

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 March 2024

Public Authority: Commissioner of Police of the Metropolis
Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant has requested information relating to a criminal investigation, from the Metropolitan Police Service (the "MPS"). The MPS would neither confirm nor deny holding any information, citing sections 30(3) (Investigations and proceedings), 31(3) (Law enforcement), 40(5B)(a)(i) (Personal information) and 42(2) (Legal professional privilege) of FOIA.
2. The Commissioner's decision is that section 40(5B)(a)(i) is properly engaged. No steps are required.

Request and response

3. On 5 October 2023, the complainant wrote to the MPS and requested the following information:

"I request a copy of the decision notice on the investigation by the Metropolitan Police into the Cash for Honours enquiry involving the Monarchy and [name redacted]. I am happy to receive the decision with personal information redacted. All I want is the grounds and reasons not to proceed".

4. On 14 November 2023, the MPS responded. It would neither confirm nor deny holding the requested information, citing sections 30(3), 31(3), 40(5) and 42(2) of FOIA.
5. The complainant requested an internal review on 2 December 2023. He said:

“Your grounds for refusal are irrational. You rely on DPA exemption neither confirm or deny when this is already in the public domain published in all the mainstream press. I am not asking for personal details, I am requesting a copy of the decision notice and if you wish you can redact any personal information”.
6. The MPS provided an internal review on 3 January 2024, in which it maintained its position.

Scope of the case

7. On 24 January 2024, the complainant wrote to the Commissioner with the following grounds of complaint:

“My original request here was for the Decision notice and what the reasons for discontinuance there was no request for personal information as that is already in the public domain [sic]. I have asked the CPS and MPS for it and both are saying the other made the decision, there is no openness or clarity and someone somewhere are [sic] not telling the truth. Secondly the MPS are trying to bury me in exemptions, they are like confetti; all they are doing is muddying the waters. The request is quite simple, there was [sic] no proceedings because of

- Insufficient evidence
- Not in the public interest.
- What was the rationale.

This is in the public interest... massively”.

8. The Commissioner will consider the application of exemptions to the request, below.

Reasons for decision

Neither confirm nor deny ("NCND")

9. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request.
10. 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.
11. 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.
12. The MPS has taken the position of neither confirming nor denying whether it holds the requested information citing sections 30(3), 31(3), 40(5B)(a)(i) and 42(2) of FOIA. The issue that the Commissioner has to consider is not one of disclosure of any requested information that may be held, it is solely the issue of whether or not the MPS is entitled to NCND whether it holds any information of the type requested by the complainant.
13. Put simply, in this case the Commissioner must consider whether or not the MPS is entitled to NCND whether it holds any information about an alleged criminal investigation into a named party.

Section 40 - personal information

14. 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 set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.

15. The Commissioner's guidance on personal data¹ explains that merely confirming or denying that a public authority holds information about an individual, can itself reveal something about that individual to the wider public.
16. For the MPS to be entitled to rely on section 40(5B)(a)(i) of 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 data protection principles.
17. The MPS has explained to the complainant that:

“To confirm or deny that the MPS hold or do not hold information about a specific individual would disclose information about that living, identifiable individual – especially given the media coverage around this matter. This would amount to a release into the public domain of personal information about an individual – namely whether or not this person was the subject of a criminal investigation. Therefore, their rights under the Data Protection Act 2018 (DPA) and the General Data Protection Regulation (GDPR) would be breached by release.

To clarify, the Freedom of Information Act only allows the processing of personal data if that processing would be compliant with the Data Protection principles. These principles are outlined under section 34 of the DPA 2018 and under Article 5 of the GDPR.

In this instance, processing this information (by issuing a confirmation or denial) would breach the first principle, that of 'lawful, fair and transparent' processing. When balancing the legitimate interests of the public against the interests of the individual and the harm and distress that would be caused by a confirmation or denial, the processing of information in this way becomes unlawful and Section 40(5A)(a)(i) is made out”.

¹ <https://ico.org.uk/for-organisations/foi/section-40-and-regulation-13-personal-information/>

18. Although there may be information in the media about the named person in connection to the criminal allegations, the MPS has advised the complainant:

“Whilst it is acknowledged in the public domain that the MPS conducted an investigation into allegations of offences under the Honours (Prevention of Abuses) Act 1925, the MPS has not publically [sic] confirmed or denied which individuals were subject of the investigation...”.

Would the confirmation or denial that the requested information if held constitute the disclosure of a third party’s personal data?

19. Section 3(2) of the DPA 2018 defines personal data as:-

“any information relating to an identified or identifiable living individual”.

20. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
21. 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.
22. Clearly, the request relates to a named, living person. Therefore, the Commissioner is satisfied that if the MPS confirmed whether or not it held the requested information, this would result in the disclosure of their personal data (ie it would reveal whether or not they were the subject of the police investigation referred to in the request). The first criterion set out above is therefore met.

If held, would the information be criminal offence data?

23. The MPS has also argued that confirming or denying whether it holds the requested information would result in the disclosure of information relating to the criminal convictions and offences of a third party.
24. 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.

25. It includes not just data which is obviously about a specific criminal conviction or trial, but also personal data about unproven allegations.
26. Having considered the wording of the request, the Commissioner is satisfied that confirming or denying whether it holds the requested information would result in the disclosure of information relating to the alleged commission of offences. This is because the request refers to a criminal investigation, which the complainant believes the named individual was the subject of.
27. 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 FOIA request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA 2018 can be met.
28. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under FOIA are the conditions at Part 3 paragraph 29 (consent from the data subject) or Part 3 paragraph 32 (data made manifestly public by the data subject).
29. The Commissioner has seen no evidence or indication that the individual concerned has specifically consented to a confirmation or denial being disclosed to the world in response to an FOIA request or that they have deliberately made such a confirmation or denial public themselves.
30. As none of the conditions required for processing criminal offence data are satisfied, there is no legal basis for confirming whether or not the requested information is held. Providing such a confirmation or denial would breach data principle (a) and therefore the second criterion of the test set out in paragraph 16, above, is met.
31. It follows that the MPS was entitled to neither confirm nor deny whether it holds the requested information, on the basis of section 40(5B)(a)(i) of FOIA.
32. In view of these findings, the Commissioner has not found it necessary to consider the other exemptions cited.

Right of appeal

33. 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

34. 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.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Carolyn Howes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF