

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 October 2021

Public Authority: Commissioner of the Metropolis
Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant has requested information from the Metropolitan Police Service (the "MPS") about whether or not it had conducted a particular investigation. The MPS refused to confirm or deny whether it had done, citing the exemptions at sections 40(5) (Personal information), 30(3) (Investigations and proceedings) and 31(3) (Law enforcement) of the FOIA.
2. The Commissioner's decision is that the MPS was entitled to rely on section 40(5) of the FOIA to issue a neither confirm nor deny response. No steps are required.

Request and response

3. On 9 November 2020, the complainant wrote to the MPS and requested information in the following terms:

"Was any investigation or enquiry carried out by The Met as result of Dominic Cummings' widely-publicised movements in March, April and May 2020? Please specify if Mr Cummings was spoken to or if any evidence was gathered. I also require details of any subsequent decision by the Met in its assessment of the matter, especially any decision on whether or not to investigate".

4. On 3 December 2020 the MPS responded. It refused to confirm or deny holding the requested information, citing sections 40(5), 30(3) and 31(3) of the FOIA.
5. On 3 December 2020 the complainant requested an internal review.
6. The MPS provided an internal review on 22 December 2020, in which it maintained its position.

Scope of the case

7. The complainant contacted the Commissioner on 28 December 2020 to complain about the way his request for information had been handled.
8. The complainant asked the Commissioner to consider the following:

"The Met Police have refused to disclose if any investigation was carried out as a result of Dominic Cummings' widely-publicised movements in March, April and May 2020. The force asked [sic] to specify if Mr Cummings was spoken to or if any evidence was gathered. I also requested details of any subsequent decision by the Met in its assessment of the matter, especially any decision on whether or not to investigate. I believe the public interest far outweighs the stated reasons for refusal. In fact, it is fundamental to the public administration of law and order. I also believe the personal information is (a) already in the public domain and (b) I am happy for the documents to be redacted as necessary. I also argue that there is no risk of prejudice to an investigation that may or may not have taken place and in any case would now be completed".

9. The Commissioner will consider the citing of exemptions below.

Reasons for decision

Neither confirm nor deny ("NCND")

10. Section 1(1)(a) of the FOIA requires a public authority to inform a requester whether it holds the information specified in the request.
11. The decision to use a NCND response will not be affected by whether a public authority does or does not in fact hold the requested information. The starting point, and main focus for NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.

12. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not 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.
13. The MPS has taken the position of neither confirming nor denying whether it holds any of the requested information in its entirety, citing sections 40(5), 30(3) and 31(3) of the FOIA. The issue that the Commissioner has to consider is not one of disclosure of any requested information that may be held, it is solely the issue of whether or not the MPS is entitled to NCND whether it holds any information of the type requested by the complainant.
14. Put simply, in this case the Commissioner must consider whether or not the MPS is entitled to NCND whether it holds any information about the suggested investigation.
15. The MPS has explained to the Commissioner:

"The MPS is required to use NCND exemptions for the need of consistently, regardless of whether the requested information is held or not in order to protect information and personal data.

The MPS is of the opinion that the Section 30(3) neither confirm nor deny argument is intrinsically linked to the section 40(5) argument. Whilst there is no evidence that information relating to this case has ever been placed officially by the MPS into the public domain, it is recognised that any acknowledgement under FOIA will do just that. In this instance, a statement confirming or denying whether information is held in relation to any part of the complainant's request would primarily require disclosing to the world at large whether or not an investigation existed in relation to a particular allegation.

The MPS have to adopt a consistent approach when responding to similar requests in relation to investigations whether they have been conducted or not. If the MPS routinely confirmed they were not investigating an individual and this was the case however when we were actually investigating an individual, we adopt a 'neither confirm nor deny' approach. Then this decision to do so could be assumed that we were in fact investigating the individual, which would undermine the whole rationale for adopting the 'neither confirm nor deny' responses in the first place".

Section 40 – personal information

16. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held 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 UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.
17. Therefore, for the MPS to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether 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?

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

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

19. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
20. 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.
21. Clearly the requested information relates to a named party. Therefore any information, if held, would be their personal information.
22. For the reasons set out above the Commissioner is satisfied that if the MPS confirmed whether or not it held the requested information this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.
23. The MPS has also argued that confirming or denying whether it holds the requested information would result in the disclosure of information relating to the criminal convictions and offences of a third party.
24. Information relating to criminal convictions and offences is given special status in the UK GDPR. Article 10 of UK GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and

offences. Under section 11(2) of the DPA 2018 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 of the disposal of such proceedings including sentencing.

25. The complainant wishes to know whether or not the MPS has undertaken an investigation or enquiries regarding the alleged commission of offences by a named party (the data subject). Were it to confirm or deny holding any relevant information, this would therefore reveal whether or not it had done so.

26. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes confirming or denying whether the information is held in response to a FOIA request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA 2018 can be met.

27. The Commissioner therefore asked the MPS to consider each of these conditions and whether any of them could be relied on to confirm or deny whether it held criminal offence data falling within the scope of this request. The MPS has informed her that none of the conditions can be met. Having regard for the restrictive nature of the Schedule 1, Parts 1 to 3 conditions, the Commissioner considers this to be entirely plausible.

28. Regarding this, the MPS advised:

"The MPS have considered each of the conditions of Schedule 1, Parts 1 to Part 3 of the DPA and whether any of them could be relied on to confirm or deny whether we hold criminal offend[sic] data. None of the conditions have been met... We do not have consent from the data subject and the information has not been made public".

29. As none of the conditions required for processing criminal offence data are satisfied there can be no legal basis for confirming whether or not the requested information is held; providing such a confirmation or denial would breach data principle (a) and therefore the second criterion of the test set out above is met. It follows that the MPS is entitled to refuse to confirm or deny whether it holds the requested information on the basis of section 40(5)(B) of FOIA.

30. As the Commissioner finds that the MPS was entitled to rely on section 40(5) she has not found it necessary to consider its application of the other exemptions cited.

Other matters

31. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

Information Notice

32. As the MPS failed to respond to the Commissioner's enquiries in a timely manner, or to acknowledge her correspondence, it was necessary for her to issue an Information Notice in this case, formally requiring a response. The Information Notice will be published on the Commissioner's website.
33. 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 strategy¹ 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 our Regulatory Action Policy².

¹ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

² <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

34. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

35. 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.
36. 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
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Wilmslow
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