

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 May 2022

Public Authority: Independent Office for Police Conduct
Address: 90 High Holborn
London
WC1V 6BH

Decision (including any steps ordered)

1. The complainant has requested information from the Independent Office for Police Conduct (IOPC) in relation to whether a specific investigation had taken place and for copies of any report/s connected to it, were they to be held. The IOPC refused to confirm nor deny whether it held the requested information under section 40(5) of FOIA.
2. The Commissioner's decision is that the IOPC has correctly cited sections 40(5A) and 40(5B)(a)(i) of FOIA in response to the request as, if held, the information would be a combination of the complainant's own personal data as well as the personal data of third parties.
3. The Commissioner does not require the IOPC to take any steps as a result of this decision notice.

Request and response

4. On 12 February 2021, the complainant wrote to the IOPC and requested information about whether or not a specific investigation had taken place and any report/s connected to it.
5. The IOPC responded on 22 March 2021. It refused to confirm or deny that the requested information was held, citing the exemption at section 40(5B)(a)(i) of FOIA.

6. Following an internal review the IOPC wrote to the complainant on 18 June 2021. It stated that it maintained its original position; to neither confirm or deny that the requested information is held. The IOPC also determined that the exemption under sections 40(1) and 40(5A) are engaged.

Scope of the case

7. The complainant contacted the Commissioner on 12 July 2021 to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of this case is to determine whether the IOPC is correct to rely on section 40(5A) and section 40(5B)(a)(i) of FOIA in relation to this request. In the interests of clarity, the Commissioner will discuss each exemption separately below.

Reasons for decision

Section 40(5) – neither confirm nor deny

9. Section 1(1)(a) of 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'.
10. There are, however, exemptions from the duty to confirm or deny. It should be noted that when applying an exemption from the duty to confirm or deny, a public authority is not restricted to only considering the consequences of the actual response that it would be required to provide under s1(1)(a). For example, if it does not hold the information, the public authority is not limited to only considering what would be revealed by denying the information was held, it can also consider the consequences if it had to confirm it did hold the information and vice versa.
11. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny 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 UK General Data Protection Regulation EU2016/679 ('UK GDPR') to provide that confirmation or denial.
12. The decision to use a 'neither confirm nor deny' 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 a 'neither

confirm nor deny' response in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not particular information is held. The Commissioner's guidance explains that there may be circumstances in which merely confirming or denying whether or not a public authority holds information about an individual can itself reveal something about that individual.

13. Therefore, for the IOPC to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny 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. The Commissioner is satisfied, from reviewing the request and having considered at length the submissions provided by the IOPC, that if the IOPC were to either confirm or deny it held the information, it would involve the disclosure of third party personal data. The first criterion set out is therefore met.
18. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party (or parties) does not automatically prevent the IOPC from refusing to confirm 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.

19. The IOPC advised that due to the nature of the request, if it were to either confirm or deny holding the information, personal data of their staff members, along with ex-employees, could be compromised. This is because of the nature of information contained within investigations if they do in fact proceed. Investigations typically name individuals and reference their employment history and so forth, with other information which may have biographical significance. Such information, if held, may be used to identify an individual or individuals.
20. The Commissioner agrees that should the IOPC either confirm or deny holding information in relation to the request, it could lead to individuals being identified.
21. The Commissioner considers that the most relevant data protection principle is principal (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, the public authority can only confirm whether or not it holds the requested information – if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) UK GDPR), be fair and be transparent.

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

24. Article 6(1) of the UK 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” conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
25. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) of the UK GDPR which provides as follows:

“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"¹.

26. In considering the application of Article 6(1)(f) of the UK 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:
 - (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(s).
27. 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

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 sake 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. In this case, it is clear that the complainant is seeking the requested information due to a private interest that they have.

¹ 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 2018) provides that: - "In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UKGDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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".

31. The complainant has advised that they consider the provision of the information, if held, is in the public interest and that a refusal to confirm or deny holding it, is to hide serious alleged wrongdoing and failures.
32. The Commissioner is satisfied that there may be a wider legitimate interest, i.e transparency about the IOPC's procedures and how it processes complaints and conducts investigations, both internally and externally.

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

33. '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 FOIA that the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
34. The Commissioner agrees with the IOPC that public disclosure of this type of information (if held) is a balanced approach, which would take in to account the need for transparency, accountability and the rights of those (if any) concerned.
35. The Commissioner is satisfied that the IOPC has robust processes in place, so any investigations, if conducted, have effective oversight and any relevant findings would be released.
36. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

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

37. 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 of the confirmation or denial. 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 legitimate interests in confirming or denying whether information is held.

38. In the Commissioner's view, a key issue is whether the individual(s) concerned have a reasonable expectation that their information will not be disclosed or that the public authority will not confirm whether or not it holds their personal data. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
39. It is also important to consider whether disclosure (or confirmation or denial) would be likely to result in unwarranted damage or distress to that individual.
40. Disclosing whether the requested information was held would reveal whether or not an investigation had been carried out and therefore would potentially disclose personal information of any individuals involved. Even if an investigation has been carried out, it does not automatically mean that there has been any wrongdoing.
41. In the Commissioner's opinion, at this stage, the confirmation or denial of information held in relation to the request, could result in the rights and freedoms of anyone involved/identified within an investigation being undermined. The Commissioner considers that members of staff would not have any expectation that their personal data would be disclosed to the world at large.
42. The Commissioner accepts that of the confirmation or denial of whether information concerning such matters is held could cause a significant invasion of privacy for any individuals involved. There is no presumption that openness and transparency of the activities of public authorities should take priority over personal privacy.
43. However, each request for information has to be considered on its own merits. The Commissioner considers that there is some legitimate interest in disclosing whether an investigation took place/the findings of an investigation.
44. The Commissioner agrees that confirming or denying whether information is held in this case would go some way towards informing the public about the IOPC's accountability in terms of the way it follows procedures and handles investigations.
45. For the IOPC to confirm or deny whether information is held, it would disclose whether or not an investigation had taken place/a report had been created, which would potentially disclose personal information about any individual(s) who may have been involved. A motivated

person could identify third parties related to the circumstances which would reveal personal data.

46. The ICO's Code of Practice on Anonymisation² notes that The High Court in R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)³ stated that the risk of identification must be greater than remote and 'reasonably likely' for information to be classed as personal data under the DPA.
47. The Commissioner accepts that different members of the public may have different degrees of access to the 'other information' needed for identification to take place. A test used by both the Commissioner and the First-tier Tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify an individual, or individuals, but begins without any prior knowledge.
48. While the Commissioner accepts that the complainant may have specific reasons for wanting to access the requested information, the Commissioner has to take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public. He must therefore consider the wider public interest issues and fairness to any third party individual/s when deciding whether or not the information is suitable for disclosure.
49. If the IOPC confirmed or denied holding the requested information, it may cause unwarranted harm or distress to the interests of any individual(s) potentially involved. The Commissioner also notes that the individual(s) would have no reasonable expectation of their personal information being placed in the public domain.
50. Whilst the Commissioner notes the complainant's additional arguments, he can only address if the IOPC is correct in saying it can neither confirm nor deny that it holds the requested information.
51. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects'

² [Anonymisation: managing data protection risk code of practice \(ico.org.uk\)](https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/11-anonymisation)

³ https://informationrights.decisions.tribunals.gov.uk/DBFiles/Appeal/i344/CO-13544-2009_HC_Judgment_20110420.pdf

fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful.

52. The Commissioner has therefore decided that the IOPC was entitled to refuse to confirm whether or not it held the requested information on the basis of section 40(5B)(a)(i) of the FOIA.

Section 40(5A) – Personal data of the applicant and Section 40(1)

53. Section 40(5A) of FOIA excludes a public authority from complying with the duty to confirm or deny in relation to information which, if held, would be exempt information by virtue of section 40(1) of FOIA.

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

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

55. Therefore, where the information requested is the requester’s own personal data within the meaning of section 40(1) of FOIA, the effect of section 40(5A) is that a public authority is not required to confirm or deny whether it holds the information.
56. ‘Personal data’ is defined in sections 3(2) and (3) of the Data Protection Act 2018 and means ‘any information relating to an identified or identifiable living individual’. 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.
57. The IOPC has explained that should it either confirm or deny holding the requested information, due to the nature of the wording of the request, there is a possibility that personal information of the complainant would be released to the world at large. Simply confirming whether or not the IOPC holds the personal data could itself reveal something about the complainant. Therefore any information the IOPC held would be the complainant’s own personal data – although it may also be the personal data of others too (dealt with under section 40(5B)(a)(i) earlier in this decision notice).

58. The Commissioner notes that the First Tier Tribunal in *Kenneth Heywood v Information Commissioner (EA/2021/0031P)* recently upheld a decision notice in which the Commissioner had proactively applied section 40(5A) of the FOIA in respect of a personal data premise-based request.⁴
59. The Commissioner is satisfied, given the nature and context of the request in question, that if any information were held by the IOPC, it would potentially be the personal data of the complainant and, as such, he is satisfied that section 40(1) is engaged.
60. The Commissioner considers it important to provide a reminder that responses provided under FOIA are considered to be provided to the world at large and not just to the individual who has made the request.
61. The Commissioner's decision, therefore, is that the IOPC could not confirm or deny holding information within the scope of this request without potentially disclosing personal information relating to the complainant. The information would be exempt from disclosure under section 40(1) and, therefore, under section 40(5A), the IOPC is not required to confirm or deny whether it holds it.
62. Section 40(5A) is an absolute exemption and there is no requirement for the Commissioner to consider the balance of the public interest.

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[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2822/Decision%20Haywood,%20Kenneth%20Michael%20\(EA-2021-0031\)%20Dismissed.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2822/Decision%20Haywood,%20Kenneth%20Michael%20(EA-2021-0031)%20Dismissed.pdf)

Right of appeal

63. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

64. 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.
65. 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

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