

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 5 August 2013

**Public Authority:** The Chief Constable of Cambridgeshire Constabulary

**Address:** Constabulary Headquarters  
Hinchingsbrooke Park  
Huntingdon  
PE29 6NP

#### Decision (including any steps ordered)

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1. The complainant submitted a request to Cambridgeshire Constabulary (the Constabulary) for the name and address of the partner of the firm of solicitors who had accompanied / acted for individuals who may have been interviewed in relation to a particular incident. The Constabulary refused to confirm or deny whether it held the requested information on the basis of section 40(5) of FOIA (the personal data exemption) and section 30(3) of FOIA (the investigations exemption). The Commissioner is satisfied that the Constabulary are entitled to refuse to confirm or deny whether it holds the requested information on the basis of section 40(5).

#### Request and response

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2. On 31 January 2013 the complainant wrote to the Constabulary and requested information in the following terms:  
  
*'Please supply me with the name and service address of the partner of the firm of solicitors who accompanied / acted for the person (s) interviewed under caution at Huntingdon Police Station in respect of Incident No CC-12042011-0254. Failing that please provide me with the name and registration number of the Data Controller who accompanied /acted for the person (s) interviewed under caution in respect of Incident No 12042011-0254'*
3. The Constabulary responded on 27 February 2013 and refused to confirm or deny whether it held information falling within the scope of

the request on the basis of sections 40(5)(b)(i) (personal data) and 30(3) (investigations) of FOIA.

4. The complainant contacted the Constabulary on 1 March 2013 and asked for an internal review of this decision to be undertaken.
5. The Constabulary informed him of the outcome of the internal review on 3 April 2013; the review upheld the application of the two exemptions cited in the refusal notice.

## **Scope of the case**

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6. The complainant contacted the Commissioner on 14 May 2013 in order to dispute the Constabulary's reliance on sections 40(5)(b)(i) and 30(3). The complainant provided the Commissioner with submissions to support his complaint which are referred to in the analysis below.
7. With regard to the scope of this case, it is important to recognise that that the right of access provided by FOIA as set out in section 1(1) is separated into two parts: Section 1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant the right to be provided with the requested information, if it is held of course. Both rights are subject to the application of exemptions.
8. In this case the Constabulary have relied upon the two exemptions cited above to refuse to confirm or deny whether they hold the requested information, i.e. they have relied on this exemption in order not to fulfil the duty contained at section 1(1)(a) of FOIA. Therefore this notice simply considers whether the Constabulary are entitled to refuse to confirm or deny whether it holds the requested information. The notice does not consider whether the requested information – if held – should be disclosed.

## **Reasons for decision**

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### **Section 40 – personal data**

9. Section 40 of the FOIA provides a number of exemptions relating to the withholding of 'personal data' with personal data being defined by the Data Protection Act 1998 (DPA).
10. Section 40(5) specifically states that:

'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 that 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).'

13. Therefore, for the Constabulary to be correct in relying on section 40(5)(b)(i) to neither confirm or deny whether it holds information falling within the scope of the complainant's request the following conditions must be met:

- Confirming or denying whether information is held would reveal personal data of a third party; and
- That to confirm or deny whether information is held would contravene one of the data protection principles.

**Would the confirmation or denial that information was held reveal the personal data of a third party?**

14. Section 1(1) of the DPA defines personal data 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 intentions of the data controller or any other person in respect of the individual'*

15. Section 2 of the DPA includes various definitions of 'sensitive personal data', including section 2(g) which states that sensitive personal data means personal data consisting of information as to 'the commission or alleged commission by him of any offence'.
16. The Constabulary have explained to the Commissioner that the incident which the request refers to is about a criminal complaint submitted to the Constabulary by the complainant. The complainant alleged that his sisters-in-law had embezzled funds from estate of his late mother-in-law.
17. The Constabulary also explained to the Commissioner that it had undertaken enquires with the investigating officers who considered the complainant's allegation, and with those who oversaw the complainant's subsequent complaints regarding the conduct of its investigation, and it had not found any record of the Constabulary confirming to the complainant whether or not the interview(s) which his request referenced ever took place.
18. Furthermore, the Constabulary argued that although the request sought to establish whether individuals interviewed as part of the specific incident number had been accompanied by solicitors when they were interviewed, confirmation as to whether or not it held information falling within the scope of the request would in fact also reveal, under FOIA, whether or not such interviews had actually taken place. The Constabulary argued that it would be very easy for the complainant to identify the individuals who may (or may not) have been interviewed if it confirmed whether or not it held information falling within the scope of the request.
19. Moreover, given the fact that the request noted that the individuals who the complainant believed had been interviewed were in fact interviewed

'under caution' the Constabulary argued that confirmation as to whether it held any information falling within the scope of the request would in fact result in the disclosure of sensitive personal data. This is by virtue of section 2(g) of the DPA because it would confirm whether or not particular individuals had been interviewed under caution.

20. When considering whether the disclosure of information under FOIA – or in this case the confirmation under FOIA as to whether information exists – would constitute the disclosure of personal data, the Commissioner considers whether on the balance of probabilities, a (or any) member of the public could identify individuals by cross-referencing the disclosed data with information or knowledge already available.
21. In the circumstances of this case, given the specific nature of the request the Commissioner does not believe that the public in general would be able to identify the individuals who may – or may not – have been interviewed in relation to the incident referenced in the request. However, the Commissioner is satisfied with the Constabulary's suggestion that the complainant would be able, with relative ease, to identify which individuals may or may not have been interviewed if it confirmed whether or not it held information falling within the scope of this request. The Commissioner is therefore satisfied that if the Police complied with the requirements of section 1(1)(a) of FOIA in respect of this request this would result in the disclosure of personal data.

**Would confirming or denying whether such information was held contravene any of the data protection principles?**

22. In support of its application of section 40(5)(b)(i), the Constabulary argued that to confirm or deny whether it held information falling within the scope of this request would contravene the first data protection principle.
23. The first data protection principle states that:
  1. Personal data must be processed fairly and lawfully; and
  2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.
24. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:
  - The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:

- what the public authority may have told them about what would happen to their personal data;
  - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights;
  - the nature or content of the information itself (if held);
  - the circumstances in which the personal data was obtained;
  - particular circumstances of the case, e.g. established custom or practice within the public authority; and
  - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
- The consequences of disclosing the information or the consequences of confirming whether information is held, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
    - whether information of the nature requested is already in the public domain;
    - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
25. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information (or confirm whether or not the information is held) if it can be argued that there is a more compelling public interest in disclosure. In considering 'legitimate interests' in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.

### *The Constabulary's position*

26. The Constabulary argued that in general, individuals who are interviewed as part of an investigation would not expect the fact that they were interviewed to be disclosed under FOIA. Similarly, individuals who had not been interviewed by the Constabulary would not expect this fact to be confirmed to the public via FOIA. The Constabulary explained that it did not see any reason why the individuals who may (or may not) have been interviewed as part of this investigation to have any different expectations.

27. In terms of the consequences of disclosure, the Constabulary explained that this investigation focused on issues of a personal/domestic incident. It argued that the complainant had pursued a prolonged campaign against the individuals whom he believed were involved in embezzlement of funds from the estate of his late mother-in-law which had resulted in him making complaints to numerous different organisations. The Constabulary argued that if it complied with the requirements of section 1(1)(a) of FOIA – and thus revealed whether or not the interviews had taken place and also revealed whether or not the potential interviewees had been represented by solicitors – in light of the complainant's previous interactions such knowledge could be used by the complainant to cause further distress to the individuals he believed were involved in behaviour of a criminal nature relating to the estate of his late mother-in-law.
28. In terms of the legitimate interests in disclosure, the Police argued that as the information requested to a matter of a personal/domestic nature, confirmation as to whether or not any information was in fact held would not be of any benefit to the public at this time.

*The complainant's position*

29. The complainant argued that he needed the requested information to be used as admissible evidence in regulatory appeals and court proceedings.
30. Furthermore, the complainant explained that he suspected that the individuals who he believed had been interviewed by the Constabulary had not been accompanied by a solicitor. The complainant alleged that by interviewing suspects without a solicitor present the Constabulary were exploiting a loophole in section 58 of the Police and Criminal Evidence Act 1984. He noted that this section of the legislation specifically provides that a person held in custody at a police station is entitled to consult a solicitor but does not mention suspects interviewed elsewhere (e.g. in their homes). The complainant argued that if any individuals in relation to this incident had been interviewed without a solicitor present (because they had been interviewed outside of police station) then this would make their evidence inadmissible in future High Court proceedings that the complainant was bringing.

*The Commissioner's position*

31. The Commissioner agrees with the Constabulary that the individuals who may have been interviewed as part of its investigation into this matter would have a strong expectation that the fact that such interviews had (or indeed had not) taken place are not matters which would be confirmed by the Constabulary via a response to a FOI request. The



Commissioner believes that such expectations are clearly reasonable ones given the established custom and practice that such information is not routinely disclosed under FOIA by the police service.

32. In terms of the consequences of complying with the requirements of section 1(1)(a), given the history of this matter, the Commissioner accepts that it may be the case that distress is caused to the individuals who the complainant believes were interviewed as part of the Constabulary's investigation.
33. In terms of the legitimate interests in confirming whether or not the requested information is held, the Commissioner recognises that the complainant has a clear personal interest in accessing the requested information in order to assist him with his ongoing complaints to regulatory bodies and pending court action. However, in the Commissioner's view, beyond this particular and specific interest it is difficult to envisage how confirmation as to whether or not the Constabulary hold the requested information would add materially to any broader public interests associated with accountability and transparency.
34. In conclusion, the Commissioner is satisfied that confirmation or denial as to whether the requested information is held would be unfair primarily because of the reasonable expectations of the individuals who may have been interviewed. Furthermore, the Commissioner believes that the complainant's argument that fulfilling this request would assist him in his ongoing actions in relation to his concerns about his late mother-in-law's estate can only attract limited weight. This is because FOIA is concerned with disclosing information to the world at large, and the benefits associated with such disclosures, rather than any private interests. Moreover, the Commissioner believes that consideration has to be given to the broader consequences of the Constabulary complying with the duty contained at section 1(1)(a) in relation to this request. If the Constabulary did comply with this duty in relation to this request this would undermine its ability to adopt a consistent neither confirm or deny response to similar future requests which sought confirmation as to whether a particular individual had been interviewed as part of specific investigation.
35. In light of the Commissioner's findings in relation to section 40(5), he has not gone on to consider the Constabulary's application of section 30(3).



## Right of appeal

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36. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

37. 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.
38. 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**  
**Cheshire**  
**SK9 5AF**