

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 January 2021

Public Authority: Chief Constable of Avon and Somerset Constabulary

Address: Force Headquarters
PO BOX 37
Valley Road
Portishead
Bristol
BS20 8QJ

Decision (including any steps ordered)

1. The complainant has requested information from Avon and Somerset Constabulary ("the Constabulary") regarding crime reference numbers/incident numbers made by a missing person, in the year leading up to them going missing.
2. The Commissioner's decision is that the Constabulary are entitled to rely on section 40(5) to refuse to confirm or deny that it holds the information.
3. The Commissioner does not require the public authority to take any further action in this matter.

Request and response

4. On 14 March 2020, the complainant wrote to the Constabulary and requested information in the following terms:

"Under the Freedom of Information Act please provide me with:

1. Any crime reference numbers and/or incident numbers for any reports made to Avon and Somerset Police by missing person [Named Person] in the 12 months before she went missing.

2. If you are not prepared to release these reference numbers please confirm the nature of any reports that she reported to Avon & Somerset Police in the 12 months before she went missing, including details of any alleged offences or intelligence reported and when that report was made.

I appreciate you may have redact any information from these records such as names or addresses of individuals including any third parties to comply with the act, but this can be done through redactions.

3. Please confirm if any physical evidence was provided by the informant on any of these occasions and if so, what that material was.

4. Please say if there was any police action in response to any of these reports and/or alleged offences, what the action was and any outcomes were."

5. The Constabulary responded on 14 April 2020. It refused to confirm or deny that it held the requested information, applying section 40(5) of the FOIA -personal information.
6. Following an internal review the Constabulary wrote to the complainant on 20 May 2020. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 15 August 2020, to complain about the way his request for information had been handled.
8. The Commissioner notes that the complainant was unhappy with the Constabulary applying exemption 40(5) to all parts of the FOIA request, as within the original response, it advised that it "can neither confirm nor deny that we hold any information relevant to question 1...".
9. The Commissioner needs to consider if the Constabulary was correct to apply section 40(5) to part 1 of of the request and if it is correct, it would also apply to points 2, 3 and 4.
10. The Commissioner considers that the scope of the investigation is to determine if the Constabulary is entitled to rely on section 40(5), to neither confirm nor deny, that it holds the requested information.

Reasons for decision

11. Section 1(1)(a) of FOIA provides that where a public authority receives a request for information, it is obliged to tell the applicant whether it holds that information. This is commonly known as the duty to confirm or deny.
12. There are however exemptions from the duty to confirm or deny. It should be noted that when applying an exemption from the duty to confirm or deny, a public authority is not restricted to only considering the consequences of the actual response that it would be required to provide under s1(1)(a). For example, if it does not hold the information, the public authority is not limited to only considering what would be revealed by denying the information was held, it can also consider the consequences if it had to confirm it did hold the information and vice versa.
13. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.
14. Therefore, for the Constabulary to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny it holds information falling within the scope of the request the following two criteria must be met:
 - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data;
 - and
 - Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

15. Section 3(2) of the DPA 2018 defines personal data as:

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

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

17. 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.
18. Clearly the request concerns a named, living individual and therefore confirmation or denial as to whether or not the requested information is held would reveal something about that person.
19. Regarding whether the individual is living, it is the Commissioner's established approach to assume that individuals aged under 100 years are still living where there is no evidence to the contrary. This is in line with The National Archive's code of practice relating to information management¹, and with its Guide to Archiving Personal Data², which was developed in consultation with the Commissioner.
20. The Commissioner has no evidence that the individual is deceased and is satisfied, in this case, that they can be presumed to be still living, using the 100-year rule.
21. The Commissioner is satisfied, from reviewing the request, that if the Constabulary were to either confirm or deny it held the information, it would involve the disclosure of personal data. The first criterion set out about is therefore met.
22. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party (or parties) does not automatically prevent the Constabulary from refusing to confirm whether it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.
23. The Commissioner considers that the most relevant data protection principle is principal (a).

Would confirming whether or not the requested information is held contravene one of the data protection principles?

24. Article 5(1)(a) GDPR states that:

¹ <http://www.nationalarchives.gov.uk/documents/information-management/dp-code-of-practice.pdf>

² <http://www.nationalarchives.gov.uk/documents/information-management/guide-to-archiving-personal-data.pdf>

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

25. In the case of a 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 – or as in this case, the public authority can only confirm whether or not it holds the requested information – if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), be fair and be transparent.

Lawful processing: Article 6(1)(f) GDPR

26. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
27. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"³.

28. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under FOIA it is necessary to consider the following three-part-test:

³ Article 6(1) goes on to state that:

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA 2018) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

(i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

(ii) **Necessity test:** Whether confirming or denying that the requested information is held is necessary to meet the legitimate interest in question;

(iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject(s).

29. The Commissioner considers that the test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

30. In considering any legitimate interests in confirming whether or not the requested information is held in response to a FOI request, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sake as well as case specific interests.

31. Further, a wide range of interests may be legitimate interests. They can be the requester’s own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

32. The Constabulary stated that there is a legitimate interest in confirming or denying the existence of information as it would show that police action is effective and efficient in responding to crime and/or intelligence reports. It also explained that there is a legitimate interest in having confidence in the police, and trusting that they will be transparent and accountable in their actions.

33. The Commissioner is satisfied that there may be a wider legitimate interest, i.e how the Constabulary responds to crime or intelligence reports, leading to confidence and trust in the Constabulary.

Is confirming whether or not the requested information is held necessary?

34. ‘Necessary’ means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA that the requested information is held

must therefore be the least intrusive means of achieving the legitimate aim in question.

35. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

36. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject(s)' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if a data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
37. Disclosing whether the requested information was held would reveal whether or not the missing individual had made any reports to the Constabulary before their disappearance, which could reveal personal information about the individual.
38. Whilst the Commissioner notes the complainant's argument that the individual has been missing for 24 years, as detailed above in paragraph 19, the Commissioner's established approach is to assume that individuals aged under 100 years, are still living where there is no evidence to the contrary. As such, the information requested would relate to a living person, who would be identifiable and as such, it is considered personal data.
39. For the Constabulary to confirm or deny that the requested information is held, it would be giving out personal information, as the data subject has been fully named within the complainant's request, therefore it would be known if the data subject had or had not made any reports to the Constabulary.
40. The Commissioner notes that the Constabulary has argued that to confirm or deny if the information is held, it could have negative repercussions if the missing person is identified. It could lead the missing person to not trust the police and therefore, they would not assist with any enquiries, such as failing to provide evidence through fear it would be released to the public.

41. The Constabulary also advised that to confirm or deny the requested information is held, could cause unnecessary contact to the missing person's family, which would cause further distress to them.
42. For these reasons, the Constabulary considers that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful.
43. The Commissioner has considered parts 2, 3 and 4 of the complainants request and concludes that the Constabulary would also apply section 40(5) neither confirm nor deny that the information is held, as to provide any other response would reveal if any data is held in response to part 1 of the request.
44. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful.
45. The Commissioner has therefore decided that the Constabulary was entitled to refuse to confirm whether or not it held the requested information on the basis of section 40(4B)(a)(i) of the FOIA.

Right of appeal

46. 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

47. 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.
48. 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

Phillip Angell
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SK9 5AF