

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 November 2022

Public Authority: Chief Constable of Durham Constabulary
Address: Police Headquarters
Aykley Heads
Durham
DH1 5TT

Decision (including any steps ordered)

1. The complainant has requested information about a specific criminal investigation which he believed was poorly handled. Durham Constabulary ('the Constabulary') would neither confirm nor deny ('NCND') holding the requested information, citing the exemption at sections 40(5A) and (5B)(a)(i) (Personal information) of FOIA. It also argued that the NCND provisions at section 31(3) (Law enforcement) and section 38(2) (Health and safety) of FOIA applied.
2. The Commissioner's decision is that the Constabulary was entitled to rely on sections 40(5A) and (5B)(a)(i) to issue an NCND response to the request. However, by failing to issue a refusal notice explaining this within 20 working days of receipt of the request, the Constabulary breached section 17(1) of FOIA.
3. The Commissioner requires no steps as a result of this decision.

Request and response

4. The complainant has told the Commissioner that his former partner was the victim of a serious assault, for which no-one has been prosecuted. He is concerned that the attack was not properly investigated by the Constabulary.

5. On 21 March 2022, the complainant wrote to the Constabulary and requested information about its investigation into the assault on his former partner:

"...you tried to implicate me in the crime (I was contacted) I believe I have a healthy interest in this case!

Therefore, please provide me with everything you hold on this case (as no one was ever prosecuted I assume this is in your Cold Case files) I will then seek legal advice about this case."

6. On 11 May 2022, the Constabulary responded. It issued an NCND response, citing section 40(5A) and (5B)(a)(i) of FOIA:

"A Freedom of Information request is not a private i.e., a one-to-one disclosure. Both the request itself, and any information disclosed, are considered suitable for open publication i.e., can be published on the Force's external website. This is because, under FOIA, any information disclosed is released into the wider public domain, effectively to the world at large and not just to one individual i.e., the person who made the FOI request.

To confirm or deny whether personal information exists in response to your request under FOIA, could publicly reveal information about you as an individual or about third-party individuals, thereby breaching the right to privacy afforded to ALL persons under the Data Protection Act 2018 (DPA) and the UK General Data Protection Regulation (GDPR)."

7. At internal review, the Constabulary maintained this position. It also applied the NCND provisions at sections 31(3) and 38(2) of FOIA.

Reasons for decision

Section 40 – Personal information

8. Section 1(1)(a) of FOIA states that an individual who asks for information is entitled to be informed whether the public authority holds that information. This is commonly known as "the duty to confirm or deny". However, there are exemptions to this duty.

Section 40(5A)

9. Section 40(5A) of FOIA excludes a public authority from complying with the duty to confirm or deny in relation to information which, if held, would be exempt information by virtue of section 40(1) of FOIA. Section 40(1) states:

“Any information to which a request relates is exempt information if it constitutes personal data of which the applicant is the data subject”.

10. Having considered the wording of the request, the Commissioner is satisfied that the complainant is the subject of part of the requested information, and that this aspect of the request is therefore for his personal data (as defined under section 3(2) of the Data Protection Act 2018). This is because the information he has requested partly relates to interactions he says he had with the Constabulary during its investigation. By definition, should the Constabulary hold information about any involvement the complainant had in the investigation, it is information which would 'relate to' and 'identify' the complainant.
11. It follows that the Commissioner considers that the complainant is a data subject within the meaning of the exemption at section 40(1) of FOIA for this part of the request.
12. In relation to such information, the provisions of section 40(5A) of FOIA mean that the Constabulary is not required to confirm deny or whether it holds it, as that duty does not arise in relation to information which is (or would be, if held) exempt information by virtue of section 40(1) of FOIA. There is no right of access to an individual's own personal data under FOIA¹.

Section 40(5B)(a)(i)

13. Turning to the part of the request which is not for the complainant's own personal data, 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 UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.
14. In practical terms, this means that a public authority may refuse to confirm or deny that it holds particular information if the mere act of confirming (or denying) that information is held would, in itself, reveal personal data about an identifiable individual, unless there is a lawful basis for doing so.
15. The request refers to the assault having been committed against the complainant's ex partner. The victim will therefore be identifiable from this description, to the complainant, his friends and family and

¹ That right, subject to exemptions, is provided under the Data Protection 2018

to anyone else who knew the couple. This information therefore falls within the definition of 'personal data' in section 3(2) of the Data Protection Act 2018, it being the victim's personal data.

16. If the Constabulary was to confirm that it did hold the requested information, it would be publicly confirming that the complainant's ex-partner had been the victim of a serious assault. The Constabulary therefore cannot confirm or deny to the general public that it holds information within the scope of the request without disclosing personal data about a third party.
17. The Commissioner has next considered whether disclosure, by way of confirming or denying that the information is held, would contravene any of the data protection principles. The most relevant data protection principle in this case is principle (a), which states:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
18. 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 (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) UK GDPR);
 - fair; and
 - transparent.
19. The Commissioner recognises that individuals have a clear and strong expectation that their personal data will be held in accordance with data protection laws. In this case, he is satisfied that the data subject would not reasonably expect the Constabulary to disclose to the world at large whether or not it held information about her being the victim of a serious assault. The data subject's identity as a victim is sensitive information which she could rightly expect would only be divulged for policing purposes.
20. The Commissioner has also determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful. In reaching this decision, the Commissioner acknowledges that the complainant's stated purpose for requiring the information was to support a complaint he wishes to make to the IOPC about the Constabulary's investigation. The Commissioner does not consider that any such complaint would be

disadvantaged by the complainant not having had access to the requested information; he can make a complaint regardless.

21. As there is no lawful basis for doing so, confirming or denying would be unlawful and therefore section 40(5B)(a)(i) is engaged.
22. The Commissioner's decision is therefore that the Constabulary was entitled to apply sections 40(5A) and 40(5B)(a)(i) of FOIA to NCND holding any of the requested information.
23. In view of this decision, the Commissioner has not gone on to consider the application of the other exemptions the Constabulary has cited. However, it is worth noting that, previously, he has upheld the application of section 31(3) of FOIA to issue NCND responses to requests for information about law enforcement matters².

Procedural matters

24. Section 1(1)(a) of FOIA states that an individual who asks for information is entitled to be informed whether the information is held. Where a public authority considers the requested information is exempt from that duty, section 17 of FOIA requires it to issue a refusal notice, explaining why, within the statutory time for compliance (ie 20 working days).
25. In this case, the Constabulary took 34 working days to issue the refusal notice. It therefore breached section 17(1) of FOIA.
26. The Commissioner has made a note of the delay for monitoring purposes.

² See, for example <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4021989/ic-136713-z1b9.pdf> and <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4021449/ic-171869-h8n0.pdf>

Right of appeal

27. 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

28. 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.
29. 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
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Wycliffe House
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