

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 June 2019

Public Authority: Devon and Cornwall Constabulary
Address: Police Headquarters
Middlemoor
Exeter
Devon
EX2 7HQ

Decision (including any steps ordered)

1. The complainant requested information relating to a named individual. Devon and Cornwall Police neither confirmed nor denied holding the requested information by virtue of section 40(5) (personal information) of the FOIA.
2. The Commissioner's decision is that Devon and Cornwall Police was entitled to rely upon section 40(5) to neither confirm nor deny whether it held the requested information.
3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. Following earlier correspondence, on 29 January 2019 the complainant wrote to Devon and Cornwall Police and requested information in the following terms:

"I made a previous request [reference redacted] concerning this matter in Feb last year. My questions are the same.

...

Therefore, my questions are as before:

1. *If [name redacted] left the Police when was it?*

2. If she left prior to December 2014 was she employed by the Police as a civilian particularly during the period December 2014 to April 2015 inclusive?"

5. Devon and Cornwall Police responded on 30 January 2019 and refused to confirm or deny that the requested information was held. It cited the following exemption as the basis for doing so:
 - section 40(5) (personal information).
6. Following an internal review, Devon and Cornwall Police wrote to the complainant on 15 February 2019 maintaining its original position.

Scope of the case

7. The complainant contacted the Commissioner on 25 February 2019.
8. In the course of his correspondence with the Commissioner the complainant raised a number of issues which are outside the scope of her remit. 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 Freedom of Information Act 2000 (FOIA).
9. It is not in dispute that the complainant made a previous request, dated 7 February 2018, to Devon and Cornwall Police on the same subject matter. During the course of her investigation, Devon and Cornwall Police provided the Commissioner with a copy of that request.
10. The Commissioner accepts that the request dated 7 February 2018 includes the following wording:

"I wish to know the employment details of one of your employees by the name of the former Ms [name redacted] who became Mrs [name redacted] following her marriage in [date redacted]".
11. The Commissioner considers that that wording provides context to the request in this case.
12. The analysis below considers whether Devon and Cornwall Police was entitled to neither confirm nor deny holding information within the scope of the request in this case, the request dated 29 January 2019.

Reasons for decision

The Law Enforcement provisions

13. The Commissioner's guidance on law enforcement processing states:

"Part 3 of the DPA applies if you process personal data for 'law enforcement purposes', although it is unlikely to apply to all processing that you do. It covers processing for the prevention, investigation, detection or prosecution of criminal offences, or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security".

14. In the case of competent authorities for the purpose of the law enforcement provisions (law enforcement bodies), the Commissioner considers that, in relation to considering disclosure under the FOIA, or as in this case confirming whether or not the requested information is held, they should be considering the application of principle (a) of the General Data Protection Regulation EU2016/679 (the GDPR).

15. The rationale for this is that disclosure to the public under the FOIA by a public authority, including a law enforcement body, is part of its purposes as a public authority, rather than being for law enforcement purposes.

16. The Commissioner has therefore concluded that disclosure to the public of personal data under the FOIA, and also confirmation as to whether or not personal data is held by a public authority, including a law enforcement body, is part of its purposes as a public authority, rather than being for law enforcement purposes.

On what basis is Devon and Cornwall Police processing the data?

17. In this case, Devon and Cornwall Police has law enforcement functions and is designated to be a 'competent authority' for the purposes of Part 3 of the Data Protection Act 2018 (the DPA). A competent authority for the purposes of law enforcement means a person specified in Schedule 7 and any other person if, and to the extent that, the person has statutory functions to exercise public authority or public powers for the law enforcement purposes.

18. However, as explained above, the Commissioner is satisfied that Devon and Cornwall Police is processing the information (if it is held) as a public authority and not for law enforcement purposes.

Section 40 - personal information

19. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the GDPR to provide that confirmation or denial.
20. Therefore, for Devon and Cornwall Police to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request the following two criteria must be met:
 - confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

21. Section 3(2) of the DPA 2018 defines personal data as:-

"... any information relating to an identified or identifiable living individual".

22. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
23. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
24. In this case, as the complainant clearly refers to a named individual in his request for information, the Commissioner is satisfied that the requested information, if held, would be that individual's personal data.
25. For the reasons set out above, the Commissioner is satisfied that if Devon and Cornwall Police confirmed whether or not it held the requested information this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.
26. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent Devon and Cornwall Police from refusing to confirm whether or not it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.

27. The Commissioner agrees that the most relevant data protection principle is principle (a).

Would confirming whether or not the requested information is held contravene one of the data protection principles?

28. Article 5(1)(a) GDPR states that:-

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."

29. In the case of a 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 – or, as in this case, the public authority can only confirm whether or not it holds the requested information - if to do so would be lawful (ie it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), be fair, and be transparent.

Lawful processing - Article 6(1)(f) GDPR

30. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
31. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:-

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"¹.

¹ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA 2018) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information,

32. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under FOIA it is necessary to consider the following three-part test:-

(i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;

(ii) Necessity test: Whether confirmation as to whether the requested information is held (or not) is necessary to meet the legitimate interest in question;

(iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

33. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

(i) Legitimate interests

34. In considering any legitimate interests in confirming whether or not the requested information is held in response to a FOI request, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.

35. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

36. In the complainant's view, the named individual "*is not entitled to any privacy concerning her Police service*" and therefore the confirmation or denial should be given. He told the Commissioner:

"[name redacted] can expect no special considerations of privacy for this information as she clearly advertises herself in several legal

Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

justice documents as published on the National Archives - copies of which I have".

37. The Commissioner acknowledges that the complainant provided Devon and Cornwall Police with excerpts, variously dated 2008 and 2009, from "articles published in various journals and the web" in support of his position.
38. The Commissioner recognises that the information is of interest to the complainant. However, while she is satisfied that he has demonstrated a legitimate interest in requesting the information, the Commissioner is not aware of any wider public interest in confirming or denying whether the information is held.

(ii) Is confirming whether or not the requested information is held necessary?

39. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA as to whether the requested information is must therefore be the least intrusive means of achieving the legitimate aim in question.
40. The Commissioner cannot envisage how the request can be met without disclosing personal data. This is because the subject is a named party and any confirmation or denial would necessarily say something about her personally as she is the focus of the request.
41. Devon and Cornwall Police told the complainant:

"If I were to confirm or deny that the information requested is held it would, by default, be confirming that the named person was or was not employed by the Police, which would then become public knowledge".
42. The Commissioner notes that Devon and Cornwall Police advised the complainant, in relation to his request in this case, about other legislation, including a court order, that allows for requests for such information, if it exists, to be provided.
43. The Commissioner considers this to be the least intrusive means of achieving the legitimate aim in question rather than Devon and Cornwall Police confirming or denying, to the world at large, whether or not it held employment details of the individual named in the request.

44. As the Commissioner considers that public disclosure of whether or not the named individual was employed by the Police is *not* the least intrusive method of achieving the legitimate interest, such processing is thus not *necessary* to satisfy any legitimate interest.
45. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is thus unlawful.
46. Given the conclusion the Commissioner has reached above on lawfulness, the Commissioner considers that she does not need to go on to separately consider whether confirming or denying whether the information is held would be fair and transparent.

The Commissioner's view

47. The Commissioner has therefore decided that Devon and Cornwall Police was entitled to refuse to confirm whether or not it held the requested information on the basis of section 40(5B)(a)(i) of FOIA.

Right of appeal

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@justice.gov.uk
Website: 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

Carolyn Howes
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