

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 21 May 2019

Public Authority: Chief Constable of Cumbria Constabulary
Address: Carleton Hall
Penrith
Cumbria
CA10 2AU

Decision (including any steps ordered)

1. The complainant has requested from Cumbria Police information in relation to an incident when he was knocked off his pushbike by an individual subsequently investigated for drink driving. Cumbria Police cited Section 40(5)(b)(i) and said it would neither confirm nor deny whether the requested information was held.
2. The Commissioner's decision is that Cumbria Police has correctly applied Section 40(5)(b)(i) of the FOIA.
3. The Commissioner therefore does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. On 25 May 2018 the complainant wrote to Cumbria Constabulary and requested information in the following terms:

"In August last year I was knocked off my pushbike by a driver who was found to be over the drink drive limit. [Redacted] was breathalysed at the roadside at [redacted] and then later breathalysed at Carlisle at [redacted]. I have sought to establish the time delay between the roadside breath test and the official test taken at Carlisle. In recent correspondence (attached) from [name redacted], he refers to a time for the driver in question being processed (not the actual time the official test occurred).

My FOI is that I would like to know the actual time the official intoxilyser reading at Carlisle was available, for the purposes of my FOI please do not confuse this with the time the suspect booking in procedure was commenced”.

5. Cumbria Constabulary responded on 25 June 2018. It stated it could neither confirm nor deny that it held the requested information by virtue of Section 40(5)(b)(i) of the FOIA.
6. On 26 June 2018 the complainant requested an internal review.
7. Following an internal review Cumbria Constabulary wrote to the complainant on 16 August 2018. It stated it was upholding its application of Section 40(5)(b)(i) of the FOIA. It also said it was applying Section 40(5)(a).

Scope of the case

8. The complainant contacted the Commissioner on 7 September 2018 to complain about the way his request for information had been handled.
9. During the Commissioner’s investigation Cumbria Police said it was no longer relying on Section 40(5)(a) of the FOIA.
10. The scope of the Commissioner’s investigation will determine whether Cumbria Police has correctly applied Section 40(5)(b)(i) of the FOIA.
11. As the request was received on and dealt with after the 25 May 2018, the date the new Data Protection Act 2018 (the DPA) and the General Data Protection Regulation (GDPR) came into force, the Commissioner considers the DPA applies.

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 General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.
13. Accordingly, for Cumbria Police to be entitled to rely on section 40(5B) 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 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. Cumbria Police has argued that the requested information if held, would constitute third party personal data because it would reveal the name of the individual referred to in the request. Although the request itself does not specifically name the individual concerned the letter attached to and referenced in it does.
18. In the circumstances of this case, the Commissioner is satisfied that the requested information relates to and identifies a third party as this individual is specifically named in the letter attached to the request. The Commissioner is also satisfied that the requested information is of biographical significance for this individual as it relates to the investigation of an alleged criminal offence, namely drink driving.
19. For the reasons set out above the Commissioner is satisfied that if Cumbria Police confirmed whether or not it held the requested information this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.

Would the confirmation or denial contravene one of the data protection principles?

20. Information relating to criminal convictions and offences is given special status in the GDPR. Article 10 of GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA 2018 personal data relating to criminal convictions and offences includes personal data relating to:-

- (a) The alleged commission of offences by the data subject; or
- (b) Proceedings for an offence committed or alleged to have been committed by the data subject of the disposal of such proceedings including sentencing.

21. Cumbria Police has argued that confirming or denying whether it holds the requested information would result in the disclosure of information relating to the criminal convictions and offences of a third party.
22. Cumbria Police has also pointed out that the requested information stems from the arrest and investigation of an individual suspected of committing a criminal offence. Confirming or denying whether this information was held would result in the confirmation or otherwise that the individual concerned was arrested and investigated for a suspected criminal offence.
23. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes confirming or denying whether the information is held in response to a FOI request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA 2018 can be met.
24. The Commissioner therefore asked Cumbria Police to consider each of these conditions and whether any of them could be relied on to confirm or deny whether it held criminal offence data falling within the scope of this request. Cumbria Police has informed her that none of the conditions can be met. Having regard for the restrictive nature of the Schedule 1, Parts 1 to 3 conditions, the Commissioner considers this to be entirely plausible.
25. Cumbria Police informed the Commissioner that to the best of its knowledge, the individual arrested and investigated has not made information about the incident public. Furthermore, given the circumstances and background of the incident, Cumbria Police said consent from the individual concerned to either confirm or deny would not be forthcoming. For that reason, consent was not sought. Cumbria Police assessed that the individual concerned would have a legitimate expectation that any personal data would only be used in connection with a law enforcement purpose, unless permitted by law and that processing such data for an unrelated purpose would not be fair. It added this would particularly be the case as the information related to the individual's private life and would be likely to cause distress and embarrassment if released into the public domain.
26. As none of the conditions required for processing criminal offence data are satisfied there can be no legal basis for confirming whether or not the requested information is held; providing such a confirmation or

denial would breach data principle (a) and therefore the second criterion of the test set out above is met. It follows that Cumbria Police was entitled to refuse to confirm or deny whether it holds the requested information on the basis of section 40(5)(B) of FOIA.

Right of appeal

27. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

28. 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.
29. 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

Samantha Bracegirdle
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF