption that it had relied upon in relation to request 1. In respect of request 2 this was because the Police believed that confirming whether or not it held information could identify particular individuals and identification of such individuals could breach the DPA.

7. The complainant contacted the Police on 27 October 2011 and asked it to conduct an internal review of its refusal of both requests.
8. The Police informed him of the outcome of the internal review on 16 December 2011; the review upheld its refusal of the requests as set out in its correspondence of 13 September 2011.

### Scope of the case

---

9. The complainant contacted the Commissioner to complain about the way his requests for information had been handled. The complainant raised three separate issues:
  - Firstly, he was dissatisfied with the Police's delay in responding to his requests.
  - Secondly, he did not accept that the information falling within the scope of request 1 is his personal data. This was because there is no reference in the request to him or any other person and nor would there be in the requested information itself.
  - Thirdly, he did not accept the Police's suggestion that providing the information falling within the scope of request 2 would lead to a particular individual being identified.
10. During the course of his investigation the Commissioner informed the complainant that he agreed with the Police's position that the information he was seeking in request 1 constituted his own personal data. The Commissioner therefore explained to the complainant that he was satisfied that the Police were entitled to rely on section 40(5) – specifically section 40(5)(a) - to refuse to confirm, under FOIA, whether or not it held information of the nature requested. The Commissioner advised the complainant to follow the Police's suggestion to submit a subject access request in relation to request 1. In light of this finding the Commissioner agreed with the complainant that this decision notice would not consider the Police's application of section 40(5) in relation to request 1. Therefore the notice simply focuses on the Police's application of section 40(5) in relation to request 2.
11. During the course of the Commissioner's investigation the Police explained that in addition to this exemption it was also seeking to rely on the exemptions contained at sections 30(3) and 31(3) of the FOIA to refuse to confirm or deny whether it held the information requested. Broadly speaking, the first of these exemptions relates to investigations that public bodies conduct and the second relates to matters of law enforcement.

## Reasons for decision

---

### Section 40 – personal data

12. The right of access provided by FOIA is set out in section 1(1) and is separated into two parts: Section 1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant the right to be provided with the requested information, if it is held of course. Both rights are subject to the application of exemptions.
13. In relation to request 2, the Police have relied on the exemption contained at section 40(5)(b)(i) of FOIA to refuse to comply with the duty contained at section 1(1)(a) of FOIA. This exemption states that a public authority does not have to confirm whether or not it holds information if such a confirmation or denial would, amongst other things, contravene any of the data protection principles.
14. The Police have argued that confirming whether or not it holds information falling within the scope of request 2 has the potential to identify an individual, or individuals. In its view this would constitute a breach of the first data protection principle. This states that:

‘Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

  - (a) at least one of the conditions in Schedule 2 is met, and
  - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.’
15. The Police argued that individuals who contact it do so with the strong expectation that the information they provide will be treated in confidence, and such information includes the fact that they have made a complaint to the Police.
16. In the Commissioner’s opinion truly anonymised data are not personal data and thus can be disclosed without reference to the DPA. The Commissioner’s test of whether the information is truly anonymised is whether a (or any) member of the public, on a balance of probabilities, could identify individuals by cross-referencing the ‘anonymised’ data with information or knowledge already available to the public. Whether this ‘cross-referencing’ is possible is a question of fact based on the circumstances of the specific case.
17. If identification is possible the information is still personal data and the data protection principles do need to be considered when deciding

whether disclosure is appropriate. Or, as in this case, whether confirmation as to whether information is actually held is appropriate. However, where the anonymised data cannot be linked to an individual using the additional available information then the information will, in the Commissioner's opinion, be considered to be truly anonymised and can be considered for disclosure without any reference to the data protection principles.

*Would confirming whether or not information is held in respect of request 2 constitute the disclosure of personal data?*

18. In submissions to the Commissioner the Police explained that if it held information falling within the scope of request 2 and it confirmed that this was the case, then this confirmation, allied to confirming the number of any incidents, could potentially lead to the identification of an individual. Conversely, the Police explained that if the situation was that it did not hold information falling within the scope of the request, and it confirmed this fact, then any member of the public with knowledge of Lincolnshire County Council (the Council) could ascertain if an employee of the Council was being investigated by the Police.
19. Furthermore, the Police also explained to the Commissioner that in reaching the decision to adopt a 'neither confirmation nor deny' (NCND) response to request 2 it had taken into account impact of request 1. This was because assuming the position was that no other incidents had been reported, beyond those identified in request 1, by disclosing this fact into the public domain the Police would be informing the public that only the complainant had made complaints against the Council and this would constitute the disclosure of his personal data.
20. In the Commissioner's opinion the Police's submissions to him fail to demonstrate how, on the balance of the probabilities, providing either a confirmation that information is held or alternatively confirmation that information is not held, could lead to particular individual(s) being identified. For both scenarios the Police's line of argument that an individual(s) would be identified would appear to be purely speculative; they have suggested that disclosure could lead to the identification of an individual but have failed to explain exactly how, using information already in the public domain, any individual's identity could be established. Furthermore, for the potential scenario where information is held, the Police's line of argument relies on the fact it would be confirmation of this fact, allied to the disclosure of the number of incidents, that could potentially lead to the identification of an individual. However, in considering the application of section 40(5)(b)(i) it is only the consequences of confirming whether or not information is held that can be considered, not the consequences of disclosing the information itself (if indeed it is held). This is because the Police are only relying on

this exemption to absolve itself of the duty contained section 1(1)(a) of FOIA not the duty contained at section 1(1)(b).

21. In the Commissioner's opinion the Police's decision to apply section 40(5)(b)(i) to request 2 because of the context provided by request 1, whilst perhaps understandable given the way in which the requests are phrased, is technically incorrect. This is because by correctly relying on section 40(5)(a) to refuse to confirm or deny whether it holds information falling within the scope of request 1, the Police have not actually revealed under FOIA whether or not it holds any information falling within the scope of this request. Furthermore, by adopting this approach the Police have not revealed the name of the complainant. Therefore in considering the effect of complying with the duty contained at section 1(1)(a) of FOIA in relation to request 2, the Police do not need to consider the consequences of disclosure upon the complainant in the manner suggested.
22. For these reasons the Commissioner is satisfied that the Police can comply with the duty contained at section 1(1)(a) without disclosing any personal data. That is to say providing confirmation as to whether or not the Police hold information falling within the scope of request 2 would only result in the disclosure of anonymised data. It follows that in the Commissioner's view the Police are not entitled to rely on 40(5)(b)(i) to refuse to comply with the duty contained at section 1(1)(a).

### **Section 30 - investigations**

23. Section 30 is a class-based exemption. Therefore in order for it to be engaged there is no need for a public authority to demonstrate any level of prejudice should the requested information be disclosed – or in this case there is no need for the Police to demonstrate why confirming whether or not the requested information is held would result in any level of prejudice. Rather the public authority simply has to demonstrate that the requested information is held (or if it were held, would be held) for the purposes specified in the relevant part of the exemption which has been cited.
24. Section 30(3) of the exemption 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) or (2).'*
25. Subsection 30(1) provides an exemption for information which has at any time been held by a public authority for the purposes of:
  - Investigations into whether a person should be charged with an offence or whether a person charged with an offence is guilty of it;



- Investigations which may lead the authority to initiate criminal proceedings which it has the power to conduct;
  - Criminal proceedings which the public authority has the power to conduct.
26. Subsection 30(2) relates to information obtained by a public authority from confidential sources for more general investigatory functions.
27. The Commissioner is satisfied that if the Police held information falling within the scope of request 2 such information would have been held for one of the purposes set out in section 30(1). This is because the request seeks information about whether the Police were contacted about incidents involving Council staff or Councillors. If the Police had received complaints about any such individuals then the Commissioner accepts that it would have held this information for the purposes of one or more of the activities listed in section 30(1). The Commissioner is therefore satisfied that the information – if held – would be exempt from disclosure on the basis of section 30(1). It follows that the Police are therefore entitled to rely on section 30(3) to refuse to confirm or deny whether it holds information falling within the scope of request 2.
28. In reaching this conclusion, the Commissioner recognises that request 2 is quite broad in scope, i.e. it merely asks for details of 'incidents' which the Police were contacted about. As a result of such contacts the Police may not have instigated detailed or lengthy investigations, rather just conducted brief enquiries in order to establish that no formal investigation was necessary. Nevertheless the Commissioner notes that the wording of section 30 is also broad, i.e. it encompasses information held at any time by the Police in order to ascertain whether a person should be charged with an offence. The Commissioner is therefore satisfied that even if the Police received a complaint about further incidents at the Council, and after a brief examination of the facts decided not to undertake any detailed investigation, even any information generated by such initial considerations would fall within the scope of the exemption.

*Public interest test*

29. Section 30 is a qualified exemption. Therefore the Commissioner must consider the public interest test at section 2 of FOIA and whether in all the circumstances of the case the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information.

*Public interest arguments in favour of maintaining the exemption*

30. The Police explained that it would be rare for any police force to confirm whether or not it held information relating a specific investigation, or an investigation into a particular body, as this would identify any police involvement regarding the body in question. In turn this could prejudice law enforcement or potentially damage the criminal justice system. This is because complying with such requests would enable individuals to become aware of what the Police are or were investigating (or indeed not investigating) and this could allow individuals engaged in criminal activity to take action to minimise the risk of being detected.
31. Furthermore the Police argued that confirmation as to whether it held information in relation to request 2 could make people less likely to contact the Police in the fear that such a fact could be disclosed. This could potentially put individuals at risk as undetected crimes could increase which in turn would have a detrimental impact on the level of service that the Police could provide to the community which it serves.

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

32. The Police acknowledged that confirming whether or not it held information falling within the scope of this request would allow for better public awareness of its activities and its resources, which in itself would lead to better public debate and participation.

*Balance of the public interest arguments*

33. The Commissioner believes that there is clear interest in the public being reassured that information which it provides to the Police which may point towards the existence of criminal activity is taken seriously and that the Police investigate any such matters effectively and expeditiously. However, the Commissioner would suggest that the extent to which a confirmation by the Police as to whether or not it holds information falling within the scope of request 2 is likely to only prove of limited value in serving this public interest. Nevertheless the Commissioner accepts that confirmation as to whether or not the Police hold any information falling within scope of request 2 could also inform the public as to whether any members of the public had sufficiently serious concerns as to the conduct of Council officers or Councillors in the period 2006 to February 2011 (the date of the request) to make a complaint to the Police. The Commissioner acknowledges that such information may well be of interest to users of the Council's services and indeed council tax payers more generally.



34. In cases involving the application of section 30(3), the Commissioner believes that the wording of the request is key to determining whether the balance of the public interest favours maintaining the exemption. This is because the more specific a request, the more likely it is that confirmation as to whether or not information is held would result in the prejudicial effects described by the Police above, and thus the more likely that the public interest favours maintaining the exemption.
35. In this case the request does not focus on a specific incident or particular investigation which may or may not be underway. Rather it simply asks whether the Police have received any complaints about Council officials or Councillors over a five year period. On the face of it this is quite a broad request and it could be argued that confirmation as to whether or not information is held may not reveal, to the wider public, the nature of any specific investigation that the Police could be undertaking. For example if the Police did hold information falling with the scope of request 2 and confirmed this fact in response to the request the public would not know, simply from this confirmation, which particular Council officer or Councillor that investigation related to, when the investigation begin, whether it was still active or why such an investigation was being conducted.
36. However, despite the relatively broad nature of the request in the Commissioner's view confirmation as to whether or not information is held would still be likely to represent a significant risk to the Police's ability to prevent or detect crime and apprehend or prosecute offenders. The Commissioner's reasoning for this is as follows:
37. If the Police did not in fact hold information falling with the scope of request 2 and it confirmed this fact, then any Council official or Councillor who had been, or was, involved in criminal activity during the five year period covered by the request would know that they were not the subject of a complaint to the Police and thus in all likelihood their activities were not the subject of a Police investigation. This would, in effect, alert any such individuals to the fact that, to date, their criminal activities had gone undetected by the Police. In contrast, if the Police confirmed that it did hold information falling within the scope of request 2, then any Council official or Councillor who had been, or was, involved in criminal activity during the five year period covered by the request would then be alerted to the possibility that the Police were in fact aware of their activities. Such a situation could obviously undermine any investigatory activity that the Police may be undertaking as such individuals may take action in an attempt to undermine any ongoing Police investigation.
38. The Commissioner recognises that there is of course a third possibility, namely that the Police do not hold any information falling within the

scope of request 2 and furthermore that no Council officials or Councillors have in fact been involved any sort of criminal activity over the time period covered by the request. Therefore confirmation that no information was held would not have the prejudicial effect described in the first hypothetical scenario.

39. However, when considering the balance of the public interest in relation to the application of an NCND exemption, significant weight has to be given to the need to protect a public authority's ability to adopt a consistent approach when responding to similar requests in the future. That is to say, if the Police routinely confirmed that it was not conducting investigations into particular organisations – because this was in fact the case – and when it actually was investigating a particular organisation it adopted an NCND approach, then its decision to do so could be reasonably assumed to be taken as an indication that it was in fact conducting an investigation into the organisation cited in the request. This would of course undermine the rationale for adopting the NCND response in the first place.
40. Therefore, in light of the limited extent to which complying with the duty contained at section 1(1)(a) of FOIA in respect of this request would serve the public interest, the Commissioner is satisfied that the public interest favours maintaining the exemption contained at section 30(3). The Police are therefore not obliged to confirm or deny whether it holds information in respect to request 2.
41. In reaching this conclusion the Commissioner recognises that the Police may well initiate investigations based upon other forms of evidence which it comes across, rather than just on the basis of people contacting it. Therefore the Police could be conducting investigations into Council officials or Councillors, but not necessarily on the basis of any contacts from other individuals that would fall within the scope of request 2. However, such a potential position would not have any affect on the second and third hypothetical scenarios described in the preceding paragraphs, only the first scenario. Therefore the Commissioner does not believe that this undermines his position that the public interest favours maintaining the exemption, especially when the need to maintain a consistent NCND approach is taken into account.
42. In light of his findings in respect of section 30(3), the Commissioner has not gone on to formally consider the Police's reliance on section 31(3). However the Commissioner would note that the exemptions contained at sections 30 and 31 are mutually exclusive by virtue of the wording of section 31(1). Therefore it is not immediately apparent to the Commissioner the basis upon which the Police believe that both section 30(3) and 31(3) can apply to request 2.

### **Section 10 and 17 – time for compliance**

43. Section 10(1) of FOIA states that a public authority must comply with the requirements of section 1(1) no later than the twentieth working day following the date of receipt of the request.
44. If a public authority relies on exemptions to refuse to disclose any requested information, then a refusal notice must be issued in line with the time for compliance set out at section 10(1).
45. In this case the complainant submitted his requests to the Police on 27 February 2011. The complainant was not provided with a response to his requests (in the form of a refusal notice) until 13 September 2011. The Police therefore clearly breached section 17(1) of the FOIA by failing to issue this refusal notice within 20 working days.

## Right of appeal

---

46. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

47. 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.
48. 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** .....

**Alexander Ganotis**  
**Group Manager – Complaints Resolution**  
**Information Commissioner’s Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**