

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

### **Decision notice**

**Date:** 25 May 2022

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

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

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1. The complainant has requested the individual email addresses for 20 named police officers from the Chief Constable of Essex Police (Essex Police).
2. Essex Police has refused to confirm or deny that it holds the requested information, citing sections 40 (third party personal data), 31 (law enforcement) and 38 (health and safety) of FOIA.
3. The Commissioner's decision is that Essex Police has demonstrated that section 40(5B) is engaged in relation to some of the names, but not the remainder. It has not demonstrated that either section 31(3) or section 38(2) are engaged in respect of the remaining names.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Confirm, to the complainant, whether it holds the email addresses of the 15 officers identified in paragraph 26 of this decision notice.
  - If it does hold any of these email addresses, it must either disclose them or issue a refusal notice that complies with section 17 of FOIA.
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the

Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

## **Request and response**

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6. On 14 July 2021, the complainant wrote to Essex Police and requested the individual email addresses of 20 named police officers that they believed worked for Essex Police.
7. In an exchange of correspondence between Essex Police and the complainant immediately after the request was submitted, the complainant stated that they wished to provide the particular named officers with some information which may assist them in their day to day Federation and Police duties.
8. Essex Police provided a response to the request on 23 July 2021. Essex Police did not explicitly confirm that it held the requested information, but it stated that it was relying on section 40(2) – which is an exemption from the duty to communicate information which a public authority holds. Essex Police also provided the complainant with some alternative options by which they could pass on the information that they wished to share with the named officers.
9. Following an internal review Essex Police wrote to the complainant on 5 November 2021, it now stated that it wished to neither confirm nor deny that it held the requested information – section 40(5B).

## **Scope of the case**

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10. The complainant contacted the Commissioner on 24 July 2021 to complain about the way the request for information had been handled.
11. During the course of the Commissioner's investigation the complainant provided further background to the Commissioner as to why they sought to contact the particular 20 officers, rather than all officers across the force as a whole. They provided the Commissioner with a document which was published online containing a list of Police Federation work-based representatives, dated July 2020 which included the 20 officers which they had listed in their request to Essex Police.
12. The Commissioner invited Essex Police to reconsider its response to the request in light of the document provided by the complainant. Essex Police provided an updated response to the request in which it sought to

rely on section 31 (law enforcement), section 38 (health and safety), as well as maintaining its reliance on section 40(5B), to neither confirm nor deny that it holds the requested information.

13. In its revised response Essex Police erroneously stated that it was relying on sections 31(5) and 38(5), but has since written to the Commissioner to clarify that it intended to cite sections 31(3) and 38(2) which are both exemptions from the duty to confirm or deny holding information within the scope of the request.
14. The Commissioner considers the scope of his investigation is to determine whether or not Essex Police is entitled to rely upon the sections which it has cited to refuse to confirm or deny that it holds information falling within the scope of the request.

## **Reasons for decision**

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### **Section 40(5) – personal data**

15. 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 or not it holds that information. This is commonly known as the 'duty to confirm or deny'.
16. However, the duty to confirm or deny does not always apply. In certain circumstances, confirming or denying that the information is held could in itself disclose information which would otherwise fall under an exemption.
17. Section 40(5B)(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 (the DP Principles) set out in Article 5 of the UK General Data Protection Regulation (UK GDPR) to provide that confirmation or denial.
18. 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.

19. Therefore, for Essex 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 DP principles.

**Would the confirmation or denial that the requested information is held constitute third party personal data?**

20. Section 3(2) of the Data Protection Act 2018 (DPA) defines personal data as:

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

21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
22. 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.
23. 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.
24. Essex Police stated that if it were to confirm or deny that it holds the requested information, it would in turn be disclosing whether or not the named individuals are employed by Essex Police.
25. As previously stated, during the course of the Commissioner's investigation the complainant provided further information as to why they sought to contact the particular named police officers rather than the force as a whole, by way of a document which they had found published online which listed the Federation work-based representatives, as of July 2020 for Essex, which included all 20 names as elected representatives.
26. The Commissioner notes that the online document which the complainant based their request on is now available in an updated

version reflecting the Federation work-based representatives as of September 2021. The updated version only carries 15 out of the 20 names listed in the request for information.

27. Essex Police argued that the document had been made available by the Federation, which is a separate organisation to Essex Police, and therefore cannot be classed as accurate.
28. Representatives are elected to Police Federation branches in accordance with the Police Federation Rules<sup>1</sup>, which are made under the Police Federation Regulations 2017.
29. As individuals who are elected to be area Federation representatives are employed by the corresponding police force, the Commissioner is satisfied that the 15 names which appear on both the July 2020 list and the September 2021 list would only have appeared on both lists if they were in fact employed by Essex Police at the time when the complainant submitted their request for information in July 2021. Therefore, confirmation or denial by Essex Police that it holds information relating to those 15 individuals would not reveal anything new about these individuals, as information about their employment status is already available within the public domain.
30. The Commissioner is therefore satisfied that Essex Police would not be disclosing personal data if it confirmed or denied holding the email addresses of these 15 individuals. It thus follows that section 40(5B) of FOIA is not engaged in respect of those individuals.
31. However, the fact that the remaining five names from the information request do not appear on the updated list of Federation work-based representatives cannot be taken as confirmation or denial of the employment status of those individuals with Essex Police at the time of the request. This is because an individual can cease to be a representative of the branch Federation for a variety of reasons, as detailed in rule 9.3 of the Police Federation Rules and not just because they are no longer employed by the particular police force. Therefore, if Essex Police were to confirm or deny that it held the requested information relating to those five individuals, it would in turn be disclosing third party personal data as there is no conclusive information in the public domain which confirms whether the individuals were or were not employed by Essex Police at the time of the request.

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<sup>1</sup> <https://www.polfed.org/media/17653/pfew-rules-2021.pdf>

32. The Commissioner must now consider if Essex Police would breach one of the DP principles if it were to provide a confirmation or denial response regarding the remaining five names which do not appear on the updated list of Federation work-based representatives.

**Would confirmation or denial contravene one of the data protection principles?**

33. The Commissioner considers that the most relevant data protection principle is principle (a).

34. 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”.

35. In the case of a request for information under FOIA, processing of personal data occurs 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, fair and transparent.

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

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

37. 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” lawful bases for processing listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information – or as in this case confirming or denying whether the requested information is held - in response to the request would be considered lawful.

38. The Commissioner considers that the lawful bases most applicable on the facts of this case would be that set out in Article 6(1)(f) of the UK GDPR, 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”.

39. In considering the application of Article 6(1)(f) of the UK 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 legitimate interest(s) override the interests or fundamental rights and freedoms of the data subject.

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

### **Legitimate interests**

41. In considering any legitimate interest(s) in providing a confirmation or a denial that the information is held, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

42. Essex Police stated in its final updated response to the request, dated 18 March 2022, that it is not clear why the complainant is seeking the requested information, and that "there does not appear to be any legitimate interest to confirm or deny the information is held and therefore to do so would be unlawful".

43. The complainant has explained to Essex Police that their reason for seeking to contact the 20 named officers is that they "wish to provide these officers with some information that may assist them in their day to day Federation and Police duties". The Commissioner has not seen the information which the complainant wishes to impart to these 20 police officers and therefore cannot vouch for its importance. However, given the complainant's previous role (which the Commissioner will not disclose to avoid identifying the complainant), the Commissioner accepts that there may be a legitimate reason for the complainant to contact the officers concerned. The Commissioner is thus satisfied that disclosure would serve a legitimate interest (albeit a narrow, personal one) and therefore the first part of the three-part test has been met.

## **Necessity test**

44. '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; 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 as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
45. Essex Police provided the complainant with alternative options by which they could communicate with the officers they sought to contact. Essex Police outlined that the complainant could provide authorisation for their email address to be disclosed to any of the named officers who are in employment with Essex Police, along with a brief overview of the information which the complainant intended to provide to them, and then the individual officers could choose to make direct contact with the complainant if they wished to. Alternatively, Essex Police stated that the complainant could provide the information that they wanted to communicate to the officers and Essex Police would pass it on to them.
46. The Commissioner is satisfied that providing confirmation or denial that the requested information is held is not the least intrusive means of meeting the identified legitimate interest in this case, and therefore the necessity test has not been met.

## **The Commissioner's decision**

47. Accordingly, in respect of the five officers whose names do not appear on both lists, confirming or denying that Essex Police held their email addresses is not necessary to satisfy the legitimate interest. It therefore follows that there is no lawful basis for processing their personal data in this fashion and any such processing would be unlawful. Essex Police is therefore entitled to rely on section 40(5B) of FOIA to neither confirm nor deny that this information is held.
48. In respect of the remaining 15 names (that appear on both lists), having found that section 40(5B) is not engaged, the Commissioner must next consider whether Essex Police is entitled to rely on either of the other two exemptions it has cited.



### **Section 31(3) – Law enforcement**

49. Section 31(3) of FOIA provides that -

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).”

50. The Commissioner understands from the wording of Essex Police’s response that it is relying upon prejudice to the matters concerned in section 31(1)(a); the prevention and detection of crime.

51. In order for prejudice-based exemptions, such as section 31(3) to be engaged prejudice must be at least likely to occur to the interest that the exemption is designed to protect. The Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if it was to confirm or deny that it holds the requested information, has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between confirming or denying that the information is held and prejudice to the interests which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and,
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., whether confirmation or denial “would be likely” to result in prejudice or confirmation or denial “would” result in prejudice. In relation to the lower threshold of would be likely, the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner’s view this places a stronger evidential burden on the public authority; the public authority must show that the anticipated prejudice would be more likely than not to occur as a result of confirmation or denial that the requested information is held.

### **Essex Police’s arguments**

52. In its submission to the Commissioner, Essex Police argued that confirmation or denial that the requested information was held “could allow individuals to target said individual emails and potentially result in

a compromised IT system which could affect the forces [sic] ability to prevent and detect crime, which in turn would led [sic] to an increase in crime being committed further placing the public at risk of harm”.

### **The Commissioner’s analysis**

53. In considering whether the exemption is engaged, the Commissioner must address whether the prejudice predicted by Essex Police is relevant to “the prevention or detection of crime”. The Commissioner’s published guidance<sup>2</sup> states that the exemption could be used to withhold (or in this case neither confirm nor deny that it holds) information that would make anyone, including the public authority itself, more vulnerable to crime.
54. Essex Police only provided a theoretical route by which providing a confirmation or denial response to the information request would “potentially” result in a compromised IT system which therefore “could” prejudice its ability to prevent and detect crime.
55. Furthermore, Essex Police have not backed up this theoretical route with any evidence of a causal relationship between confirming or denying that it holds the requested information, and prejudice to its ability to prevent and detect crime.
56. In complying with section 1(1)(a), Essex Police would only need to confirm or deny whether it holds information within the scope of the request.
57. However, the Commissioner does not consider that confirming or denying that this information is held allows any greater access to the force’s IT system for anyone with malicious intent than is already available within the public domain – because these fifteen individuals’ names are already in the public domain via the Police Federation lists. Therefore any threat that might result from deducing the email addresses, already exists. It is not exacerbated by confirmation or denial that this information is held.

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

## **The Commissioner's decision**

58. The Commissioner finds that Essex Police has not demonstrated that confirming or denying whether it holds information within the scope of the request carries anything more than a remote or hypothetical risk of prejudice to the prevention or detection of crime. His finding is, therefore, that Essex Police was not correct to rely on section 31(3) to neither confirm nor deny whether it held information within the scope of the request.

### **Section 38 – Health and safety**

59. Section 38(1) of FOIA states –

“Information is exempt information if its disclosure under this Act would, or would be likely to –

- a) endanger the physical or mental health of any individual, or
- b) endanger the safety of any individual.”

60. Section 38(2) of FOIA provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, have either of the effects mentioned in subsection (1).”

61. Therefore, for section 38(2) to be engaged, Essex Police must demonstrate that the act of confirming or denying whether the requested information is held must itself endanger, or be likely to endanger, the physical or mental health of any individual, or their safety. The effect cannot be trivial or insignificant. Even if the likelihood falls short of being more probable than not, it needs to be such that there may very well be endangerment.

62. FOIA does not explain the level to which physical or mental health or safety must be endangered for the exemption to be engaged. However, the Commissioner's published guidance on section 38<sup>3</sup> implies that disclosure of information (or confirmation or denial in this case) might lead to an adverse physical impact which often involves medical

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<sup>3</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-38-health-and-safety/>

matters, psychological disorder or make mental illness worse or risk of accident.

### **Essex Police's arguments**

63. In its submission to the Commissioner, Essex Police argue that confirmation or denial that the requested information is held could increase the risk of harm to an individual. Essex Police's reliance on section 38(2) can be broken down into two areas of concern.

64. Firstly, Essex Police raised the issue of identification of the individuals named in the information request, and subsequently confirming their employment status with Essex Police. It stated –

"By confirming if an individual named is employed by the provision of an email address by Essex Police to the wider world through a FOI disclosure could provide information to those with malicious intent who could use social media to further identify that person. Any disclosure could increase that risk and provide additional information in order for individuals to perform open search enquiries. Equally misidentification could also occur."

and,

"...any disclosure of information to the wider world through FOI could prevent those named by [sic] taking on future covert roles as disclosure and identification has been made to the wider world. Future identification through the cross referral of information disclosed by the force could compromise future safety of those officers."

65. Secondly, Essex Police raise the issue of urgent contact from members of the public being missed if the wider world has access to personal email addresses rather than generic email addresses which are constantly monitored. It stated –

"Individuals may also use an individual email to provide contact of a urgent nature. There is no guarantee that this information would be identified or if the email is regularly checked. Dedicated generic mailboxes and contacts are made available to the generic public (wider world) to allow for regular and urgent attention to be made. Specific emails are not a suitable method to collect the above data requested.

Other methods may be used to contact individuals, such as through our website, this facility allows a private transaction with the enquirer and allows appropriate checks against the enquirer to ensure that disclosure would not compromise either the safety or privacy of an individual."

## **The Commissioner's analysis**

66. Essex Police has not specified which limb of section 38(1) it is relying on, but the Commissioner notes that its arguments are vaguely concerned with matters covered by section 38(1)(b) – the safety of any individual. It has not directly addressed the likelihood of endangerment occurring, but its comments suggest that it considers that endangerment “would be likely to” occur as a result of confirming or denying that information is held. The Commissioner interprets “would be likely to” as there being a very significant and weighty chance of endangerment occurring.
67. When considering the degree of endangerment alleged and whether it is significant enough to engage the exemption, the Commissioner must be satisfied that the nature of the endangerment is “real, actual or of substance” and not trivial or insignificant. He must also be satisfied that some causal relationship exists between confirming or denying and the stated endangerment.
68. The Commissioner is disappointed to see that Essex Police’s final response and submissions contain no information on these points. Rather, it has merely speculated what the general public’s actions may be if it were to confirm or deny that it holds the requested information.
69. The Commissioner fails to see that Essex Police confirming or denying that it holds specific email addresses, without actually disclosing those email addresses, would make the named individuals any more identifiable than they already are via their names being publicly available on lists of Federation work-based representatives.
70. Essex Police has, therefore, failed to demonstrate any endangerment to the safety of the named officers concerned that would be “real, actual or of substance”, in the event that it were to provide confirmation or denial that it holds the requested information.
71. From its comments regarding contact of an urgent nature being directed to individual mailboxes, the Commissioner understands that Essex Police is suggesting this is endangerment to the safety of the general public, in that if urgent attention is being sought it may be missed if it goes to an individual officer who is not constantly monitoring their emails, as opposed to a generic mailbox which is dedicated to contact of this nature.
72. The Commissioner again fails to see that Essex Police meeting its obligations at section 1(1)(a) by confirming or denying that it holds information within the scope of the request, without actually disclosing it, would result in the general public abandoning long established

methods for reaching the police in an emergency or otherwise urgent scenario. Knowing that a particular officer has an email address is not, in the Commissioner's view, likely to dissuade a member of the public from dialling 999 in the event of an emergency. Essex Police's arguments are therefore hypothetical and highly speculative.

### **The Commissioner's decision**

73. The Commissioner finds that Essex Police has not demonstrated that a causal link exists between confirming or denying whether it holds information within the scope of the request and a significant or weighty possibility of endangerment to the safety of any individuals occurring that is "real, actual or of substance".
74. His decision, therefore, is that Essex Police has not shown that section 38(2) of FOIA is engaged in this case and that it was thus not entitled to rely on this exemption to neither confirm or deny whether it holds the requested information.

## Right of appeal

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75. 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)

76. 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.
77. 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 .....**

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