

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 February 2022

Public Authority: Chief Constable of West Yorkshire Police

Address: Police Headquarters
Laburnum Rd
Wakefield
WF1 3QP

Decision (including any steps ordered)

1. The complainant requested information from West Yorkshire Police about the telephone system used at Havertop Lane Police Station in relation to telephone calls he believed had been made.
2. West Yorkshire Police denied holding some of the requested information and refused to confirm or deny whether it held the remainder, citing sections 40(5) (personal information) and 30(3) (investigations and proceedings) of FOIA.
3. Having investigated its application of section 40(5), the Commissioner's decision is that West Yorkshire Police was entitled, by virtue of section 40(5A) of FOIA, to neither confirm nor deny holding the requested information.
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. The complainant wrote to West Yorkshire Police and requested information in the following terms:

"At page two under complaint three it is stated that Right of Access dept. is not able to answer the questions raised in respect of numerous telephone calls between a [name redacted] at Havertop

Lane Police Station and The Ministry of Justice at Liverpool Crown Court on or around 22.5.20.

Therefore, I raise the following questions with your office as [a] formal request for data:

1. On what system were these phone calls made and received?
2. Was the system one which was installed at Havertop Lane Police Station?
3. Why were the calls not made on the Airwave system?
4. Please name the system the calls were made on and when this was installed.
5. Is Airwave the default system for police phone calls from Havertop Lane?
6. Why was Airwave not used in relation to the calls at issue?
7. Please provide a record of the calls made between [name redacted] and The Ministry of Justice and also NPS [National Probation Service] between 18.5.20 - 22.5.20. This should show the date and time of each call."
6. While the complainant states that the date of his request is 6 February 2021, West Yorkshire Police considered that it was received on 9 March 2021.
7. The date on which West Yorkshire Police responded is also unclear, although it appears to be on or around 31 March 2021. West Yorkshire Police refused to confirm or deny (NCND) whether it held the requested information, citing section 40(5) (personal information) of FOIA as its basis for doing so.
8. Following an internal review, West Yorkshire Police wrote to the complainant on 4 May 2021, maintaining its original position. It also included a warning under section 14(1) (vexatious requests) of FOIA, in relation to future requests.

Scope of the case

9. The complainant contacted the Commissioner on 5 May 2021 to complain about the way his request for information had been handled.
10. By way of background to his complaint, he told the Commissioner:

"Originally a request for data was made relating to phone calls between the Ministry of Justice and [name redacted] at West Yorkshire Police circa 22.5.20. This request for data was refused.

The Freedom of information Act request that is the subject of this complaint to you was made on the back of this ... for data surrounding the phone calls of 22.5.20....".

11. He argued that technical data in relation to a phone system installed in a public building is not personal data:

"... and a request in relation to the same is not exempt in terms of the Act stated".

12. During the course of the Commissioner's investigation, West Yorkshire Police revisited its handling of the request. With respect to the information within the scope of part 5 of the request, West Yorkshire Police told the Commissioner that no information is held. West Yorkshire Police also provided further arguments about its handling of parts 1-4, 6 and 7 of the request.

13. In relation to its application of section 40(5), it clarified that section 40(5A) applies in respect of the requester and 40(5B) in respect of the individual named in the request.

14. Citing an additional exemption, West Yorkshire Police told the Commissioner:

"In addition to citing S40 (5)(a and b), West Yorkshire Police would like to add another exemption, that of S30 (3), Neither confirm nor deny that it holds such information and this is relevant to questions 1 to 4 and 6 and 7".

15. Advising the complainant of its revised NCND response, West Yorkshire Police told him:

"... Unfortunately, West Yorkshire Police are unable to provide you with the information requested as this information is exempt by virtue of Section 40(1) Personal Information....

In addition to this the West Yorkshire Police Service can neither confirm nor deny, that it holds any further information, as the duty in s1(1)(a) of the Freedom of Information Act 2000 does not apply. By virtue of Section 30 (3) (1) (a) (i) Investigations and Proceedings".

16. The complainant remained dissatisfied. He told the Commissioner:

"The response is not revised in any meaningful sense. The main exemption used is still... :

s1(1)(a) of the Freedom of Information Act 2000 does not apply, by virtue of Section 40 (5) Personal Information".

17. With respect to the various references to sections 40(1) and 40(5) in the correspondence, the Commissioner acknowledges that his issued guidance¹ entitled 'Neither confirm nor deny in relation to personal data' states:

"If the requested information is the requester's personal data, it is exempt under section 40(1) of FOIA. Furthermore, under section 40(5A), you are not required to confirm or deny if you hold the information".

18. His guidance goes on to say:

"Note that this exemption is not about the content of the requested information. Instead it concerns whether confirming or denying that you hold the requested information would, in itself, disclose personal data".

19. Arguing that the request is for technical data, the complainant told the Commissioner:

"The blanket refusal of the data on the grounds of it constituting personal information is clearly misconceived. All but question 7. amount to technical data in relation to systems used to accept and record calls to police stations."

20. In correspondence with the Commissioner, West Yorkshire Police accepted that it failed to clarify, in its revised response to the complainant, that it did not hold information within the scope of part 5 of the request.

21. As the basis of the complainant's argument is that it is not appropriate to refuse the request on the basis of personal information, the Commissioner has not investigated whether, on the balance of

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>

probabilities, West Yorkshire Police held information within the scope of part (5) of the request.

22. The analysis below considers West Yorkshire Police's refusal to confirm or deny whether it holds information within the scope of parts 1-4, 6 and 7 of the request.
23. The Commissioner understands that West Yorkshire Police considers sections 40(5) and 30(3) apply equally to the information in scope of parts 1-4, 6 and 7 of the request. In light of the arguments put forward by the complainant, the Commissioner has first considered West Yorkshire Police's application of section 40(5A).
24. When considering a 'neither confirm nor deny' response, the single issue the Commissioner must determine is whether the public authority was correct neither to confirm nor deny whether it holds the requested information.
25. Accordingly, this notice considers whether West Yorkshire Police is entitled to neither confirm nor deny holding the disputed information. The Commissioner has not considered whether the information – if held – should be disclosed.

Reasons for decision

26. In his guidance to public authorities the Commissioner states:

"When you receive a request for information, you normally have a duty under FOIA section 1(1)(a) to tell the requester whether you hold the information. This is called "the duty to confirm or deny". However, in certain circumstances, this duty does not apply and you are not obliged to say whether or not you hold the information. Instead, you can give a "neither confirm nor deny" response".

Section 40 – personal information

27. 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."

28. Section 40(5A) of FOIA states that:

"The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1)".

29. In other words, while section 40(1) of FOIA provides an exemption from the right to information if the requested information is the requester's personal data, section 40(5A) of FOIA provides an exemption from the duty to confirm or deny whether requested information is held, if to do so would disclose personal data of which the applicant is the data subject.

Would the confirmation or denial that the requested information is held constitute the disclosure of personal data?

30. Section 3(2) of the Data Protection Act 2018 (the DPA) defines personal data as "any information relating to an identified or identifiable living individual".
31. The two main elements of personal data, therefore, are that the information must relate to a living person, and that the person must be identifiable.
32. 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 or an online identifier; or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
33. 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.
34. The Commissioner acknowledges that the context of the request in this case is phone calls that the complainant believes were made about him. The complainant considers that the request comprises technical information about phone systems and that it is not appropriate that West Yorkshire Police refused the request on the basis of personal information.
35. He also told the Commissioner:
- "The data can be anonymised without any loss of the quality of the data provided. In any event the data sought is for the most part technical data and thus would not make public any issue with myself".
36. The Commissioner is mindful that, in its correspondence with the complainant, West Yorkshire Police told him, albeit in relation to its application of section 30(3), that the request relates to an investigation.
37. In its submission to the Commissioner, West Yorkshire Police explained that its neither confirm nor deny response protects the complainant's

personal data. In that regard, West Yorkshire Police considered that disclosure, by way of confirmation or denial, would disclose personal data relating to the complainant, namely whether or not he had been the subject of phone calls in relation to an investigation.

38. It told the Commissioner:

"As FOI is a disclosure to the world, a reasonable person would not expect their criminal data to be disclosed in this manner".

39. The Commissioner recognises that the requester is not referred to by name in the request. However, the preamble to the request references a complaint and the department an individual would contact to request access to their own personal data - the Right of Access department. It also refers to 'numerous telephone calls', names the parties believed to have been involved in the calls and specifies their locations as well as an approximate date. Following on from the preamble, the request itself variously refers to 'these phone calls', 'the calls' and 'the calls at issue'. It also specifies a name, dates and a location.
40. The Commissioner considers that the preamble puts the request in context and was necessary to identify the requested information.
41. Given the wording of the preamble in this case, together with the wording of the request, the Commissioner is satisfied that the requested information, if held, relates to the individual who was the subject of the call(s). He is further satisfied that the individual is identifiable from that information. The information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
42. West Yorkshire Police argued that confirmation or denial in this case would lead to disclosure of the requester's personal information.
43. The Commissioner has considered whether disclosure, by way of confirmation or denial in this case could reveal something about the requester.
44. He accepts that, in the hands of West Yorkshire Police, the seemingly technical information about the phone systems used for the calls, if they occurred, has biographical significance for the requester.
45. In this case, he is satisfied that disclosure, by way of confirmation or denial, would reveal whether or not he was the subject of phone calls relating to an investigation.
46. The Commissioner is mindful that the complainant told him:

“...the relevant data can be redacted to enable disclosure in any event”.

47. However disclosure in redacted form only applies if the information is disclosable under FOIA. Redaction would not prevent the information from being the complainant’s personal data and thus caught within s40(1) FOIA and therefore not disclosable under FOIA.
48. There is no right of access to an individual’s own personal data under FOIA. The information, if it were held, would be exempt from disclosure under section 40(1) and therefore, under section 40(5A), the public authority is not required to confirm or deny that they hold it.
49. The Commissioner has therefore decided that West Yorkshire Police was entitled to refuse to confirm whether or not it held the requested information on the basis of section 40(5A) of FOIA.

Other exemptions

50. As the Commissioner is satisfied that section 40(5A) applies, he has not found it necessary to consider West Yorkshire Police’s application of sections 40(5B) and 30(3) to the same information.

Other matters

51. The Commissioner acknowledges that the complainant told him that, in order to obtain the information, he would waive his right to anonymity.
52. However, under section 50 of FOIA, the Commissioner’s duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part I of FOIA. The offer to waive the right to anonymity is not relevant.
53. The Commissioner acknowledges that the complainant believes that no consideration appears to have been given in West Yorkshire Police’s revised response to other means by which the data can be provided.
54. In his guidance entitled ‘Neither confirm nor deny in relation to personal data’, the Commissioner states:

“... if you receive an FOI or EIR request where confirming or denying whether you hold the information would involve disclosing the requester’s personal data, you should treat this as a data protection subject access request.

You should tell the requester that you will deal with the request under the data protection legislation, rather than FOIA or the EIR.

You should carefully word any refusal notice to avoid implying whether you do or do not hold the information and to avoid inadvertently disclosing any personal data”.

55. In that respect, the Commissioner acknowledges that West Yorkshire Police told the Commissioner that, prior to responding to this FOI request, a response had been given to the requester under Right of Access and an internal review completed.
56. It is not within the Commissioner’s remit in this decision notice to consider the response provided to the complainant under the DPA.

Right of appeal

57. 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

58. 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.

59. 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

Laura Tomkinson
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