

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 August 2015

Public Authority: Commissioner of the Metropolitan Police Service

Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant has requested details from the disciplinary records of three named police officers from the Metropolitan Police Service (the "MPS"). The MPS would neither confirm nor deny holding these records citing section 40(5)(b)(i) of the FOIA. The Commissioner's decision is that the MPS was entitled to do so. No steps are required.

Request and response

2. On 14 May 2015, the complainant wrote to the MPS and requested information in the following terms:

"Evidence of bad character of non defendants ...

All Reports towards conduct by PC [name removed], DS [name removed] VW & INSPECTOR [name removed], as reprehensible such as racism, bullying, a bad disciplinary record at work for misconduct from the start of employment ..."

3. The MPS responded on 3 June 2015. It refused to confirm or deny that it held the requested information citing section 40(5) (personal information).

4. Following an internal review the MPS wrote to the complainant on 3 June 2015. It maintained its position.

Scope of the case

5. The complainant contacted the Commissioner on 3 June 2015 to complain about the way his request for information had been handled under both the FOIA and the Criminal Justice Act. The Commissioner does not have jurisdiction to consider the latter legislation but he will consider whether or not the MPS is entitled to rely on section 40(5) of the FOIA below.

Reasons for decision

6. 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 and authorities may refuse to confirm or deny through reliance on certain exemptions under the FOIA.

Section 40 – personal information

7. Generally, the provisions in section 40 subsections 1 to 4 FOIA exempt personal data from disclosure. Section 40(5) of FOIA states that the duty to confirm or deny whether information is held does not arise if providing the public with that confirmation or denial would contravene any of the data protection principles set out in the Data Protection Act 1988 (the 'DPA').
8. In this case, the MPS considers section 40(5)(b)(i) applies. It has argued that confirming whether or not it holds the requested information would breach the data protection rights of the individuals named in the request, as it would reveal under FOIA whether they had been the subject of the types of disciplinary action referred to by the complainant, ie "*Evidence of bad character*". Such an argument is relevant to the exemption contained at section 40(5)(b)(i).
9. Consideration of section 40(5) involves two steps: firstly, whether providing the confirmation or denial would involve the disclosure of personal data, and secondly, whether disclosure of that personal data would be in breach of any of the data protection principles.

Would confirmation or denial disclose personal data?

10. The definition of personal data is given in section 1(1) of the DPA:

"personal data' means data which relate to a living individual who can be identified:

- (a) from those data, or*
- (b) from those data and any other information which is in the possession of, or is likely to come into the possession of, the data controller".*

11. The Commissioner considers that the way in which the request is worded clearly indicates that the complainant is seeking information which can be linked with the named individuals.

12. As the complainant has requested information specifically about named individuals by its nature the request identifies those individuals and that information, if held, would constitute their personal data. Confirmation or denial as to whether or not the officers have been subject to complaints of the type referred to in his request would reveal something of a personal nature about those individuals and would therefore constitute their personal data.

Would disclosure breach any principles?

13. The MPS advised that it believed confirmation or denial would breach the first data protection principle. It explained to the complainant that:

"... seeking confirmation of whether individuals have been subject to any incident in the circumstances you describe ... would ... breach their rights to privacy..."

14. When considering the first principle the Commissioner will generally look to balance the reasonable expectation of the data subject(s) with the consequences of compliance with the request, and general principles of accountability and transparency.

15. The first data protection principle requires that personal data is processed fairly and lawfully and that one of the conditions in schedule 2 of the DPA is met in order to disclose personal data.

16. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:

- the individual's reasonable expectations of what would happen to their information;

- the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned); and
 - the balance between the rights and freedoms of the data subject and the legitimate interests of the public.
17. The Commissioner considers that information relating to personnel matters such as discipline will usually be inherently 'private' in nature and he recognises that officers will have a high expectation that such matters will not be placed in the public domain and that their privacy will be respected. As such, an officer's reasonable expectation would be that information of the type requested would not be disclosed.
18. Confirmation that any such allegation has been made does not prove that the allegation was upheld, nor the seriousness of any particular allegation, and could prove of considerable detriment to any officer if it were placed into the public domain via the FOIA. As such it could cause unnecessary and unjustified damage to the officer concerned. Were there any serious allegations of the nature suggested by the complainant then the Commissioner would expect these to have been fully investigated by the MPS itself under its disciplinary processes and, were such behaviour identified, that the officer would be properly dealt with under that regime.
19. The Commissioner appreciates that there is a general public interest in accountability and transparency, and the public is entitled to be reassured regarding the integrity of MPS officers. On the other hand 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, ie the officers themselves.
20. The Commissioner understands that it is likely that some police officers will have been subject to complaints by members of the public. This was confirmed in respect of an officer in his decision notice FS50552735¹ where, at paragraph 42, he included:

"The MPS also confirmed that it had received allegations about the officer during the last six years. As it has already been disclosed that the officer has issued 2958 FPNs since January 2009 the

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1043199/fs_50552735.pdf

Commissioner is not surprised that allegations have been received. However, in respect of disclosure of any further details into the public domain, the Commissioner accepts that an officer would have a reasonable expectation that there would not be any additional disclosure of information."

21. However, the Commissioner finds that there is a distinction between that case and this one. In that case, the issuing of nearly 3000 fixed penalty notices by one officer is inevitably going to result in complaints being received from dissatisfied members of the public. This case is entirely different in that the **nature** of the complaints has been specified by the complainant; he has not just asked whether they are the subject of any complaints *per se*, rather he seeks evidence of what he terms 'bad character', 'racism' and 'bullying'. It is also of note that the officers concerned in this case are employed at a local police station and not undertaking the type of role where it would be more likely that they were subject to complaints, as was the officer in the case referred to above.

Conclusion

22. The Commissioner appreciates that there is a general public interest in accountability and transparency, and that the public is entitled to be reassured about the integrity of its police officers.
23. However, the Commissioner recognises that this legitimate interest must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of those officers who would be affected by confirming or denying that the requested information is held.
24. In considering whether the exemption contained within section 40(5)(b)(i) was correctly applied, the Commissioner has taken into account that disclosure under the FOIA should be considered in its widest sense – which is to the public at large. A confirmation or denial in the circumstances of this case would reveal to the public information which is not already in the public domain.
25. With due regard to the reasonable expectations of the data subjects, and the potential impact on them if the existence of their personal data were to be confirmed or denied, the Commissioner considers that it would be unfair to do so. While he accepts that there is a limited legitimate interest in the disclosure of this information, he does not consider that this outweighs these other factors.
26. The Commissioner is of the opinion that the information requested, if held, would be the personal data of the named officers as it relates to them personally. He also finds that, if held, it would be unfair to disclose

it and to do so would be in breach of the first principle of the DPA. All information would accordingly be exempt from disclosure under section 40(2) and therefore, under section 40(5)(b)(i), the MPS is not required to confirm or deny that it is held under the terms of the FOIA.

Right of appeal

27. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

28. 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.
29. 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

Jon Manners
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