

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 26 July 2017

**Public Authority:** Chief Constable for West Yorkshire  
**Address:** PO Box 9  
Laburnum Road  
Wakefield  
WF1 3QP

#### Decision (including any steps ordered)

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1. The complainant asked West Yorkshire Police to say if, during September 2016, they employed a named person. West Yorkshire Police relied on the section 40(5) FOIA (personal information) exemption to neither confirm nor deny employing the named person.
2. The Commissioner's decision is that West Yorkshire Police had applied the section 40(5) FOIA exemption correctly.
3. The Commissioner does not require West Yorkshire Police to take any steps to comply with the legislation.

#### Request and response

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4. On 3 October 2016, the complainant wrote to West Yorkshire Police (the police) and requested information in the following terms:  
  
*On any date during September 2016, did West Yorkshire Police (inclusive of NPAS [National Police Air Service]) have a policeman by the name of [name redacted] or [name redacted] in their employment.*
5. In a letter dated 24 October 2016, the force refused to confirm or deny holding the requested information, relying on the section 40(5) FOIA exemption. Following an internal review, the police confirmed that position on 9 December 2016.

## Scope of the case

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6. The complainant contacted the Commissioner on 29 January 2017 to complain about the way his request for information had been handled. He said that he was a member of the public who had simply requested the police to admit or deny having a police officer of the name he had given in their employment during September 2016.
7. In reaching her decision, the Commissioner considered representations from the parties and had regard for the relevant case law.

## Reasons for decision

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

## Section 40 – personal information

9. Generally, the provisions in section 40 subsections 1 to 4 exempt personal data from disclosure under FOIA if to do so would breach any of the data protection principles set out in the Data Protection Act 1998 (DPA). The section 40(5) FOIA exemption states that the duty to confirm or deny whether or not information is held does not arise if providing the requester with confirmation or denial would itself contravene any of the data protection principles.
10. The consequence of section 40(5)(b)(i) FOIA is that, if a public authority receives a request for information which, if it were held, would be the personal data of a third party (or parties), then it can rely on that section to refuse to confirm or deny holding the requested information.
11. Consideration of section 40(5) FOIA involves two steps: first, whether providing the confirmation or denial would involve the disclosure of personal data, and secondly, whether disclosure of that personal data would breach of any of the data protection principles.

## Is the information personal data?

12. The first step for the Commissioner to determine is whether providing confirmation or denial would involve a disclosure of personal data, as defined by the DPA. If it would not, then section 40(5) cannot apply.

13. The DPA defines personal data 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 is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."*

14. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

15. The requested information clearly relates to an identified living individual (or individuals) who the complainant believes to be, or to have been, a police employee or associate. By its nature the request identifies that individual and that information, if held, would constitute their personal data. Accordingly the Commissioner is satisfied that confirmation or denial with regard to police employment or association would involve a disclosure of personal data.

### **Would disclosure breach any data protection principles?**

16. The police said that confirmation or denial would breach the first data protection principle and explained to the complainant that confirming whether or not individuals had been employed by, or associated with, the police would breach their legitimate expectation of privacy.

17. When considering the first principle the Commissioner will generally seek to balance the reasonable expectations of the data subject(s) with the consequences of compliance with the request, and the general principles of accountability and transparency.

18. The first data protection principle requires that personal data is processed fairly and lawfully and that one of the conditions in schedule 2 of the DPA is met in order to disclose personal data.

19. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:

- the individual's reasonable expectations of what would happen to their information;
  - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned); and
  - the balance between the rights and freedoms of the data subject and the legitimate interests of the public.
20. The Commissioner considers that information about employment related matters will usually be inherently 'private' in nature and she recognises that police officers and other employees or associates will have a high expectation that such matters will not be placed in the public domain and that their privacy will be respected. As such, their reasonable expectation would be that information of the type requested would not be disclosed.
21. Disclosure of information relating to employment status or other association with the police could prove detrimental to any police employee or to a member of the public if it were placed into the public domain via FOIA. As such it could cause unnecessary and unjustified damage or distress to the individuals concerned.
22. The Commissioner appreciates that there is a general public interest in accountability and transparency by public authorities. On the other hand the Commissioner recognises that this legitimate interest must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of any individual who would be affected by confirming or denying that the requested information is held, i.e. the individuals themselves.
23. In considering whether the exemption contained within the section 40(5)(b)(i) FOIA exemption was correctly applied, the Commissioner has taken into account that disclosure under FOIA should be considered in its widest sense – which is to the public at large. A confirmation or denial in the circumstances of this case would reveal to the public information which is not already in the public domain.
24. Having regard for the reasonable expectations of the data subject(s), and the potential impact if the existence of their personal data were to be confirmed or denied, the Commissioner considers that it would be reasonable for an individual to expect that any information held about them by the police would only be used for policing purposes and that to process that information in another way would be unfair. While she accepts that there is a limited legitimate interest in the disclosure of this information, she does not consider that this outweighs these other factors.

25. Notwithstanding a data subject's reasonable expectations or any damage or distress caused, it may still be fair to disclose information, or in this case confirm or deny if information is held, if there is a more compelling public interest in doing so. Therefore the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in confirming or denying if the information is held. This is a different balancing exercise from the normal public interest test carried out in relation to exemptions listed under section 2(3) FOIA. Given the importance of protecting an individual's personal data the Commissioner's 'default position' is in favour of protecting the privacy of the individual. The public interest in confirming if information is held must outweigh the public interest in protecting the rights and freedoms of the data subject if providing confirmation or denial is to be considered fair.
26. The interest in disclosure must be a public interest, not the private interest of an individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.
27. In the course of her investigation the Commissioner investigated with the police the relevant information held by them relating to September 2016. She considers that junior police officers and members of staff would have a greater expectation of privacy than would more senior employees. In this matter, the police confirmed that none of its then senior employees fell within the scope of the information request.
28. In the light of relevant police information and the reasonable expectations of the individual data subjects concerned, the Commissioner is satisfied that confirming or denying if the requested information is held would be an intrusion into the data subjects' privacy and could potentially cause unnecessary and unjustified distress. She considers these arguments outweigh any legitimate interest she has been shown in disclosure. She has therefore concluded that confirmation or denial in this case would breach the first data protection principle and finds the exemption at section 40(5) FOIA is engaged and that the duty to confirm or deny did not arise.
29. As the Commissioner has determined that it would be unfair to confirm or deny if the information is held, she did not go on to consider whether disclosure would be lawful or whether one of the schedule 2 DPA conditions is met.

## **Conclusion**

30. The Commissioner decided that the information requested, if held, would be the personal data of the individual(s) as it would relate to them personally. She also finds that, if held, it would be unfair to disclose it and that to do so would breach the first DPA data protection principle. The information would accordingly be exempt from disclosure under section 40(2) FOIA. Therefore, under section 40(5)(b)(i) FOIA, the police are not required to confirm or deny that the information requested is held.

## Right of appeal

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31. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

32. 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.
33. 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 .....

**Jon Manners**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**