

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 September 2016

**Public Authority:** Police and Crime Commissioner for  
Warwickshire

**Address:** 3 Northgate Road  
Warwick  
CV34 4SP

#### Decision (including any steps ordered)

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1. The complainant requested information from the Police and Crime Commissioner for Warwickshire ('OPCCW') about a police investigation. OPCCW provided some of the information but withheld the remainder citing sections 31(1)(g), law enforcement, 40(2), personal information and 42 (legal professional privilege).
2. The Commissioner has decided that OPCCW should have instead relied on the 'neither confirm nor deny' provision in section 40 of FOIA in response to this request. The reasons for this are set out in this notice. Therefore, the Commissioner's decision is that under FOIA, OPCCW was not obliged to confirm whether or not it held the requested information on the basis of section 40(5)(a). The Commissioner requires no steps to be taken as a result of this decision.

#### Background

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3. The complainant made two requests for information on 6 and 12 January 2016; however he has confirmed that his initial request was not intended to be an FOIA request although OPCCW handled it that way.
4. The complainant confirmed that he wished the Commissioner to consider OPCCW's handling of both requests.
5. Both requests were considered by OPCCW in accordance with the FOIA and the Data Protection Act (the 'DPA'). The DPA aspects will be considered separately by the Commissioner who will write to the

complainant with her conclusion. This is because there is no legal right to a decision notice for DPA complaints.

6. OPCCW has explained that it has a governance role and does not have routine access to police operational files. When an OPCC is involved in the initial handling of a complaint against a Chief Constable (as is the case here), it is permitted to make preliminary enquiries to determine whether or not the complaint should be recorded.
7. The request of 6 January 2016 concerns a complaint made by the complainant about the Chief Constable's handling of an investigation being conducted by Warwickshire Police. OPCCW has explained that most of the information on that complaints file is that submitted by the complainant (and therefore by inference already in his possession).
8. OPCCW confirmed that, in accordance with regulatory terminology under the Police Reform Act, it decided not to investigate the complaint as it was deemed an abuse of process and outside OPCCW's jurisdiction.
9. The request of 12 January 2016 concerns all the information held in relation to a specified police operation and was submitted as a subject access request under the DPA, listing a number of aspects which were to be included. As the request is so wide-ranging and contains a mixture of information that includes personal data and non-personal data, OPCCW has considered the latter under FOIA.
10. This notice will consider the request of 6 January 2016 and *FS50642252* considers the request of 12 January 2016.

## Request and response

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11. On 6 January 2016 the complainant wrote to OPCCW and requested information in the following terms:

*"Details concerning the meeting you held with the IPCC [Independent Police Complaints Commission], as well as date of meeting, where it took place, who attended the meeting (including names of IPCC staff), reason for the meeting and what was discussed at the meeting."*

12. OPCCW responded on 3 February 2016 and provided some of the requested information. However, following consultation with Warwickshire Police and the IPCC, OPCCW refused to disclose the minutes of the meeting because it was a 'closed meeting' in investigation terms, citing section 31 of FOIA. Furthermore, it stated that as legal advisors were present at the meeting the discussions were

subject to legal professional privilege (section 42 of FOIA). OPCCW also refused to disclose the attendees to the meeting, citing section 40(2).

13. The complainant requested an internal review on 18 February 2016. Following its internal review OPCCW wrote to the complainant on 17 March 2016. It maintained that sections 31(1)(g), 40(2) and 42 were engaged.

### **Scope of the case**

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14. The complainant contacted the Commissioner on 23 February 2016 to complain about the way his request for information had been handled.
15. The Commissioner understands that the information in scope of the request relates to a meeting following a number of complaints submitted by the complainant concerning a police investigation.
16. Because the meeting relates to the complainant personally, the Commissioner has considered whether the OPCCW was entitled to rely on the 'neither confirm nor deny' provision in section 40(5)(a) of FOIA in relation to this request. This subsection provides that it is not necessary to tell the requester whether the information requested is held if this information would be exempt under section 40(5)(a).
17. In this case the Commissioner must decide whether confirmation or denial that the requested information is held should be in the public domain. The Commissioner recognises that the complainant has personal reasons for making his request. However, neither the identity of the applicant nor any personal reasons or private interests for wanting the requested information are relevant to the consideration of an FOIA request.

### **Reasons for decision**

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18. Although some information has been disclosed by OPCCW in response to the request, the Commissioner is mindful of her guidance<sup>1</sup> on the

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1166/when\\_to\\_refuse\\_to\\_confirm\\_or\\_deny\\_section\\_1\\_foia.pdf](https://ico.org.uk/media/for-organisations/documents/1166/when_to_refuse_to_confirm_or_deny_section_1_foia.pdf)

application of the 'neither confirm nor deny' provision in section 40 of FOIA which states:

*"Information in the public domain*

*In some cases, it may be already known or obvious that information must be held, and in those circumstances confirming that information is held may not cause any harm (although, technically, it may still be possible to neither confirm nor deny if a relevant exclusion applies). When considering what a confirmation or denial would reveal, a public authority isn't limited to considering what the public may learn from such a response; if it can demonstrate that a confirmation or denial would be revealing to someone with more specialist knowledge, this is enough to engage the exclusion to confirm or deny."*

19. This means that even if it is already obvious that information must be held, *"technically, it may still be possible to neither confirm nor deny if a relevant exclusion applies"*. By extension, it is possible to change to 'neither confirm nor deny' if that would have been the correct response originally.

### **Section 40(5) neither confirm nor deny in relation to personal information**

20. Section 1 of FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities. These are:

(a) the duty to inform the applicant whether or not requested information is held and, if so,

(b) the duty to communicate that information to the applicant.

21. Generally, the provisions in section 40 subsections 1 to 4 FOIA exempt personal data from disclosure. Section 40(5) of FOIA states that the duty to confirm or deny whether information is held does not arise if providing the public with that confirmation or denial would contravene any of the data protection principles set out in the Data Protection Act (the 'DPA').

22. Section 40(5)(a) of FOIA excludes a public authority from complying with the duty imposed by section 1(1)(a) of FOIA - confirming whether or not the requested information is held - in relation to information which, if held by the public authority, would be exempt information by virtue of subsection (1). In other words, if someone requests their own personal data, there is an exemption from the duty to confirm or deny

23. It is important to note that sections 40(1), 40(5)(a) and are class based exemptions. This means there is no need to demonstrate that disclosure (or confirmation) under FOIA would breach an individual's rights under the DPA when engaging these exemptions.

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

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

25. The Data Protection Act 1998 (DPA) defines personal data as:

*"...data which relate to a living individual who can be identified*

*a) from those data, or*

*b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."*

26. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

27. The complainant's request is for information about a meeting connected to complaints he has made. The Commissioner considers that this is an approach for information which can be linked to a named, living individual - the complainant himself. It is therefore his personal data, and falls within the scope of section 40(1).

28. It follows from this that to comply with section 1(1)(a) of FOIA (that is, to either confirm or deny holding the requested information) would put into the public domain information about the existence or otherwise of complaints which have been personally raised by the complainant. Although such complaints will necessarily involve third parties, confirmation or denial as to the existence of any such complaints would, in the first place, constitute a disclosure of personal data that would relate to the complainant.

29. In cases such as this, to confirm or deny whether non-personal information is held is also to confirm or deny whether the requestor's personal data is held. For the reasons set out above, the Commissioner is satisfied that under section 40(5)(a), OPCCW has no duty to confirm whether any such personal data is in fact held.

30. Therefore, in this case, the Commissioner is satisfied that confirming or denying whether it holds any information under the terms of the FOIA means that OPCCW would be confirming, to the world at large, whether it holds information relating to complaints raised by this complainant. She therefore considers that OPCCW should instead have relied on section 40(5)(a) and should have neither confirmed nor denied whether it holds the requested information in its entirety.

### **Other matters**

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31. The Commissioner has some sympathy with the complainant whose position may be confused by the different access regimes set up by Parliament in relation to personal data and public information.
32. Although the complainant has in this case expressed surprise that his request was not treated as a 'business as usual' request and was instead handled by OPCCW under both the FOIA and DPA, the Commissioner considers it relevant to highlight and clarify that an applicant wishing to access their own personal data is free to pursue this right under the DPA. Furthermore, she considers that it is appropriate that any decision as to whether or not a data subject is entitled to be told whether personal data about them is being processed should be made in accordance with the scheme of that Act.

## Right of appeal

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33. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

34. 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.
35. 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** .....

**Carolyn Howes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**