

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 August 2013

Public Authority: The Commissioner of the Metropolitan Police Service

Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant requested information relating to a named person. The public authority refused to confirm or deny it held the information requested on the basis of section 40(5)(b)(i) FOIA.
2. The Commissioner's decision is that the public authority was entitled to withhold the information requested on the basis of section 40(5)(b)(i) FOIA.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 10 September 2012 the complainant wrote to the public authority and requested information in the following terms:

'.....This is a formal request for confirmation of the position of [Named Person], describing herself as a Police Officer No: 9848? [sic] Confirmation of whether she worked for the 'Sapphire Unit' of the MPS attached to Lewisham prior to January 2010? If she was in any of the employment she claimed to have been, was there any disciplinary action taked [sic] against her?.....'

5. The public authority responded on 26 September 2012. It considered the request under the terms of the FOIA and explained that it could

neither confirm nor deny if it held the information requested by virtue of the provision in section 40(5) FOIA.

6. Following an internal review (which was requested on 15 October 2012) the public authority wrote to the complainant on 17 January 2013.¹ It upheld the original decision to deny the request on the basis of section 40(5).

Scope of the case

7. On 24 April 2013 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He queried the application of section 40(5) to his request. During the course of the investigation, the public authority clarified that it was relying specifically on the provision in section 40(5)(b)(i) FOIA.
8. The scope of the investigation therefore was to determine whether the public authority was entitled to rely on section 40(5)(b)(i) to deny the complainant's request.

Reasons for decision

Section 40(5)(b)(i) FOIA

9. Generally, the provisions in section 40 subsections 1 to 4 FOIA exempt *personal data* from disclosure. In relation to a request which constitutes the personal data of individual(s) other than the applicant(s) (i.e. the person making the request), section 40(5)(b)(i) further excludes a public authority from complying with the duty imposed by section 1(1)(a) FOIA if complying with that duty would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 (DPA) or would do so if the exemptions in section 33A(1) of the DPA were disregarded.
10. Section 1(1)(a) imposes a duty on a public authority to either confirm or deny if it holds information specified in a request.

¹ The Commissioner has commented on the length of time it took to complete the review in the 'Other Matters' section further below.

11. Therefore, the first element that needs to be met before relying on section 40(5)(b)(i) is that the information requested should, if held, constitute the *personal data* of a third party (i.e. someone other than the person making the request).

12. *Personal data* is defined in section 1 DPA as follows:

'.....data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual...'

13. The public authority submitted that should the information requested be held, all of the information would clearly relate to [Named Person] who can be identified from the information. Confirmation or denial that the information requested was held would inevitably constitute a disclosure of [Named Person]'s personal data.

14. The Commissioner accepts that the information requested if held, would constitute the personal data of [Named Person] within the meaning in section 1 DPA. [Named Person] is obviously mentioned in the request and the information requested would therefore clearly identify her.

15. The next element the public authority considered was whether confirming or denying if the information requested is held², would contravene any of the data protection principles. It initially considered the first data protection principle.

Would complying with section 1(1)(a) contravene the first data protection principle?

16. The first data protection principle states:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met....'

17. The public authority submitted that confirming or denying whether it holds the information requested would be unfair to [Named Person] and therefore in contravention of the first data protection principle.

² i.e. the duty imposed by section (1)(1)(a) FOIA.

18. Owing to what the arguments of the public authority reveal, as well as that the public authority has expressed a preference that some of its arguments remain confidential, the Commissioner has not reproduced the relevant part of the submissions in this notice.
19. The Commissioner accepts the public authority's reasoning as to why complying with its duty under section 1(1)(a) in relation to this request would be unfair to [Named Person].
20. The Commissioner appreciates that the brevity of his reasoning above might prove frustrating to the complainant. It is however an unavoidable consequence of the approach required in order not inadvertently reveal information which will defeat the purpose of relying on section 40(5)(b)(i) in the first place.
21. The Commissioner therefore finds that the public authority was entitled to rely on the provision in section 40(5)(b)(i) to refuse to confirm or deny it held the information requested.

Other matters

22. The FOIA does not stipulate a time limit for public authorities to issue internal review. However, as a matter of good practice, the Commissioner considers that a public authority should take no more than 20 working days to issue an internal review and in exceptional circumstances, 40 working days.
23. The Commissioner therefore notes his concern that it took the public authority well over 40 working days to issue the outcome of its internal review to the complainant.

Right of appeal

24. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

25. 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.
26. 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

Alexander Ganotis
Group Manager – Complaints Resolution
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF