

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 4 February 2021

**Public Authority:** Chief Constable of Merseyside Police  
**Address:** Police Headquarters  
Canning Place  
Liverpool  
Merseyside  
L1 8JX

#### Decision (including any steps ordered)

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1. The complainant has requested information about the cause of a fire at Liverpool Echo Car Park on 31 December 2017. Merseyside Police refused the request on the grounds that some of the information was accessible to the complainant under the civil disclosure process, and was therefore exempt under section 21. It said the remaining information was exempt under sections 40(2) (personal information) and 30 (investigations and proceedings) of the FOIA.
2. The Commissioner's decision is that Merseyside Police was entitled to rely on sections 21 and 40(2) of the FOIA to refuse the request. However, she found that Merseyside Police breached section 1(1)(a) of the FOIA by failing to confirm to the complainant that it held some of the information described in the request.
3. The Commissioner requires no steps as a result of this decision.

## Background

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### *The Liverpool Echo Arena Fire*

4. On the evening of 31 December 2017, a car fire started in the multi-storey car park next to the Liverpool Echo Arena. The car park, and over 1,000 cars parked there, were destroyed by the fire<sup>1</sup>. At the time, the Association of British Insurers estimated that the blaze was likely to result in insurance claims worth around £20m<sup>2</sup>.
5. The request in this case involves an attempt by the complainant, a solicitor acting for a client, to establish liability for the fire, with a view to taking further legal action. He initially made an FOIA request for information about the cause of the fire, and then, on the advice of Merseyside Police, a civil disclosure application for the disclosure of information relating to prospective legal proceedings.

### *The civil disclosure process and personal data*

6. Personal data is regulated in the UK under the General Data Protection Regulation (GDPR) and the Data Protection Act 2018 (the DPA). They set out requirements which must be complied with when processing personal data.
7. Where a civil disclosure application is made for information which includes personal data, schedule 2, part 1, paragraph 5 of the DPA<sup>3</sup> permits that the personal data may be disclosed to a third party if it is necessary for the purposes of, or in connection with:
  - legal proceedings, including prospective legal proceedings;
  - obtaining legal advice; or
  - establishing, exercising or defending legal rights.
8. The provision is sometimes incorrectly interpreted as *requiring* such disclosures be made on receipt of a valid application. In fact, it simply means that if a request for personal data meets the criteria at schedule 2, part 1, paragraph 5 of the DPA, it *may* be permissible for the data

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<sup>1</sup> <https://www.bbc.co.uk/news/uk-england-manchester-42529615>

<sup>2</sup> <https://www.bbc.co.uk/news/uk-england-merseyside-42554597>

<sup>3</sup> <https://www.legislation.gov.uk/ukpga/2018/12/contents/enacted>

controller to disclose personal data to a third party. However, making a civil disclosure application does not guarantee disclosure and in some situations the decision may be taken not to release the information.

9. The Commissioner has no power to enforce compliance with civil disclosure applications.

## Request and response

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10. On 14 February 2020, the complainant wrote to Merseyside Police and requested information in the following terms:

*"The request is made for information held by Merseyside Police in respect of the Liverpool Echo Car Park Fire on the 31st December 2017. We require - - Police report and incident log details – Any details of the vehicle that caused the fire".*

11. Merseyside Police responded to the request on 9 March 2020. It said that it did not hold a police report on the fire as it was not a criminal incident. It explained that the matter was instead investigated by Merseyside Fire and Rescue Service (MF&RS) and Liverpool City Council, and it suggested the complainant contact them for more information.
12. Merseyside Police said that the record of the fire in its incident log was exempt from disclosure under section 21 (information accessible to the applicant by other means) of the FOIA, because it was accessible to the complainant under the civil disclosure process. It provided a link to information on its website about how to make a civil disclosure application to obtain information required for legal proceedings.
13. It qualified this by explaining that information about the vehicle that may have caused the fire constituted personal data, and was exempt from disclosure under section 40(2) (personal information) of the FOIA.
14. The complainant followed Merseyside Police's recommendation and, on 6 April 2020, he made a civil disclosure application to its Data Access Unit, confirming that he required the information *"...for the purpose of prospective legal proceedings, advice and investigations"*. He submitted a payment of £84.40, in compliance with Merseyside Police's published charging regime<sup>4</sup> for civil disclosure applications.

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<sup>4</sup> [https://www.merseyside.police.uk/SysSiteAssets/foi-media/merseyside/other\\_information/2020.21-fees-and-charges.pdf](https://www.merseyside.police.uk/SysSiteAssets/foi-media/merseyside/other_information/2020.21-fees-and-charges.pdf) Section 9

15. Merseyside Police then contacted the complainant on 13 May 2020, and advised him as follows:

*"[Merseyside Police] is not dealing with this incident as it was an accident and not a crime. You will need to contact the council with any requests."*

16. The complainant replied to Merseyside Police as follows:

*"...our request ... was for the release of a incident report log which was confirmed by the freedom of information team as being in existence. However, they advised we would need to contact the DPA team to obtain this. Are you able to release this report log as this will form part of our investigations into litigation of a motor claim".*

17. The complainant told the Commissioner that he did not receive a response to this email.

### **Scope of the case**

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18. The complainant contacted the Commissioner on 4 June 2020 to complain about the way his request for information had been handled. Noting that his civil disclosure application had been unsuccessful, he disagreed with Merseyside Police's decision to apply sections 21 and 40(2) to refuse his FOIA request.

19. In view of the exchange of correspondence that had taken place between the complainant and Merseyside Police about the matter, the Commissioner exercised her discretion and did not require the complainant to request an internal review prior to accepting his complaint for investigation.

20. During the Commissioner's investigation, Merseyside Police changed its position with regard to the civil disclosure application. It disclosed to the complainant a redacted copy of the incident log for the fire. It told the complainant:

*"... the information which allegedly identifies the user of the vehicle believed to be the seat of the fire is redacted. The redaction has taken place as the information is not Merseyside Police information, as it was supplied by the MF&RS and the origin of that information cannot be confirmed by the Force".*

21. The complainant told the Commissioner that it was precisely this redacted information that he required, in order to:

*"...administer investigations and open communication channels with the vehicle's motor insurer to establish liability".*

22. The complainant asked the Commissioner to consider whether, in view of his legitimate interest in the information and the access afforded by the civil disclosure process, section 40(2) of the FOIA could be set aside and the vehicle information disclosed to him.
23. Having told the complainant that it did not hold a police report for the incident, during the Commissioner's investigation Merseyside Police said that it had recently identified that it did hold some relevant information. It explained:

*"Revised information - Police report – An occurrence report was created on 9th March 2018 to record an interview at the request of M.F & R. S. with the user of a vehicle which was believed to be where the fire started...*

*The fire was subject of investigation by Merseyside Fire & Rescue Service and Liverpool City Council, which are the principal investigative and reporting bodies. The Merseyside Police occurrence is restricted to an interview with the vehicle user who provide a prepared statement and was accompanied to the interview by legal representation [Solicitor & barrister], and a record of CCTV compiled on behalf of M.F. & .R.S. from CCTV provided by that Service."*
24. Merseyside Police considered that this information engaged the exemption at section 40(2) of the FOIA. It also argued that it was exempt by virtue of section 30(1) (a) (i) and (ii) (investigations and proceedings) of the FOIA. The complainant has been notified of Merseyside Police's revised position with regard to the police report.
25. The analysis below considers whether Merseyside Police was entitled to rely on section 21 to refuse the FOIA request for the incident log. She has also considered whether section 40(2) was correctly applied to withhold the redacted section of the incident log, and the police report created in March 2018. In view of her decision with regard to the application of those exemptions, it has not been necessary to consider its claim that section 30(1) also applied.
26. The Commissioner has viewed the withheld information when reaching her decision.

## Reasons for decision

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### Section 1 – general right of access

27. Section 1(1)(a) of the FOIA states that an individual who asks for information is entitled to be informed whether the information is held.

28. In this case, the complainant asked for a copy of the police report of the incident and was told that no police report was held because the matter had been dealt with as an accident, rather than as a crime.
29. During the Commissioner's investigation, it emerged that Merseyside Police did hold a police report on the incident, because a brief investigation had been conducted to ascertain whether or not a criminal offence had been committed.
30. By failing to confirm to the complainant that it held the police report, Merseyside Police breached section 1(1)(a) of the FOIA.
31. The Commissioner uses intelligence gathered from individual cases to inform her insight and compliance function. This aligns with the goal in her draft "Openness by design"<sup>5</sup> strategy 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>6</sup>.

## **Section 21 – information accessible to the applicant by other means**

32. Section 21(1) states:

*"Information which is reasonably accessible to the applicant otherwise than under section 1 [general right of access] is exempt information".*

33. The purpose of the exemption is to ensure that there is no right of access to information via the FOIA if it is available to the applicant by another route.
34. Section 21(2)(a) states that information may be regarded as reasonably accessible to the applicant *"even though it is accessible only on payment"*.
35. The Commissioner's guidance on section 21 clarifies that if only part of the requested information is reasonably accessible, section 21 will only apply to that part of the request<sup>7</sup>.

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<sup>5</sup> <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

<sup>6</sup> <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

<sup>7</sup> <https://ico.org.uk/media/for-organisations/documents/1203/information-reasonably-accessible-to-the-applicant-by-other-means-sec21.pdf>

36. Merseyside Police told the complainant that the incident log was reasonably accessible to him under the civil disclosure process, and it provided him with information on how to do this. However, it qualified this response by stating that any information in the incident log on the vehicle thought to have caused the fire was exempt from disclosure under section 40(2) of the FOIA. This places the information covered by that part of the request outside the scope of the exemption at section 21 of the FOIA.
37. The complainant subsequently made a civil disclosure application and successfully obtained a copy of the incident log, minus the vehicle information, and also, some other operational information (mainly comprising information which identified particular police officers and staff). The Commissioner is satisfied that section 21 was correctly applied to the main part of the incident log which was disclosed, in that the information was 'reasonably accessible' to the applicant otherwise than under the FOIA.
38. For the reasons set out in paragraph 35, section 21 is not engaged in respect of the vehicle information and the other operational information which Merseyside Police withheld from the incident log.
39. The Commissioner has considered Merseyside Police's decision to withhold the vehicle information in the section 40(2) analysis, below. The complainant has not expressed any concerns about the redaction of the other, operational information and so it has not been considered further in this decision notice.

### **Section 40(2) – personal information**

40. Section 40(2) of the 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.
41. In this case the relevant condition is contained in section 40(3A)(a)<sup>8</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 ('the DP principles'), as set out in Article 5 of the GDPR.

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<sup>8</sup> As amended by Schedule 19 Paragraph 58(3) DPA.



42. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data then section 40 of the FOIA cannot apply.
43. 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 DP principles.

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

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

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

45. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
46. 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.
47. 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.
48. As discussed in the section 21 analysis, Merseyside Police made several redactions, not all of which related to the vehicle which was the possible source of the fire. Having viewed a complete copy of the incident log, the Commissioner notes that the only relevant information to be redacted was the name and phone number of an individual who had contacted Merseyside Fire and Rescue Service to say they thought the fire may have started from their vehicle.
49. Turning to the police report created in March 2018, this contains information about a statement made by the person named in the incident log, regarding the fire, and the decisions Merseyside Police took as a result of that statement.
50. In the circumstances of this case, having considered this withheld information, the Commissioner is satisfied that the information relates to a living individual who can be identified from that information. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
51. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under



the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

52. The most relevant DP principle in this case is principle (a).

***Would disclosure contravene principle (a)?***

53. Article 5(1)(a) of the GDPR states that:

*“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.*

54. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
55. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
56. In addition, if the requested data is criminal offence data, in order for disclosure to be lawful and compliant with principle (a), it must also meet the requirements of Article 10 of the GDPR.

***Is the withheld information criminal offence data?***

57. Information relating to criminal convictions and offences is given special status in the GDPR.
58. Article 10 of the GDPR defines ‘criminal offence data’ as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to:

*(a) The alleged commission of offences by the data subject; or*

*(b) Proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.*

59. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does comprise criminal offence data. She has reached this conclusion on the basis that it relates to an investigation by Merseyside Police into whether a criminal offence had been committed, in which the data subject was identified as a suspect.
60. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.

61. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under the FOIA are the conditions at Part 3 paragraph 29 (consent from the data subject) or Part 3 paragraph 32 (data made manifestly public by the data subject).
62. The Commissioner has seen no evidence or indication that the data subject has specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
63. As none of the conditions required for processing criminal offence data are satisfied there is no legal basis for its disclosure. Processing this criminal offence data would therefore breach principle (a) and so this information is exempt from disclosure under section 40(2) of the FOIA.

## Right of appeal

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64. 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)

65. 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.

66. 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 .....**

**Samantha Bracegirdle**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**