

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 January 2016

Public Authority: Commissioner of the Metropolitan Police Service

Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant has requested information about two named police officers who had arrested him in 2006. The Metropolitan Police Service (the 'MPS') would neither confirm nor deny holding information about the officers, citing section 40(5)(b)(i) of the FOIA. During the Commissioner's investigation the MPS revised its position, additionally relying on section 40(5)(a)(i) in that the requested information relates to the complainant personally and, if held, would be his own personal data. The Commissioner is satisfied that it was correct to rely on 40(5)(a)(i). No steps are required.

Request and response

2. On 29 July 2015, the complainant wrote to the MPS and requested information in the following terms:

"I would be grateful if you could look into my request for this information.

At 3.00am on Wednesday 27 September 2006 I was arrested and subsequently taken to Hammersmith Police Station: PC [details redacted] and PC [details redacted].

1) I would like to no [sic], has this two officers have a Criminal Record [sic]

2) Is this two officers [sic] still working for the Metropolitan Police Service”.

3. On 13 August 2015 the MPS responded. It refused to confirm or deny that it held the requested information citing section 40(5) (personal information) of the FOIA.
4. Following an internal review the MPS wrote to the complainant on 11 September 2015. It maintained its original position and clarified it was relying on 40(5)(b)(i) of the FOIA.

Scope of the case

5. The Commissioner received the complainant's complaint on 5 November 2015. He did not include specific grounds of complaint so the Commissioner advised him that he would consider whether the MPS is entitled to rely on the section 40(5)(b)(i) as a basis for refusing to confirm or deny whether it holds any information.
6. During the Commissioner's investigation the MPS revised its position. It advised that in addition to 40(5)(b)(i) it would also like to rely on 40(5)(a)(i).
7. Following the combined cases of the Home Office v Information Commissioner (GIA/2098/2010) and DEFRA v Information Commissioner (GIA/1694/2010) in the Upper Tribunal, a public authority is able to claim a new exemption or exception either before the Commissioner or the First-tier Tribunal and both must consider any such new claims.

Reasons for decision

8. Under section 1(1)(a) of the FOIA, a public authority is obliged to advise an applicant whether or not it holds the requested information. This is known as the “duty to confirm or deny”. However, the duty to confirm or deny does not always apply and authorities may refuse to confirm or deny through reliance on certain exemptions under the FOIA.

Section 40(5) – personal information

9. The exemption at section 40(5) of the FOIA provides that a public authority does not have to confirm or deny whether requested information is held if to do so would constitute a disclosure of personal data.

10. Section 40(5)(a) provides that the duty to confirm or deny does not arise in relation to information that falls, or would fall if it were held, within the scope of section 40(1) of the FOIA. Section 40(1) provides that information which is the personal data of the applicant is exempt from disclosure under the FOIA. This is because individuals may request their personal data under a separate legislative access regime, namely the right of subject access under section 7 of the Data Protection Act 1998 (DPA).
11. Section 40(1) is an absolute exemption, meaning that if it applies there is no requirement to go on to consider whether disclosure would nevertheless be in the public interest.

Would confirming or denying that the requested information is held constitute a disclosure of personal data?

12. Section 1(1) of the DPA defines personal information as:

"...data which relate to a living individual who can be identified-

a) from those data, or

b) 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. In his guidance on section 40¹ of the FOIA, the Commissioner expanded on what constitutes personal data:

"For data to constitute personal data, it must relate to a living individual, and that individual must be identifiable. In considering whether information requested under FOIA is personal data, the public authority must decide whether the information satisfies both parts of the definition."

14. The complainant's request is for information about his own arrest. The Commissioner considers that this is an approach for information which can be linked to a named, living individual - the complainant himself. It

¹ https://ico.org.uk/media/for-organisations/documents/1206/never_confirm_nor_deny_in_relation_to_personal_data_and_regulation_foi_eir.pdf

is therefore his personal data, and falls within the scope of section 40(1).

15. It follows from this that to comply with section 1(1)(a) of FOIA (that is, to either confirm or deny holding the requested information) would put into the public domain information about the existence or otherwise of the complainant's arrest; this would constitute a disclosure of personal data that would relate to the complainant.
16. In considering whether the MPS should have applied section 40(5)(a), the Commissioner has taken into account that the FOIA is applicant blind and that any disclosure would be to the world at large. If the information were to be disclosed, it would be available to any member of the public, not just the complainant. Confirmation or denial in the circumstances of this case would reveal to the general public information about the complainant which is not already in the public domain and which is not reasonably accessible to it. The Commissioner therefore considers that the exemption was correctly relied upon by the public authority in this case and he has not found it necessary to consider section 40(5)(b)(i).
17. The Commissioner would remind applicants that any individual wishing to access their own personal data should pursue this right under the DPA.

Other matters

18. The MPS decided to rely on this exemption at a late stage of the investigation. In doing so it has now written to the complainant to advise of this change and to inform him of his rights under the DPA.

Right of appeal

19. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

20. 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.
21. 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

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