

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 August 2013

Public Authority: The Commissioner of the Metropolitan Police Service

Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant submitted a request to the Metropolitan Police Service (MPS) for information concerning complaints and appeals he had made to both the MPS and Independent Police Complaints Commission. The MPS refused to confirm or deny whether it held the requested information relying on section 40(5) of FOIA. The Commissioner has concluded that the MPS is entitled to refuse to confirm or deny whether it holds the requested information. This is because at least some of the requested information, if held, would constitute the complainant's own personal data and under section 40(1) of FOIA a requester's own personal data is exempt from disclosure. Furthermore under section 40(5) of FOIA a public authority does not have to confirm or deny whether it holds a requester's own personal data.

Request and response

2. On 17 April 2013 the complainant wrote to the MPS and requested information in the following terms:

'I would be grateful if the Metropolitan Police service (MPS) consider my request for copies of all e-mails , letters and notes kept by the MPS in relation to the communications between (a) the officers of the MPS dealing with my complaints and appeals and between (b) the officers of the MPS and the officers of the IPCC [Independent Police Complaints Commission] in relation to my complaints and appeals from April 2012 and until present'.

3. The MPS responded on 1 May 2013 and explained that if any such information was held it would be considered to be the complainant's personal data as defined by the Data Protection Act (DPA). The MPS was therefore refusing to confirm or deny, under FOIA, whether any information was held on the basis of section 40(5). This was because to confirm or deny whether personal information exists in response to the request could publicly reveal information about an individual, i.e. the complainant, thereby breaching the right to privacy afforded to persons under the DPA. The MPS invited the complainant to submit a subject access request under the provisions of the DPA for information falling within the scope of this request. It emphasised that this invitation should not be seen as confirmation as to whether information is held.
4. The complainant contacted the MPS on 2 May 2013 and asked for an internal review to be conducted.
5. The MPS informed the complainant of the outcome of the internal review on 3 May 2013; the review upheld the application of section 40(5) of FOIA and advised the complainant to submit a subject access request under the DPA for any information that may be held.
6. The complainant exchanged further emails with the MPS on 7 May and 10 May 2013 in which he disputed the application of section 40(5). The MPS reiterated its position that the internal review had been concluded and if the complainant was dissatisfied with its response to this request under FOIA he should submit a complaint to the Commissioner.

Scope of the case

7. The complainant contacted the Commissioner on 16 May 2013 in order to complain about the way his request for information had been

handled. He argued that the way in which the MPS used FOIA and the DPA to govern access to information prevented him from seeing all of the documents held in any complaints files falling within the scope of his request.

8. In support of his position the complainant raised the following points:

- Given the fact that since April 2012 he had submitted complaints and appeals which were dealt with and responded to by the representatives of the IPCC and the MPS, he was aware that the requested information existed and moreover is held by the MPS. Consequently, for the MPS to adopt the position of refusing to confirm or deny whether it held the information he requested was irrelevant.
- He did not ask the MPS to reveal any names and suggested that in responding his request it could delete names from the information which he requested. Therefore, he suggested that the MPS' argument that confirming whether or not information was held would breach his privacy was irrelevant.
- The information he requested was not his personal data, or alternatively, he argued that the MPS failed to take into account the ICO's guidance 'Access to information held in complaint files' which explained that not every piece of information contained in a person's complaint file will be their personal data. He emphasised that the MPS' approach to applying the relevant legislation effectively prevented him from seeing any documents contained in the files that were not his personal data. That is to say, as such information was not his personal data it would not be covered by the subject access provisions of the DPA and nor would he be to access such information under FOIA given the MPS' application of section 40(5).

Reasons for decision

Section 1 – the right of access to information

9. The right of access to information provided under FOIA is set out in section 1(1) of the legislation and is in two parts.
10. Firstly, section 1(1)(a) provides requesters with the right to be told whether the information that they have requested is held. Secondly, section 1(1)(b) provides requesters with the right to be provided with that information (assuming of course that the requested information is held).

11. Both rights of access are subject to the application of exemptions. That is to say a public authority can choose to confirm that it holds information, i.e. it can comply with the right of access contained at section 1(1)(a), but then refuse to disclose that information, i.e. refuse to comply with right of access contained at section 1(1)(b).
12. Alternatively, as in this case, a public authority may decide to rely on an exemption to refuse to comply with the right of access contained at section 1(1)(a) of FOIA, i.e. they may refuse to even confirm or deny whether the requested information is in fact held.

Section 40(1) – personal data of the requester

13. Under section 40(1) of FOIA requested information is exempt from disclosure if it constitutes the personal data of the requester.
14. Furthermore, under section 40(5)(a) of FOIA the duty to confirm whether or not information is held does not apply if the requested information (if it were held) is exempt from disclosure under section 40(1), i.e. it is the requester's personal data.
15. The consequence of these two exemptions is that if a public authority receives a request for information which, if it were held, would be the requester's personal data then it can rely on section 40(5)(a) to refuse to confirm or deny whether or not it holds the requested information..
16. Personal data is defined by the DPA as:

'...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'

17. The Commissioner's guidance on 'Access to information held in complaints files' says that a complaints file may hold a mixture of personal data and information that is not personal data, eg a policy

statement.¹ In the circumstances of this case the Commissioner is satisfied that at least some of the information requested by the complainant, if held by the MPS, would constitute his own personal data. This is because the complainant would be identifiable from the information that has been requested, containing as it presumably would his name and contact details. Furthermore, the information would obviously relate to the complainant given that it concerns complaints he had made to the MPS and IPCC.

18. Therefore, the Commissioner accepts that the parts of the requested information, if held, which are the complainant's own personal data would be exempt from disclosure on the basis of section 40(1) of FOIA because it is likely to comprise the complainant's own personal data. Furthermore, as section 40(1) of FOIA applies to such information, the MPS is not required to confirm or deny whether it holds any of the requested information under FOIA by virtue of section 40(5)(a).
19. In reaching this conclusion the Commissioner wishes to emphasise that he has taken into account the complainant's submissions as summarised at paragraph 8 above, in particular his concern that the MPS' approach - and indeed the Commissioner's decision - frustrates his attempts to access the parts of the requested information (if held) which is not his personal data.
20. However, if the MPS were to respond to this FOI request by providing the complainant with the non-personal information contained in the complaint file (if indeed any such information was held) then it would, under FOIA, also be confirming that it holds personal data of which of which he is the data subject, i.e. they would be confirming that his complaints file is held. In other words, in cases such as this, to confirm or deny whether non-personal information is held is to confirm or deny whether the requestor's personal data is held. For the reasons set out above, the Commissioner is satisfied that under section 40(5)(a) the MPS have no duty to confirm whether any such personal data is in fact held.

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http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Data_Protection/Practical_application/access_to_information_held_in_complaint_files.ashx

Other matters

21. The Commissioner notes that the MPS has advised the complainant that if he wishes to access any personal data about himself that it may hold (including the information which is the focus of this request) then it is the DPA rather than FOIA that provides a right of access to such information. The Commissioner also notes that the MPS has advised the complainant of the steps he needs to take so that it can process any such subject access request under the DPA, i.e. pay the £10 fee and provide proof of his identity. The Commissioner would encourage the complainant to follow the MPS' advice on this matter.
22. It may be the case, as the complainant suggests, that not all of the information falling within the request is his personal data. However, the Commissioner's guidance 'Access to information held in complaint files' does explain that:

'It is good practice for data controllers and public authorities to be as helpful as possible to individuals who make access requests. In addition to being helpful, it can often be easier to give an applicant a mixture of all the personal data and ordinary information relevant to his request, rather than to look at every document in a file to decide whether or not it is his personal data.'

23. Albeit that the guidance also notes that:

*'However, organisations should be clear about the approach they are taking to dealing with access requests. In particular, they should be clear that they are recommending that the information be provided to the applicant on a discretionary basis and that their organisation is under no legal obligation to provide it. Of course individuals have no right of appeal to the ICO or Information Tribunal in respect of information that they have no legal right of access to. Providing the information on a discretionary basis does not mean that it becomes the applicant's personal data.'*²

² See page 4 of the guidance.

Right of appeal

24. 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

25. 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.
26. 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
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