

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 11 December 2019

**Public Authority:** Home Office  
**Address:** 2 Marsham Street  
London  
SW1P 4DF

#### Decision (including any steps ordered)

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1. The complainant requested police force data on the 'use of force' from the Home Office. It refused to provide the requested information citing section 21 (information accessible to applicant by other means) for part of the request and section 40(2) (personal information) for the remainder. The complainant requested an internal review in relation to the Home Office's reliance on section 40(2) only. The Home Office subsequently disclosed some of the requested information but withheld the remainder under section 40(2).
2. The Commissioner's decision is that section 40(2) is not engaged.
3. The Commissioner requires the Home Office to take the following step to ensure compliance with the legislation.
  - Disclose the information in scope which was withheld under section 40(2) to the complainant.
4. The Home Office must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

#### Background

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5. The requested information covers all reported incidents where police officers have used force against an individual (or 'subject') and details of the tactics used, the reason for the use of force, the outcome, any

injuries (to the officers and / or the subject) and subject information (age, gender, ethnicity and disability, as perceived by the reporting officer). The data is provided to the Home Office by individual police forces.

6. The Commissioner understands that police forces submit their 'use of force' data to the Home Office, where their individual submissions are compiled into one larger spreadsheet.
7. The term 'CED' in the request below stands for 'conducted energy devices' or tasers.

## Request and response

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8. On 13 December 2018, the complainant wrote to the Home Office and requested information in the following terms:

*"Under the Freedom of Information Act, please could you provide me with the record-level use of force data for the year to March 2018 for all police forces (as summarised here<sup>1</sup>), supplied as part of the annual data requirement, as well as the summary-level figures on CED use from the 17 forces that submitted them.*

*Please provide this information as a spreadsheet or CSV file."*

9. The Home Office responded on 10 January 2019. It refused to provide the requested information citing section 21 (information accessible to applicant by other means) for part of the request (specifically CED use) and section 40(2) (personal information) for the remainder.
10. The complainant requested an internal review on 18 January 2019 in relation to the Home Office's application of section 40(2) only. She argued that this exemption could not apply since, in her opinion, the requested information did not identify any individuals. The Home Office failed to respond.

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<sup>1</sup><https://eur03.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.gov.uk%2Fgovernment%2Fstatistics%2Fpolice-use-of-force-statistics-england-and-wales-april-2017-to-march-2018&data=01%7C01%7Cacknowledgement%40ico.org.uk%7C77f2bc980b419de58108d6cfc63018%7C501293238fab4000adc1c4cfefba21e6%7C1&sdata=848DY%2FHPIry%2BC0A4Ajr68swqEwGbVU3nXXcoSUsaaMQ%3D&reserved=0>

2018&data=01%7C01%7Cacknowledgement%40ico.org.uk%7C77f2bc980b419de58108d6cfc63018%7C501293238fab4000adc1c4cfefba21e6%7C1&sdata=848DY%2FHPIry%2BC0A4Ajr68swqEwGbVU3nXXcoSUsaaMQ%3D&reserved=0

## Scope of the case

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11. The complainant contacted the Commissioner on 3 May 2019 to complain about the way her request for information had been handled; her initial complaint was about the then overdue internal review.
12. Due to the almost four months delay with the outstanding internal review, the Commissioner exercised her discretion and accepted the complaint without the review process having been exhausted.
13. However, during the early stage of the Commissioner's investigation, the Home Office issued its internal review (on 28 August 2019). It disclosed some of the requested information and continued to withhold the remainder under section 40(2). It maintained its position that individuals could be identified from the withheld information and, therefore, that section 40(2) was engaged.
14. The Commissioner asked the complainant for her view following the release of some of the requested information. In reply, she said:

*"I am not satisfied with the outcome of the internal review. While it goes some way to answering the request, it is still missing information about the submitting police force. The argument as to the application of Section 40(2) is still lacking in detail, and the points I made to you on July 30 are still relevant here (i.e. if individual police forces are publishing this data, in a way that obviously identifies the police force area (as well as lower level location data), then there would appear to be a strong basis (be it non-identifiability [sic] or legitimate interest) for the Home Office to release the same data.*

*As such I would like this case to continue forward."*

15. The Commissioner subsequently spoke to the complainant who confirmed she was not concerned about disclosure of the withheld incident and custody numbers; as a result these have been scoped out of the Commissioner's investigation.
16. The Commissioner has considered whether the Home Office was entitled to withhold the remainder of the requested information by virtue of section 40(2) of FOIA.

## Reasons for decision

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### *The withheld information*

17. The withheld information in this case consists of a spreadsheet which the Home Office has described as follows:

*"The full dataset is held in a spreadsheet containing 82 columns and around 330,000 lines."*

18. The Home Office explained that it had provided the complainant with a disc containing the information it had disclosed at internal review, due to the size of the disclosure. It also provided the Commissioner with a sample extract spreadsheet showing what information had been provided to the complainant, together with an extract from the 'return' from one of the participating police forces, stating:

*"The full return has 8,698 lines and is too large to email, but the extract shows the format and what the full spreadsheet contains."*

19. The Home Office advised that it had withheld the following columns of information from the complainant:

- Incident number
- Custody number
- Impact factor: mental health
- Subject physically disabled
- Subject mentally disabled
- Outcome detained – Mental Health Act
- Police force

20. As per the 'Scope' section above, the incident and custody numbers have been scoped out of the Commissioner's investigation.

### **Section 40 – personal information**

21. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the

requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

22. In this case the relevant condition is contained in section 40(3A)(a)<sup>2</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data set out in Article 5 of the GDPR ('the DP principles').
23. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (the 'DPA'). If it is not personal data then section 40 FOIA cannot apply.
24. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

### ***Is the information personal data?***

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

*"any information relating to an identified or identifiable living individual"*.

26. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
27. 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, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
28. 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.

### ***The complainant's view***

29. The complainant submitted the following arguments in support of her view that the remaining withheld information should be released:

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<sup>2</sup> As amended by Schedule 19 Paragraph 58(3) of the Data Protection Act 2018

*"The individual must also be identified as a result of the release of this information - it is not enough that someone might attempt to guess that a data point in the release might be a particular individual. The ICO's anonymisation guidance<sup>3</sup> states that "identification involves more than making an educated guess that information is about someone; the guess could be wrong" (page 26). Even where a guess based on anonymised data turns out to be correct, this does not mean that a disclosure of personal data has taken place.*

*This is what the Home Office is suggesting could happen. It has said that people could "use Google to identify incidents of police use of force reported online that appear in our dataset. The dataset can then be used to identify personal characteristics (for example ethnicity, gender, mental health) of the subjects involved that wouldn't otherwise be known." However, this is not a route to identification, this is a route to guesswork. In many cases (and I suspect this may be the issue with the Home Office's example), there would be a strong element of trying to make the reports fit with a line in the data without having enough information to accurately identify the incident. As well as this, the information in the dataset is as reported by police officers, and as such is not necessarily accurate (and therefore may make identification even less likely).*

*That police forces across England and Wales that collect this data have been able to publish the incident level data, suggests that the requested information is not personal data, and that it is possible for the Home Office to release the information requested. The data has now been published regularly over several months and there appears to be no indication that people are being identified as a result of the publication and the Data Protection Act breached as a result.*

*These publications (and more limited ones from other forces) is [sic] a result of a decision at Chief Constable Council in January 2017 for all forces to collate and publish data on use of force:*

*'From April this year, almost all forces will start recording and publishing every time an officer uses force - whether that is a form of restraint, handcuffing, use of a Taser or*

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<sup>3</sup> <https://ico.org.uk/media/1061/anonymisation-code.pdf>

*CS spray. These powers are legitimately available to police officers under law to enable them to protect the public and themselves from harm. It is right that we are transparent about how and why they are used."*

And:

*"I think the only thing to note is that the Home Office is refusing to include the information about which police force the data is from citing Section 40(2), however, most of the police forces that publish this data (as noted in the email of July 30), already clearly identify which police force area that data is for, but also publish data on the geographic location of the incident at a level below police force area, which again suggests the Home Office's use of Section 40(2) is incorrect."*

### **The Home Office's view**

30. The Home Office submitted the following arguments to the Commissioner in support of its view that the remaining information constituted personal data and should, therefore, be withheld:

*"We recognise that the ICO's guidance on 'What is personal data' says that 'the fact that there is a very slight hypothetical possibility that someone might be able to reconstruct the data in such a way that the individual is identified is not necessarily sufficient to make the individual identifiable'.*

*However, in this case we consider that the risk of identification or indirect disclosure of personal data is significantly higher than a 'very slight hypothetical possibility'. We certainly do not agree with [the complainant's] contention that the way in which we have suggested that an individual might be identified is a 'route to guesswork' rather than a route to identification. Were that the case, we would have maintained our original position that the whole of the dataset is exempt under section 40(2) and we would not have disclosed the majority of it to [the complainant].*

*The following example will help to illustrate why we consider that there is a non-negligible risk that individuals could be identified if we provide the force data".*

31. The Home Office provided the Commissioner with one example of a newspaper article where it indicated that a link could be made between one of the entries in its dataset and that article, thereby meaning that the dataset entry constituted that person's personal data. It said that, from that article, it was possible to ascertain the following about a named individual:



- 40-year-old man;
- Location: dwelling;
- Reason: method of entry;
- Staff injury: Yes, minor;
- Tactics used: Taser fired;
- Outcome: arrested.

32. Furthermore, the Home Office argued that by filtering on the full data set, one row of data would be left which would reveal 'ethnicity' and other 'special category' data about a named individual.
33. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
34. The Home Office contended that:

*"This will not be an isolated case. As the Commissioner will be aware, the local press features a lot of information about crime in the locality, often naming individuals. The example shows that it is possible to use the full dataset to obtain additional personal data about such individuals. This would be a fairly simple process for a 'motivated individual'. We do not suggest that [the complainant] would use the information for this purpose, but disclosure under the FOIA is in effect to the world at large and we must take into account the risk of this happening, set against the Home Office's obligation to protect any personal data which it holds as part of its work. The risk is more than hypothetical or remote.*

*We therefore conclude that the information about the force constitutes personal data because it could enable the identification of individuals in the entries in the spreadsheet relating to that particular force, or the obtaining of information about individuals already identified in the public domain."*

### **The Commissioner's view**

35. The Commissioner's guidance on anonymisation (page 25) sets out that it is good practice to try to assess the likelihood of motivated individuals having and using the prior knowledge necessary to facilitate re-identification of statistical data.
36. The Commissioner understands the Home Office's concerns that, should the withheld information be released, a motivated requester and/or



person with knowledge of the relevant incident/situation could potentially discover the specific identities of and/or further related information about individuals, such as their ethnicity or mental health status. However, using the example provided by the Home Office, if indeed this example is one of those included within the dataset, the individual's identity is already in the public domain by virtue of the newspaper article which contains considerably more detail about him. Also, whilst the Home Office has said that this newspaper article correlates to an entry within a completed police force submission, the Commissioner has not seen any definitive proof that this is actually that same incident. The perpetrator concerned, according to that article, has allegedly committed a number of offences and it is not known how many of these may be recorded in the dataset, if indeed any of them are.

37. Further, from the information provided to the Commissioner, there are no specific date entries within the withheld information. Any age related information appears to be recorded in bands spanning a significant period (seemingly either 18-34 or 34-49 in the extracts provided to the Commissioner). Age, together with ethnicity, disability and mental health entries are "officer perceived" ie the police officer has formed a perception of that individual based on their appearance/state of mind/behaviour, etcetera. This means that the information recorded is not definitive and may not accurately reflect an individual's status. Indeed, the guidance within the Home Office's full data set states:

*"- To find details of a specific person/event – all subject details (e.g. age, gender) are reported as 'perceived by the officer', so should not be taken as 'self-reported' by the subject; consequently, it is possible in some cases that multiple officers reporting the details of the same subject may report different subject details, due to their differing perceptions or judgement."*

38. Additionally, the Home Office has confirmed that there are no 'free text' entries within the full data set. This means that all entries are confined to specific pre-determined criteria so there is no possibility of further identifiers having been included within the dataset.
39. For all the aforementioned reasons, the Commissioner was not persuaded that the possibility of identifying an individual, or individuals, from the withheld information, is more than remote.
40. In trying to informally resolve the case, the Commissioner contacted the Home Office to advise that her view was that the information did not constitute personal data and that she was minded to order disclosure of the remaining withheld information (minus the custody and incident numbers). She asked it to reconsider its position.
41. In reply, the Home Office said:

*"I can confirm that the spreadsheet does not contain any free text. Nevertheless, I have been asked to emphasise that there will be many other examples in the dataset similar to the [force removed] example where information (age, gender, ethnicity, mental health status) would be made available by releasing this data, not necessarily information that is already in the public domain.*

*We would wish to have a formal decision notice, not least to allow the possibility of appeal."*

42. The Commissioner asked the Home Office to elaborate on how the other information (age, gender, etc) would be "made available" as stated, should the requested information be released. In the absence of any further response from the Home Office regarding this point, the Commissioner is not persuaded that the withheld information constitutes personal data.
43. Since the Commissioner is not satisfied that the withheld information relates to identifiable individuals, she cannot be satisfied that it is personal data within the meaning of section 3(2) of the DPA 2018. Accordingly the Commissioner finds that section 40(2) is not engaged. She is not required to consider whether disclosure would contravene any of the DP principles.

### *Conclusion*

44. For the reasons set out above, the Commissioner finds that the Home Office was not entitled to rely on section 40(2) for the remaining withheld information in scope and she requires the Home Office to disclose this information as set out in the step at paragraph 3 of this notice.

### **Other matters**

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45. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA.
46. Part VI of the section 45 Code of Practice states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale

is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.

47. The Commissioner is concerned that in this case, it took over seven months for an internal review to be completed.

48. The Home Office has explained that:

*"The delay to the internal review had two causes: first, the fact that we are currently unable to give priority to internal reviews over initial requests, because of the primary need to respond to at least 90% of initial requests within 20 working days; and secondly because the clearance of the disclosure of information to [the complainant] at a time when Ministers were changing took longer than we would have wished".*

49. In addition, the Home Office caused further delay in this case by failing to respond in a timely manner to the Commissioner's investigation.

50. Notwithstanding the Home Office's explanation, the Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft "Openness by Design strategy"<sup>4</sup> to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"<sup>5</sup>.

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<sup>4</sup> <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

<sup>5</sup> <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

## Right of appeal

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51. 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](mailto:grc@justice.gov.uk)

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

52. 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.

53. 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**  
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