

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 July 2020

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

Decision (including any steps ordered)

1. The complainant has requested information regarding an investigation. West Yorkshire Police ("WYP") would neither confirm nor deny ("NCND") holding any information by virtue of sections 30(3) (investigations and proceedings) and 40(5)(B) (personal information) of the FOIA.
2. The Commissioner's decision is that WYP has applied section 30(3) appropriately to the requested information. WYP is not required to take any steps as a result of this decision.

Background

3. The Commissioner understands that the complainant paid a company to produce a report. This company arranged for the report to be compiled by a third party and the complainant was dissatisfied with its content. He believes that he has been defrauded out of a significant amount of money by the author of this report and he is seeking their details to enable him to take civil proceedings.

Request and response

4. On 8 October 2019, the complainant wrote to WYP and requested information in the following terms:

"Reference [redacted] [name redacted] [name redacted] [name redacted] [title redacted] investigation [name redacted].

I understand now from [name redacted] Casework and Information Officer at the West Yorkshire PCC that the Bank accounts of the above were analysed in the investigation ref [redacted].

In this investigation [name redacted] claimed we paid him for project analysis reports to be carried out by a 3rd party service provider, we know the reports were fabricated and have evidence that the reports are falsified.

Therefore I am requesting under the freedom information that we can have the Company name or personal name of this 3rd party service provider so we can take the appropriate action against them. We have asked [name redacted] for this on several occasions and I also believe [name redacted] was asked in Court for this information and he failed has refused to disclose this 3rd party service provider.

The PCC advise us the Bank accounts of the [name redacted] have been analysed so this information will be available, I am requesting this to enable us to take action against the 3rd party service provider who fabricated these reports."

5. WYP responded on 4 November 2019. It refused to confirm or deny that it held the requested information, citing sections 30(3) and 40(5) of the FOIA.
6. Following an internal review, WYP wrote to the complainant on 23 December 2019 maintaining its original decision.

Scope of the case

7. The complainant contacted the Commissioner on 27 January 2020 to complain about the way his request for information had been handled.
8. The complainant confirmed that there had already been a civil court hearing and his request was related to a third party service provider. He acknowledged that his concern was probably a police matter.
9. The complainant also explained that the requested information would enable him (and others) to proceed with legal action against the person/s or company who he considers has taken thousands of pounds for fabricating reports.

10. The Commissioner will consider WYP's application of exemptions to the requested information.

Reasons for decision

Section 1(1)(a) – confirming or denying that information is held

11. Section 1(1)(a) of the FOIA requires a public authority to inform a requester whether it holds the information specified in the request. However, there may be occasions when complying with the duty to confirm or deny under section 1(1)(a) would itself disclose sensitive or potentially damaging information that falls under an exemption. In these circumstances, the FOIA allows a public authority to respond by neither confirming nor denying whether it holds the requested information. The decision to use a NCND response will not be affected by whether a public authority does or does not hold the requested information. The starting point and main focus in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.

Section 30 – investigations and proceedings

12. WYP explained that, if held, the information would be exempt under section 30(3) by virtue of section 30(1)(a) of the FOIA.

13. Section 30(1)(a) of the FOIA states:

"(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained –

*(i) whether a person should be charged with an offence, or
(ii) whether a person charged with an offence is guilty of it."*

14. The Commissioner considers that the phrase "*at any time*" means that information can be exempt under section 30(1) if it relates to a specific ongoing, closed or abandoned investigation.

15. Section 30(3) of the FOIA states:

"The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2)."

16. Section 30(3) therefore provides an exclusion from the duty to NCND whether information is held in relation to requested information which, if it was held, would fall within section 30(1).
17. Consideration of section 30(3) involves two stages; first, the information described in the request must fall within the class described in section 30(1). Secondly, the exemption is qualified by the public interest. This means that if the public interest in maintaining the exemption does not outweigh the public interest in confirming or denying whether information is held, then confirmation or denial must be provided.
18. WYP explained that it has a duty to investigate offences and allegations of offences. In addition, it explained that, if held, the requested information would have been held for the purpose of a criminal investigation, with a view to ascertaining whether a person should be charged with an offence or was guilty of an offence.
19. WYP also explained that, if held, the information would have been held in relation to a specific investigation and therefore falls within the class of information described in section 30.
20. The Commissioner is satisfied that, as a police force, WYP has a duty to investigate offences and allegations of offences. She considers that information held for the purposes of a police investigation will generally fall within the description at section 30(1)(a).
21. The Commissioner therefore accepts that the requested information, if held, would be held by WYP for the purposes of an investigation and therefore would fall within the class described in section 30(1)(a).
22. The Commissioner is therefore satisfied that section 30 is engaged.
23. As section 30 is a class-based, qualified exemption it is subject to public interest considerations.

Public interest arguments in favour of confirming or denying whether the requested information is held

24. WYP acknowledged that confirmation or denial that the requested information exists could provide reassurance to the complainant and the general public that such investigations are conducted thoroughly and appropriately. It also explained that it is important that the public have confidence in WYP as it is charged with upholding the law. Confidence will be increased by allowing scrutiny of its performance and this may involve examining the decisions taken in particular cases.
25. The complainant explained that he wanted the requested information to challenge reports produced by a third party service provider in relation

to previous civil proceedings, and, as such, can be described as having a 'personal interest' in the information.

26. The complainant advised that the requested information would enable him (and others) to proceed with legal action against the person or persons in question.

Public interest arguments in favour of maintaining the exclusion of the duty to confirm or deny holding the requested information

27. WYP explained that confirming or denying whether it held the requested information in relation to a specific investigation would itself constitute a disclosure. It argued that the release of any details relating to an investigation, such as the identification of witnesses, could hinder the prevention or detection of crime and impact upon its investigatory and prosecution processes generally, including prejudice to future investigations and proceedings.
28. In addition, WYP explained that release of any information would compromise its law enforcement investigative functions, as disclosure could lead to misinformation on where the investigation was directed and who may or may not have been of interest. WYP would not wish to reveal who, what and when intelligence is recorded and the extent of its investigation, as this would undermine law enforcement and investigative processes.
29. WYP confirmed that it will only disclose information concerning investigations when it considers that no harm will be caused to the investigative process or to any individual involved in the investigation. It also pointed out that it had not previously disclosed any information regarding the investigation identified in the request.
30. WYP also explained that it is in the public interest to allow investigators the necessary space to determine the course of the investigations that they have a duty to conduct. Disclosure of the information, even in an investigation that is not ongoing (as in the present case), may undermine the future prosecution of individuals and the role of the criminal courts as the sole forum for determining guilt.

Balance of public interest arguments

31. WYP argued that the balance of public interest arguments in this case, lies in favour of neither confirming nor denying that any information is held. In addition, in considering the balance of the public interest in relation to the application of both the substantive exemption and the NCND provisions of section 30, WYP considered that significant weight has to be given to the need to protect its ability to adopt a consistent

approach when responding to these types of requests about investigations into named individuals in the future.

32. WYP explained that section 30 was designed to prevent disclosures that would prejudice or harm either a particular investigation or set of proceedings. This also includes harm to investigatory and prosecution processes generally and any prejudice to future investigations and proceedings. It argued that the public interest in maintaining the exemption is favoured in this case.
33. The Commissioner has also considered the balance of the public interest in this case, including what public interest there is in WYP confirming or denying whether or not it holds any of the requested information. In addition, the Commissioner has considered whether such confirmation or denial would be likely to harm any investigation, which would be counter to the public interest. She has also considered what weight to give to these competing public interest factors.
34. The purpose of section 30 is to protect the effective investigation and prosecution of offences. The Commissioner considers that it is not in the public interest to jeopardise the ability of the police to investigate crime effectively.
35. However, the Commissioner also recognises the importance of the public having confidence in public authorities whose role is to uphold the law. She considers that confidence will be increased by allowing scrutiny of their performance, which may involve revealing whether or not any actions have been necessary, or are potentially ongoing, in particular cases such as this one.
36. The Commissioner also recognises that a confirmation or denial in relation to an investigation might be harmful to WYP's responsibility to manage its investigations effectively. She considers that disclosure of information could undermine WYP's present and future investigations and therefore hinder its ability to conduct its policing functions, which would not be in the public interest.
37. The Commissioner accepts that a public authority may need to issue a NCND response consistently, over a series of separate requests, regardless of whether 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. For example, were no information held in this case, then it would be a simple matter for WYP to confirm this. However, when a similar request is made and information is held and WYP does not wish to reveal this to be the case, by taking a NCND stance on that occasion only, it may be inferred that information is held.

38. This does not mean, however, that public authorities should use a NCND response in a blanket fashion. They should base their decision on the circumstances of the particular case with regard to the nature of the information requested and with appropriate consideration given to the public interest test.
39. The Commissioner acknowledges that there is general public interest in how allegations of fraud are handled by the police. However, she notes WYP's explanation that in this case, either confirming or denying whether the requested information is held, may undermine the future prosecution of individuals and could impact on the role of the criminal courts as the sole forum for determining guilt.
40. The Commissioner also notes that the complainant has previously been provided with related information under section 35 of the Data Protection Act 1998 for the purpose of allowing him to bring civil proceedings. Information was provided under that access regime, however, it would seem that the information requested here was not included. It is not clear whether this is because it was not requested or if it was refused. However, it is noted that, in an attempt to provide advice and guidance to the requester, WYP suggested to the complainant that there might be a more appropriate route to the information - namely that he make a request under Data Protection Act 2018 (which has since superseded the 1998 Act) for the information, advising that it is for the purposes of intended court proceedings. WYP has explained to him:

"FOI is disclosure to 'the world' not only the person making the request therefore this is not the most appropriate route to request this type of information.

You would most likely need a court order to request third party information. Our Data Protection team can advise on this more specifically".

41. It is unclear whether or not he has taken such action.
42. The Commissioner considers that confirmation or denial in this case could create a perception among the wider public that, following court proceedings, individuals can ask for information in order to continue with their personal allegations.
43. The Commissioner also accepts that either confirming or denying whether the requested information is held would be likely to disrupt the flow of information and intelligence to WYP; and there would be an inevitable impact on its ability to conduct efficient and well evidenced criminal investigations which would be strongly against the public interest.

44. Furthermore, given that the request names particular parties, the Commissioner considers that confirmation or denial in this case could create a perception among the wider public that individuals who cooperate with WYP (or any police force), whether as victim, witness or suspect, risk having this fact disclosed into the public domain, and that communications with the police may prove not to be truly confidential. She also considers that it is vital that WYP is able to give a guarantee of confidentiality to anyone who wishes to complain or give evidence to it or who may be willing to cooperate with it about criminal matters.
45. It is of particular importance to stress that WYP's response would not be only for the complainant, it must be suitable for provision to the world at large.

Conclusion

46. Taking all of the above into account, the Commissioner is satisfied that section 30(3) has been applied appropriately in this case and that the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information.
47. The Commissioner has therefore not gone on to consider WYP's application of section 40(5).

Right of appeal

48. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

49. 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.

50. 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