

The Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 April 2023

Public Authority: Independent Office for Police Conduct
PO Box 473
Sale
M33 0BW

Decision

1. The complainant has requested, from the Independent Office for Police Conduct ('IOPC'), information relating to a named, deceased police officer, including information about disciplinary matters, complaints and conduct reports.
2. In response, IOPC cited sections 38(2) and 44(2) of FOIA (the 'health and safety' and 'prohibitions on disclosure' exemptions), thereby neither confirming nor denying whether IOPC holds the requested information.
3. The Commissioner's decision is that IOPC was not entitled to give a 'neither confirm nor deny' ('NCND') response under either exemption.
4. The Commissioner therefore requires IOPC to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the request which confirms or denies that the requested information is held. If the requested information is held, it should either be disclosed or IOPC should issue an adequate refusal notice.
5. IOPC must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner

making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

Request and response

6. The complainant made the following information request to IOPC on 13 July 2022:

“According to [reference to journalistic content redacted] at the time of his death, [name redacted], was under investigation for his alleged role in the regional child sex abuse abuse scandal.

See also

[reference to journalistic content redacted] ...

REQUEST.

Disclose:

1. The police disciplinary/personal investigatory record of [name redacted]. This includes but is not limited to punishments or censure or other disciplinary matters.
 2. All complaints made against [name redacted]. This includes but is not limited to child abuse and sexual matters.
 3. All IPCC/IOPC and police reports relating to misconduct, wrongdoing, etc. by [name redacted] ...”.
7. The final position of IOPC, expressed in its internal review (8 September 2022), was to uphold its original decision (11 August 2022) to apply sections 38(2) and 44(2) of FOIA and thereby NCND whether IOPC holds the requested information.

Scope of the case

8. The complainant contacted the Commissioner on 12 September 2022 to complain about the way their request for information had been handled.
9. The complainant argued that IOPC was wrong to NCND whether it holds the information because IOPC itself previously “admitted ... that it holds the information”. This point will be expanded on in the analysis below.
10. The Commissioner will therefore consider whether it was appropriate for IOPC to give a NCND response.

Reasons for decision

Neither confirm nor deny ('NCND')

11. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request.
12. 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.
13. 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.
14. In the present case, IOPC has taken the position of neither confirming nor denying whether it holds any of the requested information in its entirety, citing sections 38(2) and 44(2) of 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 IOPC was entitled to NCND whether it holds any information of the type requested by the complainant.

Section 38(2)

15. Section 38(2) provides an exemption from the duty to confirm or deny whether information is held if such confirmation or denial would, or would be likely to, endanger the physical or mental health, or the safety, of any individual.
16. The Commissioner has published detailed online guidance about section 38¹ on his website.

IOPC's position

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-38-health-and-safety/>

17. On 11 August 2022 IOPC told the complainant that confirmation or denial "**would be likely to**" cause harm to and endanger the **safety** of one or more individuals" (emphasis added).
18. In its submissions to the Commissioner, IOPC said both "would" and "would be likely to", for the level of likelihood; and for the endangerment, IOPC referenced 'physical or mental health' **and** 'safety'.
19. IOPC elaborated on the individuals it envisages would or would likely be endangered.
20. Regarding the public interest test, IOPC argued that the limited public interest arguments in favour of confirming or denying whether the requested information is held are outweighed by the public interest in maintaining section 38(2), given the endangerment IOPC envisages.
21. IOPC emphasised to the complainant the information published on its website, which IOPC believes already satisfies the public interest in IOPC's accountability for Operation Linden – IOPC's investigations of complaints and conduct matters in relation to South Yorkshire Police's handling of reports about non-recent child sexual abuse and exploitation in Rotherham between 1997 and 2013.

Section 44(2)

22. Section 44(2) provides an exemption from the duty to confirm or deny whether information is held if such confirmation or denial is prohibited by an enactment, is incompatible with a retained EU obligation or would constitute a contempt of court.
23. Section 44 is an absolute exemption. It is not subject to a public interest test.
24. The Commissioner has published detailed guidance about section 44² on his website.
25. IOPC has cited the Sexual Offences (Amendment) Act 1992 (SOAA).
26. Section 1 of SOAA provides for the anonymity of victims of certain sexual offences (listed in section 2 of SOAA), stating that no matter likely to lead members of the public to identify them as victims of such offences shall be published.

² <https://ico.org.uk/media/for-organisations/documents/1186/section-44-prohibitions-on-disclosure.pdf>

27. IOPC has, specifically, cited section 1(2) of SOAA, which states that:

"Where a person is accused of an offence to which this Act applies, no matter likely to lead members of the public to identify a person as the person against whom the offence is alleged to have been committed ("the complainant") shall during the complainant's lifetime be included in any publication".

28. Furthermore, section 5 of SOAA provides that it is an offence for a person to publish any matter in contravention of section 1 of SOAA.

IOPC's position

29. In its 11 August 2022 response, IOPC noted the journalistic content cited by the complainant, and said that:

"... a publication prohibited by [SOAA] does not have to expressly identify the individual, it simply has to include information that might, when pieced together with other information, lead to the person being identified ... stating whether or not the information is held would be likely to lead members of the public to identify someone who is said to be the victim of a sexual offence".

The Commissioner's position regarding both exemptions

30. The Commissioner considers that IOPC was not entitled to give a NCND response under the NCND provisions it has cited, as neither is engaged. As explained below, this is primarily because of comments made by IOPC itself in response to a previous information request from the same complainant. The Commissioner also emphasises that the request in the present case was framed in general terms.

31. Prior to the request, numerous journalistic articles on the internet had reported that the deceased police officer had been referred to, or was being investigated by, the Independent Police Complaints Commission (now IOPC) in connection with the scandal of child sexual exploitation in Rotherham.

32. There is an important distinction between information in the public domain and official confirmation of that information. The Commissioner will only take into consideration information from an official source, such as a press statement made by a police force. In this case, the complainant has argued that IOPC itself has previously admitted holding the requested information.

33. The Commissioner notes that the complainant made a request to IOPC on 12 March 2021 for "all information held relating to [the same deceased police officer] ... this includes but is not limited to the police

referral". IOPC refused that request as vexatious on 14 April 2021, but also commented that the deceased officer "**was connected with** Operation Linden, the IOPC investigation into South Yorkshire Police's response to non-recent allegations of child sexual abuse in Rotherham" (emphasis added).

34. Whilst IOPC has said it does not believe that its 14 April 2021 comment quoted above undermines the NCND position it has taken in the present case, the Commissioner does not agree. Whilst the comment may not mean that IOPC requested any material from the officer's force, or retained any such material, IOPC's interest in the officer has already been confirmed to the public and IOPC has connected the officer with its investigation.
35. The Commissioner notes that whilst the request of 13 July 2022 focuses on a named officer, the request was general in that it was for their (full) police disciplinary record, all complaints made against them and all reports about misconduct. It was not limited to complaints relating to a particular subject. As the Commissioner's guidance³ notes, "Requests framed in very general terms are less likely to trigger the exclusion from the duty to confirm or deny".
36. For the avoidance of doubt, nothing in this decision notice should be taken to mean that IOPC does or does not hold the requested information. The Commissioner has focused on IOPC's NCND position in light of comments already published and in the public domain, and the wording of the request. He considers that in all the circumstances of this case IOPC was not entitled to give a NCND response under section 38(2) or 44(2) of FOIA.

³ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/when-to-refuse-to-confirm-or-deny-holding-information/#considerations>

Right of appeal

37. 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

38. 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.
39. 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

Daniel Kennedy
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF