

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 4 February 2022

**Public Authority:** Chief Constable of Staffordshire Police  
**Address:** Police Headquarters  
Weston Road  
Stafford  
ST18 0YY

### Decision (including any steps ordered)

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1. The complainant has requested information from Staffordshire Police in relation to an alleged theft at a petrol station in a specific area.
2. The Commissioner's decision is that Staffordshire Police is entitled to rely on the exemption at section 40(5) of FOIA to neither confirm nor deny that it holds the requested information.
3. The Commissioner does not require Staffordshire Police to take any further action in this matter.

### Request and response

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4. On 23 June 2021, the complainant wrote to Staffordshire Police and requested information in the following terms:

"On the 5th March 2020 an allegation of theft was reported to Staffordshire police regarding a crime at a petrol station in Lichfield. I believe SP created an incident number recorded as [crime reference number].

Under FOI please provide the following information no personal information that may have been recorded is required

- 1) the time and date the incident was recorded by SP

- 2)the crime number allocated to the incident together with the date the crime number was raised and the Home Office category it was recorded under
  - 3)date and brief details of how the matter was finalised i.e.Detected, undetected, no further action etc
  - 4)if the incident was not recorded as a crime on the date it was reported to SP how was the matter initially classified and dealt with.”
5. Staffordshire Police responded on 29 June 2021, advising that it could neither confirm nor deny holding the information, under section 40(5) of FOIA. It explained that to confirm or deny holding the information would reveal personal information which would breach the Data Protection Act.
  6. Following an internal review Staffordshire Police wrote to the complainant on 1 July 2021. It stated that it upheld its original position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 6 July 2021 to complain about the way their request for information had been handled.
8. The Commissioner considers that the matter to be decided is whether Staffordshire Police is entitled to rely on section 40(5) to refuse to either confirm or deny it holds the requested information.

### **Reasons for decision**

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#### **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 General Data Protection Regulation EU2016/679 ('UK GDPR') to provide that confirmation or denial
12. Therefore, for Staffordshire Police 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 providing a confirmation or denial breach data protection principles?**

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

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

14. 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.
15. Therefore, for Staffordshire 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, not only must providing a confirmation or denial involve the disclosure of personal data, but providing this confirmation or denial must be either not be lawful, not be fair or not be transparent.
16. The Commissioner notes the complainant has advised that Staffordshire Police have provided an incident number for the alleged theft. However, there is no evidence to suggest that the incident number is linked to the alleged crime as no information has been published in the public domain.
17. Additionally, the Commissioner notes that the complainant does not consider the requested information to be personal data. While the Commissioner acknowledges this point, for Staffordshire Police to

confirm or deny holding the information, it would reveal personal data about those involved should an incident have actually occurred and, therefore, the requested information is considered to be personal data.

18. The complainant has provided what they say is a crime reference number which would link to the alleged crime. The Commissioner advises that even if the crime reference number is for the alleged crime, if it was confirmed or denied that information was held, it would be releasing personal data. This is because the reference would link to those involved in a crime, the location of a crime, and the date and time a crime was committed, which in turn could lead to a determined individual piecing together personal information about those involved.
19. 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.
20. The ICO's Code of Practice on Anonymisation<sup>1</sup> notes that The High Court in R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)<sup>2</sup> 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.
21. In summary, the motivated intruder test is that if the risk of identification is 'reasonably likely', the information should be regarded as personal data.

#### Criminal Offence data

22. The Commissioner also considers it appropriate to consider whether Staffordshire Police would be disclosing information relating to the criminal convictions and offences of a third party by confirming or denying that it holds further information within the scope of the request.

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<sup>1</sup> [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/collecting-and-storing-personal-data/anonymisation)

<sup>2</sup> [https://informationrights.decisions.tribunals.gov.uk/DBFiles/Appeal/i344/CO-13544-2009\\_HC\\_Judgment\\_20110420.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Appeal/i344/CO-13544-2009_HC_Judgment_20110420.pdf)

23. Information relating to criminal convictions and offences is given special status in the UK GDPR. Article 10 of UK 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.
24. 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.
25. When considering the disclosure to the world at large required by FOIA, the Commissioner considers it likely that only two of the Schedule 1, Part 3, conditions might ever justify such processing of personal information of this type. These are:
  - a. that the data subject had given their explicit consent for the public authority to provide a confirmation (or a denial) that information is held; or (para 29)
  - b. that the data subject has manifestly made the information public themselves (para 32)
26. There is no evidence to suggest that those involved in an alleged crime, have given consent to Staffordshire Police to provide a confirmation or denial that it holds relevant criminal offence data. Staffordshire Police are not required to seek consent from those involved, and it seems likely that consent would not be given in any case.
27. The Commissioner therefore considers that providing a confirmation or a denial that further information within the scope of the request is held would involve the processing of criminal offence data about those involved in the alleged incident. As none of the conditions required for processing criminal offence data are satisfied, there can be no legal basis for confirming whether or not further 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.
28. The Commissioner's decision is that Staffordshire Police was therefore entitled to refuse to confirm or deny whether it held further information, on the basis of section 40(5)(B) of FOIA.

## Right of appeal

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29. 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](mailto:grc@justice.gov.uk)

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

30. 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.
31. 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 .....**

**Michael Lea**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**