

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 February 2023

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

Decision (including any steps ordered)

1. The complainants have requested a report into an allegation concerning a late relative, from the Metropolitan Police Service (the "MPS"). The MPS would neither confirm nor deny whether it held the report, citing section 40(5B) (Personal information) of FOIA.
2. The Commissioner's decision is that the MPS was entitled to rely on section 40(5B). No steps are required.

Request and response

3. On 6 April 2022, the MPS received the following request from the complainants:

"Re: [reference redacted] Estate of [name redacted]"

Further to our recent telephone conversations we contacted [name redacted] at Messrs [solicitors' names redacted] regarding Freedom of Information Requests and we have just received his reply (copy attached).

In the circumstances in accordance with his advice we request that you accept this letter as our Formal Freedom of Information Request for a Full Copy of The Report dated 11th January, 2020 Ref: [reference redacted] as prepared by the two Police Officers upon their attendance at [location redacted] Hospital to visit [initials redacted].

As time is pressing we should be most grateful if we could receive this as soon as possible.

Finally we should appreciate your advising if following our previous letter with copy Hospital Letter you have requested copy medical records apparently via the Police System”.

4. On 11 May 2022, the MPS responded. It would neither confirm nor deny holding the requested information, citing section 40(5B) of FOIA.

5. The complainants requested an internal review on 13 June 2022, saying:

“We are just this morning in receipt of your letter dated 11 May 2022 (which apparently has been in the post for a month). We have made it clear that we have made our Freedom of Information Request with not only the assistance and guidance of the Police through the offices of Detective Constable [name redacted] but also our solicitors who have acted for us since this matter arose two and a half years ago. Further the Letter Freedom of Information Request dated 6th April, 2022 was specifically to obtain Copy Police Report dated the 11 January, 2020 under the Ref: [reference redacted]. We were given to understand this would be a straightforward exercise given our relationship with the late [name redacted] - basically we know the contents of The Report DC: [name redacted] advised [name redacted] (Son in Law) he is The Primary Witness. Also we have spoken to and corresponded with DC [name redacted] and met and corresponded with our solicitors [name redacted]. Therefore your issues as to the Confirmation of The Existence of The Report or its Contents, our Status (victim - witness - suspect) Various Proofs Residential Address - ID - Signature would appear to be unnecessary. In the circumstances before we take the matter further we should appreciate a specifically directed response as to your specific problems in acceding to our specific request for a copy of a specific ... document to which we have been directed by the Police itself”.

6. The MPS provided an internal review on 21 June 2022, in which it maintained its position that section 40(5) applied.

Scope of the case

7. The complainants wrote to the Commissioner on 19 October 2022 to complain about the way their request for information had been handled. Their grounds of complaint were as follows:

“We are the daughter and son-in-law of [initials redacted] who sadly died in hospital 23rd February, 2020.

At the end of March upon the suggestion of Detective Constable [name redacted] and with the guidance of [name redacted] of [solicitors' names redacted] we made a Freedom of Information Request by our letter dated 6th April, 2022 for the police report relating to the visit at our request of Police Officers to see [initials redacted] in the [location redacted] Hospital following one his [sic] neighbour's attempt to have him sign a Power of Attorney in her favour.

Thus far the police have obstructed our request and not provided this needed copy report.

...

You will note [name redacted] the DCE [Deputy Chief Executive] states there are established channels of communication in place and open between the Metropolitan Police and the Hospital Staff.

The police have not utilised this facility to obtain medical and administration files from the hospital with regard to [initials redacted]'s care and protection as a listed vulnerable patient.

Our reading and understanding of various material regarding the Freedom of Information Act 2000 indicates to us apparently supported by our solicitor that The Act gives The Right to Request Recorded Information held by the Public Authorities as listed of which The Police and The NHS are two.

The actions of The Police and the NHS Letter seem to contradict this purpose.

In the circumstances we should be extremely grateful for your clarification and advices as to how we might overcome such unforeseen obstacles given the literature and our solicitor seems to make the process quite straightforward".

8. The Commissioner will consider the MPS's citing of section 40(5B)(a)(i) of FOIA in respect of the report referred to by the complainants, below. He will not consider the remainder of the request, as this is the only matter that was referred to when asking for an internal review and when submitting a complaint to his office.
9. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of FOIA. FOIA is concerned with transparency and provides for the disclosure of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held by public authorities. FOIA does not require public authorities to generate information or to answer

questions, provide explanations or give opinions, unless this is recorded information that they already hold.

10. In the circumstances suggested by the complainants, above, the MPS is not required to contact the hospital to obtain information in order to deal with their request under FOIA. It is only obliged to consider any information that it already holds when it receives an information request.
11. Furthermore, whilst their solicitor has suggested: "... you can simply request the information by letter", such a request under FOIA does not automatically compel the MPS to provide what is sought. FOIA disclosures must be deemed suitable for unfettered release to the general public; if the information isn't suitable to be disclosed to everyone then its disclosure will likely be restricted by the non-disclosure exemptions. The only guaranteed way for the complainant to receive full disclosure would be by their solicitor obtaining a court order, formally requiring disclosure of the alleged report, or any other relevant information that may be held, for their personal use (if it is held).

Reasons for decision

Section 40 – Personal information

12. 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.
13. Therefore, for the MPS to be entitled to rely on section 40(5B)(a)(i) 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?

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

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

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.
17. Clearly, the request relates to a named, living person who the complainants believe tried to unlawfully obtain Power of Attorney over their vulnerable relative. The police report, if held, would contain details of that person along with the other parties spoken to in compiling the report. Therefore, 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.

If held, would the information be criminal offence data?

18. Although not specifically referred to by the MPS, the Commissioner considers that confirming or denying whether it holds the requested information would result in the disclosure of information relating to an allegation of a criminal offence committed by a third party.
19. Information about criminal 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.
20. The request clearly relates to an alleged criminal offence. If the MPS was to confirm, publicly, whether or not it holds any information, it would be disclosing information relating to an alleged criminal offence, by a named third party, who is known to the complainants; it is likely the third party would be identifiable to others too, were the information placed in the public domain. It is also possible that the third party is unaware of this matter having been reported to the police, if they have not been approached about it.
21. The Commissioner has received a further submission from the MPS which he is unable to share in this notice without revealing information which is itself exempt.

22. 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.
23. The Commissioner has considered the MPS's position and the conditions attached to Schedule 1, Parts 1 to 3. Taking into account the arguments advanced by the MPS, and having regard to the restrictive nature of the conditions, he has concluded that none can be met.
24. 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 protection 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(5B)(a)(i) of FOIA.

Right of appeal

25. 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

26. 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.
27. 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
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