

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 September 2018

Public Authority: Chief Constable West Mercia Police
Address: West Mercia Police Headquarters
Hindlip Hall
PO Box 55
Worcester
WR3 8SP

Decision (including any steps ordered)

1. The complainant requested information relating to whether or not proceedings were taken against the driver of a specific vehicle.
2. West Mercia Police refused to provide the requested information citing section 40 (personal information) of the FOIA.
3. The Commissioner's decision is that the exemption under section 40(5)(b)(i) of the FOIA is engaged and that West Mercia Police was entitled to neither confirm nor deny whether it held the requested information.
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 24 May 2017, the complainant wrote to West Mercia Police and requested information in the following terms:

"I require information under the above Act regarding an enforcement made by a Gatsometer on the 30th November 2016 at 12:03:46 on the A44 in Worcester (Site Address 0508).

Were proceedings taken against the driver of the Volkswagen Golf in the centre lane?"

6. West Mercia Police responded on 2 June 2017. It refused to provide the requested information citing the following exemption as its basis for doing so:
 - section 40(2) personal information.
7. The complainant expressed dissatisfaction with that response on 5 June 2017.
8. West Mercia responded on 8 June 2017, clarifying its response. In its correspondence it said that it was not obliged to confirm or deny whether it held the requested information.
9. The complainant wrote to West Mercia Police on 12 January 2018. He again expressed dissatisfaction with West Mercia Police's handling of his request for information and asked to be provided with further information, namely:
 - "1. Were proceedings taken against the driver of the vehicle, which would include a Notice of Intended Prosecution.*
 - 2. The offer of a Fixed Penalty.*
 - 3. The option of a Speed Awareness Course.*
 - 4. The issue of a Court Summons".*
10. West Mercia Police wrote to the complainant on 18 January 2018, reminding him that West Mercia Police expects a complainant to request a review within 20 working days of the refusal. It advised him, however, that it had nevertheless reviewed its decision in this case.
11. Following an internal review, West Mercia Police upheld its application of section 40(2) of the FOIA.

Scope of the case

12. Following earlier correspondence, on 28 February 2018 the complainant provided the Commissioner with the necessary documentation to support his complaint about the way his request for information had been handled.
13. He told the Commissioner:

"We have not requested any data which is protected under the Data Protection Act, all we have asked is was the driver in the centre lane sent a Notice of Prosecution.

It was made abundantly clear we were not requesting any information which could identify the driver or the vehicle”.

14. He told the Commissioner:

“... [West Mercia Police’s] refusal to tender the information is wholly unreasonable”.

15. With respect to the complainant’s observation that the same information was also requested in court proceedings, the Commissioner understands that criminal procedure rules¹ give the courts explicit powers. Those powers stem from different legislation to the legislation the Commissioner regulates.

16. The Commissioner’s duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part I of the FOIA.

17. Noting that, in its correspondence with the complainant, West Mercia Police both referred to section 40(2) of the FOIA and said that it was not obliged to confirm or deny whether it held the requested information, the Commissioner asked West Mercia Police to confirm which sub-section of section 40 it considered applied in this case. West Mercia Police confirmed that it considered that section 40(2) of the FOIA applied.

18. The Commissioner has investigated West Mercia Police’s approach to this request. She has considered whether, in the circumstances, it would have been appropriate for West Mercia Police to have neither confirmed nor denied that it held the specific information that had been requested.

Reasons for decision

Section 40 personal information

19. In its submissions to the Commissioner, West Mercia Police explained that it was refusing the request under the exemption in section 40(2) of FOIA which provides that information is exempt if it constitutes the personal data of someone other than the applicant and disclosure would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 (DPA).

¹ <https://www.justice.gov.uk/courts/procedure-rules>

20. However, in this case the Commissioner has exercised her discretion to consider an exemption that, while alluded to in its correspondence, was not ultimately relied upon by West Mercia Police. She has considered whether, in the circumstances, it would have been more appropriate for West Mercia Police to have neither confirmed nor denied whether it held the requested information.
21. The Commissioner recognises that there may be circumstances, for example requests for information about investigations or complaints, in which simply to confirm whether or not a public authority holds that personal data about an individual can, in itself, reveal something about that individual. To either confirm or deny that the information is held could indicate whether a person is, or is not, the subject of a complaint or some form of action. If to do so would contravene data protection principles, for example because it would be unfair, then the public authority is not obliged to confirm or deny that it holds the information.
22. Accordingly, the analysis below considers section 40(5)(b)(i) of the 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.
23. Consideration of section 40(5) involves two steps: first, 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.
24. 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.

Is the information personal data?

25. The complainant disputes that he has requested personal information.
26. He told West Mercia Police:

"Our request did not request the identification of the driver or any other personal details in which the driver could be identified..."

and

"This request did not ask you to provide the vehicle details or that of the driver. It does not therefore contravene the 1998 Data Protection Act".

27. The Commissioner has issued guidance on handling a request under the FOIA for information that may include personal data. In that guidance² she states:

"Information is still personal data even if it does not refer to individuals by name, provided that it meets the definition of personal data in the DPA".

28. Section 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 intention of the data controller or any other person in respect of the individual."

29. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable.

30. 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.

31. Having considered the wording of the request, the Commissioner is satisfied that the requested information, if held, clearly relates to the driver of the Volkswagen Golf.

32. The second part of the test is whether the withheld information identifies any individual.

33. In that respect, West Mercia Police told the complainant:

"The information that you are requesting pertains to a vehicle being driven by an individual. The individual themselves, and others, will know who the driver was ...".

34. The Commissioner is mindful that the issue to be considered in a case such as this is whether disclosure to a *member of the public* would breach the data protection principles.

² <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>

35. She accepts that different members of the public may have different degrees of access to the 'other information' needed for re-identification to take place.
36. A test used by both the Commissioner and the First-tier Tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of reidentification of an individual from information which, on the face of it, appears truly anonymised.
37. The ICO's Code of Practice on Anonymisation³ notes that:

"The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA".
38. In summary, the motivated intruder test is that if the risk of identification is *reasonably likely* the information should be regarded as personal data.
39. Taking all the above into account, and mindful of the timeframe and context of the request, the Commissioner is satisfied that the information, if held, constitutes information that falls within the definition of 'personal data'. In other words, she is satisfied that it relates to a living individual who may be identified from that data and that it constitutes their personal data.

Is the information sensitive personal data?

40. Sensitive personal data is defined in section 2 of the DPA. It is personal information which falls into one of the categories set out in section 2 of the DPA. The Commissioner considers the relevant category in this instance is:

"(g) the commission or alleged commission by him of any offence".

³ <https://ico.org.uk/media/for-organisations/documents/1061/anonymisation-code.pdf>

41. In correspondence with the Commissioner, West Mercia Police told her that as the requested information was in relation to the commission of an alleged offence, it would be defined as sensitive personal data.
42. The request in this case specifies a vehicle being driven in a specified location at a specified time. Having had particular regard to the wording of the request, which relates to a criminal allegation involving the driver of that vehicle, the Commissioner is satisfied that the requested information comprises information that falls within the definition of personal data in section 1(1) of the DPA and within the definition of sensitive personal data under sub-section 2(g) of the DPA.
43. Accordingly, the Commissioner considers that, if West Mercia Police confirmed or denied holding the requested information, it would constitute a disclosure of sensitive personal data relating to the data subject who is the subject of the request. This is because the act of confirming or denying whether the requested information is held would disclose to the requester, and to the world at large, whether or not West Mercia Police had instigated proceedings of the sort described in the request.
44. Having accepted that the request is for the sensitive personal data of an individual other than the applicant, and that the act of confirming or denying would involve the disclosure of sensitive personal data, the Commissioner must go on to consider whether this disclosure would contravene any of the data protection principles.
45. 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?

46. 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."

47. In the case of a FOIA request, 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 and, in this case, one of the Schedule 3 conditions. If disclosure, by way of confirmation or denial, would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

48. The Commissioner has first considered whether the disclosure which would take place as a result of confirming or denying whether information was held, would be fair to the data subject.
49. In considering whether a disclosure of personal information is fair, the Commissioner takes into account the following factors:
 - the data subject'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
 - any legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the individuals who are the data subjects.
50. The Commissioner recognises that members of the public have an instinctive expectation that a police force, in its role as a responsible data controller, will not disclose sensitive information about them and that it will respect their confidentiality.
51. In this case, the Commissioner accepts that the driver of the vehicle would reasonably expect that their sensitive personal data – whether or not proceedings had been taken against them – would not be released to the world at large.
52. Furthermore, the Commissioner considers that, in most cases, the very nature of sensitive personal data means it is more likely that disclosing it will be unfair. The reasonable expectation of the data subject is likely to be that such information would not be disclosed in response to an FOIA request and that the consequences of any disclosure could be damaging or distressing to them.
53. In light of the above, the Commissioner considers that information relating to criminal allegations and proceedings, if held, will carry a strong general expectation of privacy for the parties concerned.
54. 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.
55. Given the nature of the request in this case, and the sensitivity of the subject matter, the Commissioner considers that disclosure by way of confirmation or denial would constitute an invasion of the data subject's privacy, and the consequences of any disclosure could cause them damage and distress.

56. 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 that information is held, if there is an overriding legitimate interest in disclosure. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public and the private interests of the requester.
57. Examples of a legitimate public interest in disclosure include the general public interest in transparency, the public's interest in the issue the information relates to and any public interest in disclosing the specific information.
58. The Commissioner understands that the complainant may have a private interest in the requested information. In that respect she notes that he told her:

"This information was also requested in court proceedings".
59. Given his background to the request, and his concerns, the Commissioner recognises that the information in question is of interest to the complainant. However, the Commissioner is not aware of any overlap between the public interest and the requester's own private interest.
60. In considering whether the exemption at section 40(5)(b)(i) of the FOIA applied in this case, 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.
61. With due regard to the nature of the requested information, the reasonable expectations of the data subject and the potential impact on them if the existence of their personal data in the context of proceedings was to be confirmed or denied, the Commissioner considers that it would be unfair to do so.
62. The Commissioner is satisfied that confirming or denying that the requested information is held would not only be an unwarranted intrusion of the data subject's privacy but could potentially cause unnecessary and unjustified distress to the data subject. She considers these arguments outweigh any legitimate interest in disclosure.
63. Accordingly, she considers that the exemption provided by section 40(5)(b)(i) is engaged and that West Mercia Police was therefore not obliged to confirm or deny whether it held the information requested by the complainant.

64. As the Commissioner has determined that it would be unfair to confirm or deny that 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 or schedule 3 DPA conditions is met.

Other matters

Internal reviews

65. The section 45 Code of Practice (the code) provides guidance on the practice it would be desirable for public authorities to follow to meet their obligations under FOIA⁴. Part VI of the code provides advice on how public authorities should deal with complaints relating to request handling.
66. Any written correspondence where the applicant says they are unhappy with a public authority's response to an information request, or any communication which indicates that the authority is not meeting its obligations as set out within its publication scheme, should be treated as a complaint.
67. The Commissioner notes that, while West Mercia Police did process the complainant's formal request (submitted on 12 January 2018) for internal review, it failed to handle the complainant's initial expression of dissatisfaction (submitted on 5 June 2017) as a complaint. The Commissioner expects that the authority's future handling of complaints will conform to the recommendations of the Code.

Other access regimes

68. In reaching her decision in this case, the Commissioner is mindful that the introduction of the FOIA did not directly affect existing regimes or arrangements for accessing information, such as court rules for access to court records. The Commissioner does not oversee these other regimes for accessing information.
69. She understands that the complainant is aware that such avenues may be available to him.

⁴ <https://ico.org.uk/media/for-organisations/documents/1624144/section-45-code-of-practice-request-handling-foia.pdf>

Right of appeal

70. 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

71. 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.

72. 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

**Deborah Clark
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SK9 5AF**