

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 June 2013

Public Authority: Chief Constable of West Midlands Police

Address: Police Headquarters
Lloyd House
PO Box 52
Colmore Circus Queensway
Birmingham
West Midlands
B4 6NQ

Decision (including any steps ordered)

1. The complainant requested information relating to the records held by West Midlands Police about a named individual.
2. The public authority refused to confirm or deny whether it held the requested information citing section 40(5) - Personal information and later section 30(3) - Investigations and proceedings conducted by public authorities. The Information Commissioner's decision is that the public authority correctly applied section 40(5)(b)(i) to the request. Consequently he did not consider the application of second exemption.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 7 August 2012 the complainant wrote to the West Midlands Police ('the Constabulary') and requested information on a named individual as follows:

"How many times in total has he been arrested?"

How many times has he either been charged with an offence or received a caution?

How many times has he been arrested on suspicion of having committed an offence but not been either charged or received a caution?

What types of offence has he been arrested for?

How many involve violence against other people?

How many involve domestic violence?

How many involved damage to property?

What criminal convictions and cautions does he have and what sentences has he received?

Whilst resident at [a named address] how many times to the present has he come to the attention of the police for whatever reason?

If there is anything not covered by the above please supply it as well."

5. The Constabulary responded on 4 October 2012 with a refusal notice citing section 40(5).
6. The Constabulary provided an internal review on 14 December 2012 which upheld its initial response.

Scope of the Case

7. The complainant contacted the Commissioner on 4 February 2013 to complain about the Constabulary's response.
8. During the course of the Commissioner's investigation the Constabulary introduced the exemption at section 30(3) of the FOIA. The Commissioner has not considered the application of this exemption.

Reasons for decision

9. **Section 40(5)** states:

"The duty to confirm or deny-

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either-

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would

(apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

10. Section 40(5) provides that the duty to confirm or deny does not arise in relation to information that falls, or would fall if it were held, within the scope of section 40(2) of the Act. Section 40(2) provides that information which is not the personal data of the applicant and is data as defined in section 1(1) of the Data Protection Act 1998 ("the DPA") is exempt from disclosure to a member of the public if disclosure would contravene any of the data protection principles. This exemption is absolute and therefore requires no public interest test.
11. The Constabulary cited section 40(5) of the Act to refuse to confirm or deny whether it held information relevant to the complainant's request. The Constabulary argues that section 40(5)(b)(i) applies because, in its view, it would contravene the first data protection principle of the DPA if it were to provide confirmation or denial as to whether it holds the information described in the request.
12. The first data protection principle of the DPA states that:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met, and in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."
13. The term "personal data" is defined by section 1(1) of the DPA. The term 'personal data' means data which relate to a living individual who can be identified from those data or from data in the possession, or likely to come into the possession, of the data controller – West Midlands Police. The Commissioner has considered the nature of the complainant's request and has determined that all of the requested information would be the personal data of the individual named in the request.
14. Under the requirements of the DPA, personal data must be processed in accordance with the 8 data protection principles. The Constabulary has argued that the information described in the request would, if held, be personal data and that confirming it is held, if this was in fact the case, would be unfair and thus in breach of the first data protection.

15. The Commissioner is satisfied that the information sought would, if held, constitute the personal data of a living, named individual who could be identified from any biographically significant data which may or may not be held by the Constabulary. In addition, the information requested in this case would be considered to be sensitive personal data as it relates to the commission or alleged commission of offences.
16. An important consideration when assessing whether it would be fair to process personal data, is the data subject's expectation of disclosure. The Constabulary explained that it considered that generally those accused or found guilty of committing crimes would not expect such information to be placed into the public domain outside of the normal judicial processes.
17. The Commissioner notes that the Constabulary responded to the complainant's assertion that he is entitled to the requested information because he is "engaged in legal action arising out of the actions of the third party". The Constabulary explained that the legal process for exercising such rights is by making an application to court for the release of such information, not through an FOIA information request.
18. The Commissioner thinks that where information is sensitive personal data, the data subject (in this case, the named individual) has a greater expectation of confidentiality. The Commissioner also thinks that such an expectation is both reasonable and legitimate given the type of information in question. In this case, the information, if held, would be about allegations of criminality.
19. In light of the above, the Commissioner has concluded that the Constabulary was correct to rely on the provisions of section 40(5) of the FOIA. He considers that it would be unfair and outside of the reasonable expectations of the named individual for the Constabulary to confirm whether or not information within the scope of the complainant's request was held. He therefore finds that the information is properly exempt from disclosure by virtue of the absolute exemption at section 40(5)(b) and he has not gone on to consider the application of section 30(3).

Right of appeal

20. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

22. 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.
23. 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

Alexander Ganotis
Group Manager – Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF