

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 October 2019

Public Authority: Staffordshire Police
Address: Police Headquarters
PO Box 3167
Stafford
ST16 9JZ

Decision (including any steps ordered)

1. The complainant has requested from Staffordshire Police, information about civil claims submitted against it in respect of a murder case which resulted in wrongful convictions. Staffordshire Police disclosed information in respect of two named individuals, but it refused to disclose information about whether any other claims had been brought, citing the exemptions at section 40(2) (Personal information) and section 38(1) (Health and safety) of the FOIA.
2. The Commissioner's decision is that, under section 40(5B)(a)(i) of the FOIA, Staffordshire Police was not obliged to confirm or deny whether it held information about any other claims.
3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. On 26 November 2018, in reference to civil actions for damages he believed had been filed against Staffordshire Police, the complainant wrote to Staffordshire Police and requested information in the following terms:

"I would like to request the following information:-

- 1. The date that the two civil actions by [claimants' names redacted] were first received by Staffordshire Police.*
- 2. The date that the civil actions by [claimants' names redacted] were settled.*
- 3. The date Mrs Sawyers became (a) Acting Chief Constable (b) Substantive Chief Constable (C) Retired from the post of Chief Constable.*
- 4. The total amount spent by Staffordshire Police on Legal Advice throughout the period of the two Civil Actions, both in the preparation and representation at hearing, please sub divide as following:-*
 - (a). Cost of advice from in-house legal staff including the joint West Midlands Legal Service, [if the cost of shared services are not individual charged please advise of the number of hours charged to the two civil actions],*
 - (b) Cost of using outside legal services and barristers.*
- 5. The cost if [sic] any of legal costs of the actions taken by [claimants' names redacted] that were subsequently met by Staffordshire Police.*
- 6. Details/case numbers of any other civil actions launched by the remaining defendants in this matter, together with an indication as to whether the cases have been finalised or are ongoing."*

5. Staffordshire Police responded on 21 December 2018. It provided the information requested at points 1) – 5) of the request. However, it said that section 40(2) (Personal information) of the FOIA was engaged in respect of point 6) of the request.
6. Following an internal review, Staffordshire Police wrote to the complainant on 17 January 2019. It upheld its application of section 40(2), and said that section 38(1) (Health and safety) of the FOIA was also engaged.

Scope of the case

7. The complainant contacted the Commissioner on 3 April 2019 to complain about the way his request for information had been handled. He was dissatisfied with Staffordshire Police's response to part 6) of the request, saying:

"I disagree with the position of Staffordshire [sic] Police on the basis that I am seeking information regarding Civil Actions that are filed publically with the Courts, therefore they [sic] cannot be any expectation of privacy by the litigants."

8. He also argued that the defendants referred to in part 6) of the request had made public statements about their intention to sue Staffordshire Police:

"...one of the remaining defendants has retained a solicitor with a view to launching proceedings alleging 'misfeasance' against Staffordshire Police, that information was publically announced by the solicitor representing [name redacted]...The two defendants cleared by the Court of Appeal and named in Point 1, each publically announced [sic] their court actions. Now a third defendant as [sic] similarly announced [sic] his intention to sue Staffordshire Police. The actions of the three defendants indicate that they are unconcerns [sic] about being named or their safety, or that of their families."

9. During the Commissioner's investigation, Staffordshire Police confirmed that it considered sections 40(2) and 38(1) of the FOIA to be engaged in respect of part 6) of the request.
10. However, in addition to the FOIA, the Commissioner is responsible for regulating data protection legislation. As such, she takes account of the need to protect personal data when considering whether such information may be disclosed under the FOIA. Accordingly, she will intervene and apply exemptions herself to prevent the disclosure of personal data where she considers it necessary, to avoid a breach of data protection legislation.
11. Having considered the request, and in view of information provided to her by Staffordshire Police, the Commissioner has considered whether, instead of section 40(2), Staffordshire Police should have cited section 40(5B)(a)(i) of the FOIA to neither confirm nor deny whether it held the information specified in part 6) of the request.

Reasons for decision

Section 40 – personal data

12. Section 1(1)(a) of the FOIA provides that where a public authority receives a request for information, it is obliged to tell the applicant whether it holds that information. This is commonly known as the duty to confirm or deny. However, there are exemptions from the duty to confirm or deny.
13. Section 40(5B)(a)(i) of the 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. Section 40(5B)(a)(i) is concerned with the consequences of confirming or denying whether information is held, rather than with the specific content of the information that has been requested.
15. Thus, for Staffordshire Police to be entitled to rely on section 40(5B)(a)(i) of the 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 confirming or denying that the requested information is held constitute the disclosure of a third party's personal data?

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

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

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. 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.

19. 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.
20. The Commissioner's guidance¹ explains that there may be circumstances in which merely confirming whether or not a public authority holds information about an individual can itself reveal something about that individual. For example, where a request is made for information about staff disciplinary records in respect of a particular individual, to confirm or deny that that information is held would be likely to indicate that the person was, or was not, the subject of a disciplinary process. This is, of itself, a disclosure of information about that person.
21. Part 6) of the request asked to know whether the remaining defendants had launched civil claims against Staffordshire Police and, if they had, to know what stage the claims had reached. If Staffordshire Police was to confirm that the requested information was held, it would indicate that one or more of the remaining defendants (whose identities are known to the complainant, and are in the public domain in the context of their wrongful convictions) had launched civil actions against the force, whereas denying that it held information would indicate that none of them had. Either one of these outcomes constitutes a disclosure of information about those individuals.
22. The Commissioner is therefore satisfied that confirmation or denial in this case would involve the disclosure of information which relates to, and identifies, living individuals. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
23. The fact that confirming or denying would reveal the personal data of a third party (or parties) does not automatically prevent Staffordshire Police from confirming or denying whether 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.
24. The Commissioner considers that the most relevant data protection principle is principal (a).

¹ <https://ico.org.uk/media/for-organisations/documents/2614719/neither-confirm-nor-deny-in-relation-to-personal-data-section-40-5-and-regulation-13-5-v20.pdf>

Would confirming or denying that the requested information is held contravene one of the data protection principles?

25. Article 5(1)(a) of the 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 an FOI request, personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed – or, in this case, the public authority may only confirm or deny whether it holds the requested information - if to do so would be lawful, fair and transparent.

27. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

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

28. 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.

29. 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 child”².

² 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

30. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the 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;
 - ii) **Necessity test:** Whether confirming or denying that the requested information is held 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.
31. 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

32. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
33. 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.
34. The complainant has explained the reason for, and purpose behind, his request, as follows:

"The public rightly have high expectations of the police, and when things go wrong there is usually a high level of public interest. In this case there was local and national newscoverage over a number of years, and the case was the subject of a Radio 4, File on Four programme. The media interest reflects the public interest in this case.

(dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

Civil Courts are the places where individuals can seek justice when they feel they have suffered some form of mistreatment. This request relates directly with five men, convicted and held in prison following a now discredited court case. Any proceedings which allege that [sic] Misfeasance by Staffordshire Police would be of interest to the public and media. By withholding the information Staffordshire Police are trying to avoid the details of proceeding [sic] reaching the media and public, such action lacks the openness and transparency that the public expect."

35. Staffordshire Police argued that the request was part of a wider pattern of requests and approaches for information from the complainant, all linked to a particular murder investigation. It said that he had submitted multiple requests, complaints to the ICO and two First Tier Tribunal appeals. It said that the complainant consistently suggested that Staffordshire Police was trying to avoid embarrassment or hide with regard to matters that had already been exhausted via independent assessment. It therefore believed that there was no legitimate interest that the applicant may have in requesting the information.
36. The Commissioner is familiar with the particular criminal case that the complainant has referred to (which relates to a murder committed nearly twenty years ago) and knows that the murder convictions were subsequently overturned, reportedly due to mistakes made in the original police investigation. She notes that a decision was recently taken to re-open the murder investigation, and that it remains live at the time of writing.
37. The Commissioner accepts that there is a legitimate interest in the public having confidence in the accountability and transparency of the police, particularly where there has been serious criticism of the way in which a force has conducted an investigation, which has resulted in financial penalties. The Commissioner is also satisfied that there is a legitimate interest in the public knowing whether, in instances where people have been wrongfully convicted of a crime, appropriate reparations have subsequently been made. Taking the above into account, she therefore finds that a legitimate interest was being pursued in the request for information.
38. However, she does also note that whether or not the individuals concerned wish to publicise their pursuit for compensation is something which they should be entitled to decide for themselves, rather than having this revealed by a request to the police under the FOIA.

Is confirming or denying whether 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, and 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 the FOIA that the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
40. Since Staffordshire Police had argued that the request served no legitimate interests, it offered no arguments as to 'necessity'.
41. The Commissioner notes that there is information in the public domain about damages paid to some of the individuals who were wrongfully convicted, including the amounts paid; the earlier part of this request, which Staffordshire Police responded to, concerns itself with those payments. However, she has been unable to locate information in the public domain as to whether or not the remaining defendants have lodged civil actions against Staffordshire Police.
42. The Commissioner therefore considers that confirmation or denial would be necessary to satisfy the particular legitimate interests identified above.

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

43. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject(s)' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact that confirmation or denial would have. For example, if a 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 any legitimate interests in confirming or denying whether information is held.
44. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that confirmation or denial may cause;

- whether the information which would be revealed by confirming or denying is already in the public domain;
 - whether the information which would be revealed by confirming or denying is already known to some individuals;
 - whether the data subjects have expressed any concerns; and
 - the reasonable expectations of the data subjects.
45. In the Commissioner's view, a key issue is whether the data subjects have a reasonable expectation that information about them will not be disclosed (by way of confirmation or denial). These expectations can be shaped by factors such as their general expectation of privacy, whether the information relates to them in their professional role or in their personal capacity, and the purpose for which they provided their personal data. It is also important to consider whether the act of confirming or denying would be likely to result in unwarranted damage or distress to the data subjects.
46. Staffordshire Police has provided the Commissioner with arguments on these points which contain confidential information. They, and the Commissioner's analysis of them, are contained in a confidential annex to this decision notice which is being supplied only to Staffordshire Police.
47. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms, and thus that confirming or denying whether the information specified at part 6) of the request is held, would not be lawful.
48. The Commissioner has therefore decided that Staffordshire Police was entitled to refuse to confirm or deny whether it held the information specified in part 6) of the request by way of section 40(5B)(a)(i) of FOIA.
49. In view of this decision, it has not been necessary to also consider Staffordshire Police's application of section 38 of the FOIA.

Right of appeal

50. 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

51. 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.
52. 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
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