

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 March 2019

Public Authority: Chief Constable of Essex Police
Address: Essex Police Headquarters
PO Box 2
Springfield
Chelmsford
Essex
CM2 6DA

Decision (including any steps ordered)

1. The complainant has requested details of correspondence between four named parties and itself from Essex Police ("EP"). EP would neither confirm nor deny ("NCND") whether or not it holds any information, citing the exemptions at sections 30(3) (investigations and proceedings) and 40(5) (Personal information) of the FOIA. The Commissioner's decision is that EP was entitled to rely on section 40(5) of the FOIA. No steps are required.

Background

2. The request refers to an organisation called the Campaign Against Antisemitism. According to its website¹:

"Campaign Against Antisemitism consists of eight directorates which collaborate closely to expose and counter antisemitism through education and zero-tolerance enforcement of the law".

¹ <https://antisemitism.uk/about/>

Request and response

3. On 10 February 2018 the complainant wrote to EP and requested information in the following terms:

"I wish to see all correspondence between Essex Police and the Campaign Against Antisemitism".

4. The request was refused on costs grounds and the complainant asked the Commissioner to investigate whether or not this was correct. The Commissioner issued decision notice FS50764425² in which she found that EP was entitled to rely on section 12(2) (cost of compliance exceeds appropriate limit) to refuse to comply with that request.

5. On 8 August 2018 the complainant made the following refined information request:

*"To hone this down to some specifics as you ask ... here are some names involved:
[Name redacted] and [name redacted] of the Campaign Against Antisemiism [sic]
[Name redacted]
[Name and internet link redacted]"*.

6. On 12 November 2018 EP responded. It would neither confirm nor deny ("NCND") holding any information. It cited sections 40(5) and 30(3) of the FOIA as its basis for doing so.

7. In view of the delays in responding to this revised request the Commissioner has used her discretion and investigated the case without an internal review.

Scope of the case

8. In correspondence regarding his earlier request the complainant explained to the Commissioner that:

"The Campaign Against Antisemitism (CAA) is an organisation created in the UK during the 2014 Israel bombardment of Gaza known as Operation Protective Edge to mitigate and dilute criticism

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2614449/fs50764425.pdf>

of Israel government policy. Since then they have been targeting those who criticise or question Israeli government policy as 'anti-Semites' when all they are doing is questioning a government's policy.

Part of this strategy includes involving the police in attempts to have their targets prosecuted and clearly it is central to the public interest to know what form this CAA-police interaction takes. I therefore made a Freedom of Information request to Essex Police for correspondence between them and the CAA because I know that Essex Police are a main port of call with regard to this via CAA officials ...”.

9. The complainant’s grounds of complaint specifically in respect of this request were as follows:

“I am complaining about the systematic refusal by Essex Police to release information under the Freedom of Information Act about their interactions with an organisation that is little more than an agency for a foreign power targeting British citizens and their right to freedom of speech about the actions of that foreign power.

No matter how I frame the request Essex Police will conjure an excuse for refusal and that is a blatant abuse of the Act and an attempt to deny information that the public have a right to know about”.

10. The Commissioner will consider the citing of exemptions below.

Reasons for decision

Section 40 – personal information

11. As EP’s refusal of the request was after 25 May 2018, the date the new Data Protection Act 2018 (DPA 2018) and General Data Protection Regulation (GDPR) legislation came into force, the Commissioner considers that the DPA 2018 applies.
12. Under section 1(1)(a) of the FOIA, a public authority is obliged to advise an applicant whether or not it holds the requested information. This is known as the “duty to confirm or deny”. However, the duty to confirm or deny does not always apply and authorities may refuse to confirm or deny through reliance on certain exemptions under the FOIA.
13. Section 40(5)(B)(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.

14. Therefore, for EP to be entitled to rely on section 40(5)(B) 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?

15. Section 3(2) of the DPA 2018 defines personal data as:-

"any information relating to an identified or identifiable living individual".

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. 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.
18. The information being requested here clearly relates to four named individuals and copies of any correspondence they may have had with EP.
19. For these reasons the Commissioner is satisfied that if EP confirmed whether or not it held the requested information this would result in the disclosure of third party personal data as it would reveal whether or not any of the parties had been in correspondence with the force. The first criterion set out above is therefore met.
20. The fact that in confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent EP 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.
21. The Commissioner agrees that the most relevant data protection principle is principle (a).

Would confirming whether or not the requested information is held contravene one of the data protection principles?

22. Article 5(1)(a) GDPR states that:-

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

23. 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, EP can only confirm whether or not it holds the requested information - if to do so would be lawful (ie it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), be fair and be transparent.

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

24. Article 6(1) of the 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"* lawful bases for processing listed in the Article applies.

25. The Commissioner considers that the lawful basis most applicable is basis (f) which states:-

"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 child³".

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

(i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

³ 4 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) provides that:- *"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the 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"*.

(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.

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

(i) Legitimate interests

28. In considering any legitimate interests in confirming whether or not the requested information is held in response to a FOIA 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.

29. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

30. The complainant has suggested that EP is interacting with an organisation which is, in his view, targeting British citizens and their right to freedom of speech. He is therefore of the opinion that any correspondence which EP may have had with the parties would be on this subject matter and that it could reveal such behaviour. It is also noted that the complainant provided an internet link to one of the named parties wherein that party claims to have been interviewed by EP as a result of claims being made against him by the CAA.

31. Although she is not certain, two of the named parties do not appear to be members of the CAA and it is therefore not clear to the Commissioner how a response to these particular parts of the request would actually assist the complainant, ie how knowing whether or not they had ever been in correspondence with EP would be useful in assisting with his view that the CAA is targeting British citizens. Nevertheless, the Commissioner accepts that the complainant has demonstrated a legitimate interest in requesting the information, albeit that confirmation or denial as to the existence of that information may not actually serve his purpose.

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

32. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves the consideration of alternative measures which may make confirming or denying whether or not the requested information is held unnecessary. 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.

33. EP advised the Commissioner that:

"If the requestor has any issues or concerns about the way Essex Police or the named individuals have behaved there are many suitable routes through which such concerns can be raised and examined".

34. The Commissioner enquired as to how this might be done and was advised that if the complainant wished to raise concerns or complaints about any of its officers, staff or investigations it could do so via an online complaint form⁴, by writing to its Professional Standards Department at its Headquarters, or by calling either 101 or 01245 491491. It also said that it offered specific online advice about hate crime⁵ and that a person could also report concerns via Hate Incident Reporting Centres (HIRCs) (details being given on EP's hate crime web page), on-line⁶, or by calling Crimestoppers anonymously on 0800 555 111.

35. It is therefore apparent to the Commissioner that if the complainant has any specific concerns about the CAA and that he believes it targets citizens and their right to freedom of speech he is able to report this directly for consideration under one of the options above. Any necessary action can then be taken by the appropriate authority. The Commissioner considers this to be the least intrusive means of achieving the legitimate aim in question rather than EP confirming or denying whether or not it has had personal correspondence with any of the named parties.

⁴ <https://www.essex.police.uk/do-it-online/dissatisfaction-and-complaints/>

⁵ <https://www.essex.police.uk/advice/hate-crime/>

⁶ <http://www.report-it.org.uk/home>

36. As the Commissioner has decided in this case that confirmation or denial is not necessary to meet the legitimate interest, she has not gone on to conduct the balancing test.
37. As confirmation or denial is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
38. Given the above conclusion that confirmation or denial would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether confirmation or denial would be fair or transparent.

The Commissioner's view

39. The Commissioner has therefore decided that EP was entitled to neither confirm nor deny whether it holds any information and the information under regulation 13(1), by way of section 40(5)(B)(a)(i) of the FOIA.

Right of appeal

40. 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

41. 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.
42. 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
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