

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 11 August 2016

**Public Authority:** Her Majesty's Inspectorate of Constabulary  
**Address:** 6th Floor  
Globe House  
89 Eccleston Square  
London  
SW1V 1PN

### Decision (including any steps ordered)

---

1. The complainant has requested information about Nottinghamshire Police secondees at Her Majesty's Inspectorate of Constabulary ("HMIC"). HMIC provided some information and advised that the remainder was not held. This was subsequently changed to a neither confirm nor deny response for part of the request, citing section 40(5)(personal information). The Commissioner's decision is that HMIC was entitled to rely on this exemption. No steps are required.

### Request and response

---

2. On 16 February 2016, the complainant wrote to HMIC and requested information in the following terms:

*"I seek disclosure of the following information:*

1. *The number of Nottinghamshire Police Officers currently on secondment to HMIC*
2. *The rank of Nottinghamshire Police Officers currently seconded to HMIC*
3. *The number of Nottinghamshire Police Officers currently seconded to HMIC and subject of un-expunged Misconduct Findings, including findings under the 'Unsatisfactory*

*Performance Procedure' (UPP) and such matters as would be required to be notified in proceedings under form MG6b".*

3. HMIC responded on 4 March 2016. It provided the requested information with the caveat that, in respect of part (3), to its knowledge none of the officers were at that time subject to misconduct findings.
4. The complainant sought an internal review of part (3) only. Following its internal review HMIC wrote to the complainant on 16 May 2016. It revised its position, refusing to confirm or deny holding relevant information citing section 40(5)(b)(i).

### **Scope of the case**

---

5. The complainant wrote to the Commissioner on 27 May 2016 to complain about the way his request for information had been handled. He asked her to consider the application of section 40(5) to his request.

### **Reasons for decision**

---

#### **Section 40 - personal information**

6. The analysis below considers section 40(5)(b)(i) FOIA. The consequence of section 40(5)(b)(i) is that if a public authority receives a request for information which, if it were held, would be the personal data of a third party (or parties), then it can rely on section 40(5)(b)(i), to refuse to confirm or deny whether or not it holds the requested information.
7. 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.

#### ***Is the information personal data?***

8. The first step for the Commissioner to determine is whether the requested information, if held, constitutes personal data, as defined by the DPA. If it is not personal data, then section 40 cannot apply.
9. 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 intention of the data controller or any other person in respect of the individual."*

10. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
11. Whilst there are no named parties within the wording of the initial request, HMIC drew the Commissioner's attention to the complainant's request for an internal review. In this, the complainant names an officer and explains why he believes that HMIC would hold misconduct records about this officer, based on information in his own possession. As a result of this, HMIC reconsidered his request and revised its position in responding to the internal review, something which it is entitled to do. As the complainant clearly refers to a named officer, the Commissioner is satisfied that the requested information, if held, would be that officer's personal data.
12. Having accepted that the request is for the personal data of a living individual other than the applicant, the Commissioner must go on to consider whether confirming or denying if the information is held would contravene any of the data protection principles. The Commissioner considers that the first data protection principle is relevant in the circumstances of this case.

***Would confirmation or denial breach the first data protection principle?***

13. The first data protection principle states -

*"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –*  
*(a) at least one of the conditions in Schedule 2 is met, and*  
*(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."*

14. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions. If disclosure would fail to satisfy any of these criteria, then the information is exempt from disclosure. The Commissioner has first considered whether disclosure would be fair.

15. 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);
- any legitimate interests in the public having access to the information; and,
- and the balance between these and the rights and freedoms of the individuals who are the data subjects.

16. The Commissioner recognises that staff would have an instinctive expectation that HMIC, in its role as a responsible data controller, will not disclose certain information about them and that it will respect their confidentiality. In that respect, HMIC advised the Commissioner:

*"Her Majesty's Inspectorate of Constabulary believes that it is a reasonable assumption that the named officer, or any employee or secondee at HMIC, would not willingly consent to their personal information being published into the public domain i.e. a record of an employee's disciplinary record".*

17. HMIC also advised the Commissioner that there was no information about alleged "un-expunged misconduct findings" already in the public domain. Furthermore, it had sought consent from the named officer regarding the disclosure of any information that may, or may not, be held, and that this had not been granted.

18. The Commissioner considers that, in most cases, the very nature of misconduct-related data means it is more likely that disclosing it will be unfair. The reasonable expectation of the data subject is that such information would not be disclosed and that the consequences of any disclosure could be damaging or distressing to them.

19. In light of the above, the Commissioner considers that information relating to misconduct matters will carry a strong general expectation of privacy for the party concerned.

20. As to the consequences of disclosure upon a data subject, the question – in respect of fairness - is whether disclosure would be likely to result in unwarranted damage or distress to that individual.

21. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the withheld information. He will also take into account the fact that disclosure under

FOIA is effectively an unlimited disclosure to the public at large, without conditions.

22. Given the sensitivity of the subject matter, the Commissioner considers that disclosure in this case could lead to an intrusion into the private life of the individual concerned and the consequences of any disclosure could cause damage and distress to that party.
23. Notwithstanding a data subject's reasonable expectations or any damage or distress caused, it may still be fair to disclose information, or in this case confirm or deny if information is held, if there is a more compelling public interest in doing so. Therefore the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in confirming or denying if the information is held.
24. The Commissioner would stress that this is a different balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Given the importance of protecting an individual's personal data the Commissioner's 'default position' is in favour of protecting the privacy of the individual. The public interest in confirming if information is held must outweigh the public interest in protecting the rights and freedoms of the data subject if providing confirmation or denial is to be considered fair.
25. The interest in disclosure must be a public interest, not the private interest of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.
26. The Commissioner acknowledges that the integrity of police officers is of genuine public interest. Their actions need to be lawful and their individual conduct is of paramount importance to the maintenance of the public's trust in the police service as a whole.
27. However, if indeed there are any misconduct issues being investigated, then the Commissioner believes that the appropriate authorities will already be aware of any related concerns and that they will deal with the matters in the correct manner. This will ensure that any issues will be resolved via the appropriate channels rather than through a disclosure to the world at large through the FOIA. If any action is deemed necessary in connection with the named officer then this will be taken and if any disclosure is ultimately deemed necessary then this will be done in a carefully managed way, outside the terms of the FOIA.
28. In light of the nature of the information and the reasonable expectations of the individual concerned, the Commissioner is satisfied that confirming or denying if the requested information is held would not only

be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the data subject; she considers these arguments outweigh any legitimate interest in disclosure. She has therefore concluded that confirmation or denial in this case would breach the first data protection principle and therefore finds the exemption at section 40(5) is engaged and the duty to confirm or deny did not arise.

29. As the Commissioner has determined that it would be unfair to confirm or deny if the information is held, it has not been necessary to go on to consider whether this is lawful or whether one of the schedule 2 conditions is met.

## Right of appeal

---

30. 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)

31. 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.
32. 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** .....

**Carolyn Howes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**