

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 10 February 2021

**Public Authority:** Chief Constable of West Midlands Police

**Address:** Police Headquarters

Lloyd House

Colmore Circus

Birmingham

West Midlands

B4 6NQ

### **Decision (including any steps ordered)**

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1. The complainant submitted a request for information about an alleged criminal offence. West Midlands Police (WMP) would neither confirm nor deny whether it held the requested information, citing sections 30(3) (investigations and proceedings) and 40(5) (personal information) of the FOIA.
2. The Commissioner's decision is that WMP was entitled to rely on section 30(3) of the FOIA to neither confirm nor deny whether it held the requested information.
3. The Commissioner requires no steps as a result of this decision.

### **Background**

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4. The complainant made an earlier, related request for information to WMP, on 27 May 2020. That case resulted in a complaint which the Commissioner has considered alongside this complaint, under reference IC-43151-T8N7.
5. In that case, a decision notice has been issued at the same time as this decision notice; the Commissioner upheld WMP's reliance on section 30(3) of the FOIA to neither confirm nor deny whether it held the requested information.

## **Request and response**

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6. On 12 June 2020, the complainant wrote to WMP and requested information in the following terms:

*"With reference to [incident reference number redacted] recorded on 19th October 2017, please would you confirm whether the crime involved one or more victims? By definition, a victim may be a company or business as well as an individual."*

7. WMP responded on 22 June 2020. Referring him to its recent responses to a related request for information that he had submitted, it would neither confirm nor deny whether it held the requested information, citing sections 30(3) (investigations and proceedings) and 40(5) (personal information) of the FOIA.
8. The complainant requested an internal review on 22 June 2020, arguing that no harm to any investigation could result from disclosing the requested information. He also stated that he had not requested any personal information, or any information that could enable a person to be identified.
9. WMP provided the internal review on 30 June 2020. It maintained its application of sections 30(3) and 40(5) of the FOIA.

## **Scope of the case**

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10. The complainant contacted the Commissioner on 30 June 2020 to complain about the way his request for information had been handled. He disagreed with the application of sections 30(3) and 40(5) of the FOIA to his request.
11. The analysis below considers whether WMP was entitled to rely on the exemptions cited to neither confirm nor deny holding the requested information.

## Reasons for decision

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### Neither confirm nor deny (NCND)

12. Section 1(1)(a) of the FOIA requires a public authority to inform a requester whether it holds the information specified in a request.
13. However, there may be occasions when complying with the duty to confirm or deny under section 1(1)(a) would itself disclose sensitive or potentially damaging information that falls under an exemption. In those circumstances, the FOIA permits a public authority to respond by neither confirming nor denying whether it holds the requested information.
14. The decision to use a NCND response will not be affected by whether a public authority does, or does not, in fact, hold the requested information. The starting point, and main focus for NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.
15. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held.
16. WMP has taken the position of neither confirming nor denying whether it holds any of the requested information, under sections 40(5B)(a)(i) (personal information) and 30(3) (investigations and proceedings) of the FOIA. The issue for the Commissioner to consider is not one of the disclosure of any requested information that may be held, it is solely the issue of whether or not WMP is entitled to NCND whether it holds any information of the type requested by the complainant.
17. Put simply, in this case the Commissioner must consider whether or not WMP was entitled to NCND whether it holds information relating to an alleged vehicle theft.

### Section 30(3) – investigations and proceedings (NCND)

18. WMP said that section 30(3) of the FOIA applied to the information described in the request in its entirety.
19. Section 30(3) of the FOIA provides an exclusion from the duty to confirm or deny in relation to any information which, if it were held, would fall within any of the classes described in sections 30(1) or 30(2)

of the FOIA. WMP confirmed that, in this case, section 30(1)(a) and (b) were the appropriate limbs of section 30.

20. Section 30(1)(a) of the FOIA states:

*"Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-*

*(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained –*

*(i) whether a person should be charged with an offence, or*

*(ii) whether a person charged with an offence is guilty of it".*

21. The Commissioner considers the phrase "at any time" to mean that information can be exempt under section 30(1)(a) if it relates to a specific ongoing, closed or abandoned investigation. The information requested (if it were held) must be held for a specific or particular investigation and not for investigations in general.

22. Consideration of section 30(3) is a two-stage process. First, the exemption must be shown to be engaged. Secondly, as section 30 is a qualified exemption, it is subject to the public interest test: whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in confirming or denying whether the requested information is held.

23. The first step is to address whether, if WMP holds information falling within the scope of the complainant's request, it would fall within the classes specified in section 30(1)(a) of the FOIA.

24. WMP told the Commissioner:

*"The applicant has provided a number that they believe to be an incident reference number and specified a date that they believe relates to the theft of a vehicle.*

*...information has been requested in relation to an offence of theft, should this information exist and a theft has been reported to the Police, then the theft would have been investigated and the information requested would only have been gathered for the purposes of an investigation into that theft. The force does not routinely gather or hold information on stolen items taken during a vehicle theft, or the details of victims involved, unless it is using it in the course of their investigation to solve the offence. West Midlands Police are a Police force and therefore have the powers of the Police in England and Wales. These are defined largely by statute law, with the*

*main sources of power being the Police and Criminal Evidence Act 1984 and the Police Act 1996”.*

25. The Commissioner is satisfied that, as a police force, WMP has a duty to investigate criminal offences and allegations of offences. Referring to the wording of the request and to the explanation provided by WMP, the Commissioner is satisfied that any information, if it were held, would be held in relation to an investigation into an alleged criminal offence and that it would fall within the class described in section 30(1)(a)(i) (that is, it would be held for the purposes of an investigation into whether a person should be charged with an offence). The exemption provided by section 30(3) is, therefore, engaged.

***Public interest test***

26. Section 30(3) is a qualified exemption. This means that the Commissioner must consider the public interest test contained at section 2 of the FOIA and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in confirming or denying whether the requested information is held.
27. In accordance with her guidance, when considering the public interest in maintaining exemptions, the Commissioner considers that it is necessary to be clear what they are designed to protect.
28. In broad terms, the section 30 exemptions exist to ensure the effective investigation and prosecution of offences and the protection of confidential sources. They recognise the need to prevent disclosures that would prejudice either a particular investigation or set of proceedings, or the investigatory and prosecution processes generally, including any prejudice to future investigations and proceedings.

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

29. In his request for an internal review, the complainant said:

*"Section 30(3) has also been wrongly applied as paragraph 50 of the ICO's guidance states:*

*"Where section 30(3) applies it is subject to the public interest test. Although the exception may be automatically engaged where the information would be exempt under either subsection (1) or (2), it could only be maintained in the public interest if confirmation or*

*denial would interfere with the effective conduct of the investigations or proceedings. If no harm would arise the public authority should not attempt to apply Section 30(3)."<sup>1</sup>*

*As no harm would arise from the release of the information requested, Section 30(3) cannot be applied in this case."*

30. WMP acknowledged the "...public interest in the transparency of policing operations and providing assurance that the police service is appropriately and effectively engaging with the threat posed by those intent on engaging in criminal activity".

**Public interest arguments in favour of neither confirming nor denying whether the requested information is held**

31. At internal review stage, WMP referred the complainant to the reasons it had already given him, in response to his similar request, dealt with under reference IC-43151-T8N7:

*"It would be rare for any police force to confirm whether or not it held information relating to a specific investigation, or current investigations of a specific offence type as this would identify any police involvement and 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 have been informed of and/or are investigating (or not investigating) and this could enable individuals engaged in criminal activity to take action to minimise the risk of being detected.*

*You should be aware that disclosure made under the FOI Act is disclosure into the public domain (for all to see) and that the public interest is not what interests the public, but what will be beneficial to the community as a whole. This is why a Public Interest Test (PIT) is carried out when deciding if Section 30 can be applied appropriately. ... In this case disclosure of the information, should it exist, does not serve any community benefit and the harm to an ongoing investigation, and the possibility of identifying individuals, outweighs any public benefit in knowing if any information is held relating to a specific offence."*

32. WMP advised the Commissioner that it had not placed any information about the incident referred to in the request, in the public domain. It

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1205/investigations-and-proceedings-foi-section-30.pdf>

argued that confirming or denying whether it held information relating to it would therefore involve a disclosure of new information, into the public domain.

33. Talking through the theoretical responses it could give, it said:

*"Should the force provide the information requested or refuse it under substantive exemptions this in itself would confirm that a specific offence had actually taken place and been reported by the victim/s. Should the force advise that no information was held, this would not necessarily mean that an offence had not taken place – it would only confirm that either it had not been reported, or that the incident reference number that the applicant is quoting is incorrect. There is no public interest, or benefit to the community, in a third party individual knowing whether an incident number that they have got from somewhere is actually a valid incident number unless the incident involves themselves – and if it does then there are already formal processes in place to assist with this. And there is no public interest, or benefit to the community, in a third party individual knowing whether an offence that has been committed has been reported to the Police unless they have a criminal interest in knowing whether it has been/will be investigated.*

*To advise that no information is held for one case but then refuse another under substantive exemptions would confirm that a specific offence had actually taken place and been reported by the victim/s.*

*To confirm or deny that specific crimes have been committed and reported to the Police, would set a precedent that FOI is the correct legislation to enquire about any offence that individuals may have any interest in, for whatever reason – criminal or otherwise, and to determine if specific offences have been reported.*

*This would undermine victims of crimes, and witnesses, faith in the Police service that information they provide for the purposes of reporting crime, in order that the Police can effectively investigate the crime, will be made freely available to any other member of the public wishing to know about it. This would reduce the number of offences reported to the Police for investigation and subsequently increase the opportunity for offenders to commit crimes without fear of being investigated for those crimes.*

*In this instance, should the information be held, it would relate to an individual/s that have already had their vehicle and its contents stolen from them which would be a very stressful and upsetting event. There is no policing purpose or benefit to the community revisiting this event nearly 3 years after the event".*

***The Commissioner's conclusion***

34. In reaching a conclusion on the balance of the public interest, the Commissioner has considered the public interest in WMP confirming or denying whether the requested information is held. She has also considered whether such a confirmation or denial would be likely to harm any investigation, which would be counter to the public interest, and what weight to give to these competing public interest factors.
35. The Commissioner recognises the importance of the public having confidence in public authorities whose role is to uphold the law. She considers that public confidence will be increased by allowing scrutiny of their performance, which may involve revealing whether or not particular actions have been necessary, or are potentially ongoing, in specific cases.
36. However, the purpose of section 30 is to preserve the ability of relevant public authorities to carry out effective investigations. Key to the balance of the public interest in a case where this exemption is found to be engaged is whether confirmation or denial could have a harmful impact on the ability of the police to carry out effective investigations. Clearly it would not be in the public interest to jeopardise the ability of WMP to investigate crime effectively.
37. The Commissioner recognises that confirmation or denial in relation to an investigation might be harmful to WMP's ability to manage its investigations effectively. She considers that it could undermine WMP's present and future investigations and therefore hinder its ability to conduct its policing functions, which would not be in the public interest.
38. The Commissioner accepts that a public authority may need to issue a NCND response consistently, over a series of separate requests, regardless of whether it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held. For example, were no information held in this case, then it would be a simple matter for WMP to confirm this. However, if a similar request is made and the information *is* held, and WMP does not wish to reveal this to be the case, by taking a NCND stance on that occasion only, it may reasonably be inferred that the information is, in fact, held.
39. In reaching a conclusion on the balance of the public interest the Commissioner has considered the public interest in WMP confirming or denying whether the requested information is held. She has also considered whether such a confirmation or denial would be likely to harm any investigation, which would be counter to the public interest, and what weight to give to these competing public interest factors.



40. Whilst, on the face of it, the public interest in confirmation or denial in this case is limited, as the request relates to a relatively minor offence which is alleged to have occurred nearly three years ago (at the time of the request), the Commissioner notes that there is always a public interest in transparency and accountability in relation to information held by public authorities.
41. As a counter to this, she recognises the inherent need to protect police investigations. She considers that disclosure of information that risks compromising a current or possible future police investigation (such as by revealing how much, or how little, the police know about a particular incident) would not be in the public interest, and that this is a factor that carries more weight than those favouring transparency in this case.
42. Taking all of the above into account, the Commissioner is satisfied that the NCND exemption at section 30(3) of the FOIA has been applied appropriately in this case and that the public interest in maintaining the exemption outweighs the public interest in WMP confirming or denying whether it holds the requested information.
43. The Commissioner has therefore not gone on to consider the other exemption cited by WMP.

## Right of appeal

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

45. 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.
46. 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**