

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 22 September 2015

**Public Authority:** Independent Police Complaints Commission  
**Address:** 90 High Holborn  
London  
WC1V 6BH

### Decision (including any steps ordered)

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1. The complainant has requested a copy of a referral he believes was made to the Independent Police Complaints Commission ("the IPCC"), and related correspondence and information, in relation to the investigation of a police officer connected with the Stephen Lawrence murder investigation. The IPCC would neither confirm nor deny holding any of the information by virtue of sections 23(5) (information supplied by, or relating to, bodies dealing with security matters), 31(3) (law enforcement) and 40(5) (personal information).
2. The Commissioner's decision is that the IPCC was entitled to rely on the exemptions cited. The Commissioner requires no action to be taken.

### Request and response

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3. On 5 October 2014, the complainant wrote to the IPCC and requested information in the following terms:

*"\* Please provide a copy of the referral by the Metropolitan Police in relation to [name redacted] and the investigation in the murder of Stephen Lawrence;*

*\* Please provide copies of all correspondence with the Met Police over the scope of an IPCC investigation into the matters raised;*

*\* Please disclose the form the IPCC investigation will or is taking and who is leading it. If the investigation has started please disclose the date it started."*

4. The IPCC responded on 3 November 2014, citing the exemption at section 30(1) (investigations and proceedings conducted by public authorities) with the public interest favouring maintaining the exemption.
5. It provided an internal review on 19 February 2015 in which it withdrew its reliance on section 30(1). It would neither confirm nor deny whether relevant information was held, citing sections 23(5) (bodies dealing with security matters) and 31(3) (law enforcement).

### **Scope of the case**

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6. The complainant contacted the Commissioner on 19 February 2015 to complain about the way his request for information had been handled. He expressed concern that the IPCC had fundamentally changed the basis for its refusal at the internal review and argued that it was in the public interest that the IPCC be transparent regarding its investigations.
7. During the course of the Commissioner's investigation the IPCC indicated that it was also relying on the exemption at section 40(5) (personal information) to neither confirm nor deny whether it held the requested information.
8. Following the combined cases of the *Home Office v Information Commissioner* (GIA/2098/2010) and *DEFRA v Information Commissioner* (GIA/1694/2010) in the Upper Tribunal, a public authority is able to claim a new exemption or exception either before the Commissioner or the First-tier Tribunal and both must consider any such new claims. The Commissioner accepts that this includes new claims for an NCND response.
9. The Commissioner therefore considers the scope of this decision notice to be whether the IPCC was entitled to rely on sections 23(5), 31(3) and 40(5) to neither confirm nor deny whether it held information described in the request.

### **Reasons for decision**

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10. Under section 1(1)(a) of the FOIA, a public authority is obliged to advise an applicant whether or not it holds the requested information. This is known as the "duty to confirm or deny". However, the duty to confirm or deny does not always apply; public authorities may issue a neither confirm nor deny response ("NCND") through reliance on certain exemptions under the FOIA.

**Section 23 – supplied by, or relating to, bodies dealing with security matters**

11. Section 23(5) excludes the duty of a public authority to confirm or deny whether it holds information which, if held, would be exempt under section 23(1).
12. By virtue of section 23(5) the duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in section 23(3).
13. It is absolute, meaning that, if engaged, there is no requirement to consider whether the public interest nevertheless favours confirming or denying whether information is held.
14. The test as to whether a disclosure would relate to a security body listed in section 23(3) is decided on the normal civil standard of proof, that is, the balance of probabilities. In other words, if it is more likely than not that the disclosure would relate to a security body then the section 23 exemption would be engaged.
15. From the above it can be seen that section 23(5) has a very wide application. If the information requested is within what could be described as the ambit of security bodies' operations, section 23(5) is likely to apply. This is consistent with the scheme of FOIA because the security bodies themselves are not subject to its provisions. Factors indicating whether a request is of this nature will include the functions of the public authority receiving the request, the subject area to which the request relates and the actual wording of the request.
16. It is the Commissioner's opinion<sup>1</sup> that the exemption contained in Section 23(5) should be interpreted so that it is only necessary for a public authority to show that either confirmation or denial as to whether the requested information is held would involve the disclosure of information relating to a security body. Whether or not the security body

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<sup>1</sup> See, for example, the approach taken in decision notice FS50503584 [https://ico.org.uk/media/action-weve-taken/decision-notices/2013/915178/fs\\_50503584.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2013/915178/fs_50503584.pdf)

is interested or involved in a particular issue is in itself information relating to a security body.

17. The IPCC explained that the information specified in the request relates to allegations of police corruption against the Metropolitan Police Service, relating to the Stephen Lawrence murder case. Such is the nature of the allegations that if an investigation of the nature specified in the request was being conducted by the IPCC, the investigation would likely have the involvement of one or more of the security bodies identified in section 23(5). Confirming or denying whether the IPCC held the information specified in the request would therefore constitute a disclosure of information about one or more of the security bodies listed in section 23(5).
18. The Commissioner is satisfied that there is a close working relationship between the Metropolitan Police Service and the security bodies listed in section 23(3). The Commissioner notes that those listed now include the National Crime Agency, as the successor body to the Serious Organised Crime Agency. He has previously stated<sup>2</sup> that he is satisfied that (except on rare occasions) such work will necessarily involve close working with security bodies and regular sharing of information and intelligence.
19. In light of the Metropolitan Police Service's relationship with the security bodies and the wording of the request, the Commissioner finds that, on the balance of probabilities, the requested information, if held by the IPCC, would relate to or have been supplied by one or more bodies identified in section 23(3) FOIA.
20. The Commissioner is therefore satisfied that complying with the requirements of section 1(1)(a) would constitute a disclosure of information about one or more of the security bodies listed in section 23(3). The need to adopt a consistent position is of vital importance in considering the application of an NCND exemption and he is therefore satisfied that section 23(3) is engaged in this case. Being an absolute exemption, there is no requirement to consider whether the public interest favours confirming or denying whether the requested information is held.

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<sup>2</sup> See decision notice FS50258193 [https://ico.org.uk/media/action-weve-taken/decision-notice/2011/594104/fs\\_50258193.pdf](https://ico.org.uk/media/action-weve-taken/decision-notice/2011/594104/fs_50258193.pdf)

## **Section 31 – prejudice to law enforcement**

21. Section 31(3) provides that a public authority is not obliged to confirm or deny whether it holds information described in a request if to do so would, or would be likely to, prejudice any of the matters mentioned in section 31(1). The IPCC specified that the relevant matters are those set out at section 31(1)(a) (the prevention and detection of crime), 31(1)(b) (the apprehension or prosecution of offenders) and 31(g) (by reference to 31(2)(b), the purpose of ascertaining whether any person is responsible for any conduct which is improper). This is a qualified exemption, and is therefore subject to a public interest test.
22. The issue for the Commissioner to consider in this case is whether confirming or denying that the requested information is held would or would be likely to prejudice the prevention or detection of crime, the apprehension or prosecution of offenders or the ascertaining of whether any person is responsible for any conduct which is improper.
23. The IPCC's position is that confirming or denying whether it holds the requested information would effectively reveal whether or not an investigation was being carried out into the matters alluded to in the request. If an investigation were being conducted, such a disclosure, it said, would be likely to undermine its effectiveness, taking into account the specialist tactics and resources which may be applied in an anti-corruption investigation. Since it is possible for a criminal prosecution to be brought on the evidence gathered in an IPCC investigation, the Commissioner is satisfied that by citing sections 31(1)(a) and (b) and 31(1)(g) (by reference to 31(2)(b)) that the IPCC has identified the appropriate subsections of section 31 for consideration.
24. In the case of a prejudice-based exemption, for the exemption to be engaged it is also necessary to establish a 'causal link' between confirming or denying that the information is held and the prejudice claimed. The IPCC has claimed that the lower level of prejudice (ie that prejudice "would be likely to" occur) applies. It has explained that confirming or denying that it holds the requested information would effectively be to confirm whether an investigation into the matters alluded to in the request was or was not taking place. Disclosing such information before the conclusion of any such criminal investigation (if there was one) would be likely to jeopardise the success of the case.
25. In cases where there is an allegation of police corruption or criminal behaviour, it is important that any processes to investigate such allegations are not prejudiced by disclosures of information which might be useful to someone trying to evade justice or which might interfere with the ability to successfully prosecute a crime. For example, an individual who is under investigation might be unaware of that fact, and

so confirmation of the existence of an investigation could alert them and prejudice the effectiveness of evidence gathering methods. It could lead them to alter their behaviour, destroy evidence or otherwise take action to avoid being brought to justice. It might also render certain information inadmissible in court or even impinge upon a defendant's right to a fair trial.

26. As mentioned in relation to section 23(5), the need to adopt a consistent approach to applying an NCND response (ie, applying it both in instances where information is and is not held) is vitally important to ensuring that the exemption successfully fulfils its intended purpose. Applied consistently, the application of an NCND response should not be considered indicative that information either is or is not held.
27. The IPCC has provided the Commissioner with additional submissions to further support its position. The Commissioner has considered these submissions but due to the nature of the exemption applied, he has not reproduced them here. In any event, he considers the argument for an NCND response in the circumstances of this case is sufficiently well made out without reference to these additional submissions.
28. Having regard to all the information and evidence provided, he is satisfied that to confirm or deny holding the information would be likely to prejudice the matters identified at 31(1)(a) and (b) and 31(1)(g) (by reference to 31(2)(b)) and therefore that the exemption at section 31(3) is engaged.

### **Public interest**

29. Section 31 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in confirming or denying whether information is held outweighs that in issuing an NCND response.
30. The IPCC recognises that there is a public interest in transparency with regard to its investigations, particularly in view of their purpose and scope. It noted that the Ellison Review<sup>3</sup> had identified concerns with the IPCC's handling of a previous investigation into related matters. Confirming or denying whether an investigation had taken place in this

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<sup>3</sup> <https://www.gov.uk/government/publications/stephen-lawrence-independent-review>

case would allow the public, at some level, to assess whether complaints about the police were receiving a fair and thorough hearing. The IPCC also recognised that as a publicly funded body it was accountable to the public for the money it spent and the decisions it made. It therefore accepts that there is some public interest in confirming or denying that the information is held.

31. In favour of issuing an NCND response, the IPCC referred to the need to preserve the integrity of its investigations, discussed in paragraphs 25 – 26, above. If investigations are compromised, they may not get to the heart of serious issues, justice might not be served and public money would be wasted.
32. The Commissioner finds that there is a public interest in confirming or denying that the information is held, to allow the public to know whether the IPCC is investigating complaints about the police (particularly in connection with the Stephen Lawrence affair) and that it is transparent in its handling of such matters.
33. However, he finds that there is a stronger public interest in protecting the IPCC's ability to investigate allegations of criminal conduct by the police and gather evidence which may subsequently be used in criminal prosecutions. For the public to have confidence in police forces (and in bodies with remits such as the IPCC) it is vital that criminal allegations against officers can be investigated thoroughly and without outside interference which might jeopardise those investigations.
34. The Commissioner accepts the IPCC's argument that this sometimes entails concealing the existence of such investigations until such time as they have concluded. As explained in the body of the decision notice, such an approach can only be effective if it is applied consistently, in cases where investigations both are and are not taking place.
35. Since the Commissioner considers that the public interest in issuing an NCND response outweighs that in confirming or denying, he is satisfied that the IPCC was entitled to issue an NCND response under section 31(3).

### **Section 40(5) – Personal data**

36. The exemption at section 40(5) of the FOIA provides that a public authority does not have to confirm or deny whether requested information is held if to do so would constitute a disclosure of information which is exempt under section 40(2) of the FOIA. The exemption is absolute, meaning that, if engaged, there is no requirement to consider whether the public interest nevertheless favours confirming or denying that information is held.



37. Section 40(2) of the FOIA provides an exemption for information that constitutes the personal data of third parties:

*"Any information to which a request for information relates is also exempt information if—*

*(a) it constitutes personal data which do not fall within subsection (1), and*

*(b) either the first or the second condition below is satisfied."*

38. Section 40(3)(a)(i) of the FOIA states:

*"The first condition is-*

*(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-*

*(i) any of the data protection principles, or*

*(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress)."*

39. Section 40(5) provides 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 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)."*



40. The IPCC explained that the request asks for information which relates to a named police officer and that it is therefore satisfied that the requested information, if held, would constitute personal data within the meaning of the definition at section 1(1) of the Data Protection Act 1998 ("the DPA").
41. The request contains a statement of assumption that the officer is under investigation by the IPCC in connection with Metropolitan Police Service's investigation into the Stephen Lawrence murder enquiry. Such an investigation, if it was taking place, would consider not only whether the subject of the investigation was guilty of any wrongdoing which merited disciplinary procedures, but also whether they had committed any criminal offences. Thus, the IPCC considered it was being asked to disclose sensitive personal data about the named officer, relating to the commission or alleged commission of a criminal offence, as defined at section 2(g) of the DPA. It said that confirming or denying whether or not the requested information is held would reveal whether or not a referral had been made to the IPCC about the officer and whether or not he was the subject of an investigation. This would, of itself, constitute a disclosure of sensitive personal data about him.
42. The Commissioner agrees that complying with the duty at section 1(1)(a) would involve the processing of sensitive personal data for the purposes of making a disclosure (the disclosure being that either a referral had or had not been received and that an investigation was or was not underway). When determining whether sensitive personal data may be processed it is necessary to firstly consider whether the processing would be fair, before turning to whether schedule 2 (processing of any personal data) and schedule 3 (processing of sensitive personal data) conditions also exist which would permit the processing.
43. In assessing fairness, it is necessary to consider the likely consequences of the processing in each particular case. Personal data must be processed fairly and not used in ways that have unjustified adverse effects on the individuals concerned. The Commissioner appreciates that there is a general public interest in accountability and transparency, and the public is entitled to be informed as to how the IPCC operates, particularly in high profile cases about which there is widespread public concern. However, the Commissioner recognises that this legitimate interest must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of any individual who would be affected by confirming or denying that the requested information is held.
44. The information requested here, if held, would comprise sensitive personal data. In most cases the very nature of sensitive personal data

means it is highly likely that disclosing it will be unfair. In this case, the nature of the sensitive personal data, if held, comprises (currently) unsubstantiated criminal allegations. It could be highly detrimental and distressing to the data subject if the response was a confirmation and that confirmation widely disseminated. It might also interfere with their right to a fair trial, if the investigation concluded that there was evidence which merited being tested in a criminal court. Generally, individuals under investigation by the IPCC have the right to expect that their identities will be protected until such time as they are formally charged with an offence or the investigation finds some other evidence of wrongdoing.

45. The IPCC provided some further submissions to explain why it would not be fair, and thereby breach the data protection principles, to confirm or deny whether the requested information is held. The Commissioner has considered this information but due to the nature of the information involved, he has not reproduced it here.
46. The IPCC concluded that it is satisfied that simply confirming or denying whether it holds the requested information would reveal sensitive personal data about an individual, as it would indicate whether the individual is or is not the subject of an IPCC investigation (which, given the IPCC's remit, would have the potential to result in a criminal prosecution). This would be unfair to that individual and therefore be in contravention of the first data protection principle.
47. The Commissioner is satisfied that the IPCC has demonstrated that confirming or denying whether it holds the requested information would be unfair to the data subject named in the request and that the IPCC was entitled to apply section 40(5) on that basis.

Because the Commissioner is satisfied that the disclosure would be unfair, it has not been necessary to go on to determine whether schedule 2 or 3 of the DPA provides a basis for processing the sensitive personal data. Nevertheless, even without resorting to a detailed analysis, he considers it highly unlikely that a condition for processing personal data of this kind would be available.

## Right of appeal

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48. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

49. 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.
50. 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 .....**

**Graham Smith**  
**Deputy Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**