

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 August 2021

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 from the Metropolitan Police Service (the "MPS") information about the disciplinary records of a named former police officer.
2. The Commissioner's decision is that the MPS is entitled to rely on section 40(5) to refuse to confirm or deny that it holds the information.
3. The Commissioner does not require the MPS to take any further steps.

Request and response

4. On 14 August 2020 the complainant, a local Councillor, wrote to the MPS to request information in the following terms:

"As a local elected councillor for the Hillhead ward, Glasgow City, I am seeking information on a former police officer of the Met in the interests of protecting the public. His name is [name redacted], [job title redacted] at the University of Glasgow. [Name redacted] was a Detective Constable at [name redacted] Police Office. Information is requested referring to [name redacted] as the subject of a disciplinary process in 2003 which led to his dismissal or resignation."

5. The MPS responded on 18 August 2020 and refused to provide the information, citing section 40(5) of the FOIA . It stated that it was unable to confirm nor deny that it holds the requested information. It explained that the request was seeking the personal data of a third party and to confirm or deny it is held, would be a breach of the GDPR.
6. The complainant sought an internal review on 22 December 2020. The complainant said:

"I am seeking release of the information from the hearings regarding [name redacted] as a matter of public interest.

I do not accept the reasons given that information from hearings of pre-2015 are private. In this case, the welfare of students and staff at the University of Glasgow require this information to be made available to myself as their local elected representative".

7. Following an internal review, the MPS wrote to the complainant on 26 April 2021. It maintained the application of section 40(5) FOIA. The MPS set out in its internal review, why it considered, if it confirmed or denied the requested information were held, it would be personal data and how disclosure of it would be unfair to the named former police officer.

Scope of the case

8. The complainant contacted the Commissioner on 10 June 2021 to complain about the way her request for information had been handled. Her grounds of complaint were:

"I am not satisfied with this response as information on a former police officer of the MET is in the interests of protecting the public as the case from 2003 is relevant to his current employment. I am seeking reassurance that [name redacted] is suitable to implement measures within the University of Glasgow to address gender-based violence. ... The recent publicity about case of Sarah Everard should be considered as this involved a police officer from the MET."

9. Given her dual role as the regulator of data protection legislation, the Commissioner considers that she has sufficient experience and expertise to reach a decision in this case based on the request and responses. The Commissioner has therefore not sought further submissions from the MPS as to why it handled the request in the way that it did.

10. The Commissioner considers that the matter to be decided is whether the MPS is entitled to rely on section 40(5B)(a)(i) FOIA to refuse to either confirm or deny it holds the requested information.

Reasons for decision

Section 40(5) - neither confirm nor deny

11. Section 1(1)(a) of FOIA provides that where a public authority receives a request for information, it is obliged to tell the applicant whether it holds that information. This is commonly known as 'the duty to confirm or deny'.
12. 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 General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.
13. The decision to use a 'neither confirm nor deny' response will not be affected by whether a public authority does or does not in fact hold the requested information. The starting point, and main focus for a 'neither confirm nor deny' response in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not particular information is held. The Commissioner's guidance explains that there may be circumstances in which merely confirming or denying whether or not a public authority holds information about an individual can itself reveal something about that individual.
14. The MPS has taken the position of neither confirming nor denying whether it holds any of the requested information in its entirety, citing 40(5) of the FOIA. The issue that the Commissioner has to consider is not one of the disclosure of any requested information that may be held, it is solely the issue of whether or not the MPS is entitled to 'neither confirm nor deny' whether it holds any information of the type requested by the complainant.
15. Therefore, for the MPS to be entitled to rely on section 40(5B)(a)(i) of FOIA to refuse to confirm or deny 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?

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

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

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. 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.
19. The former police officer is specifically named in the request. As the complainant is already aware of the identity of the individual named in her request, confirmation or denial as to whether the MPS held information specific to this individual would reveal information that is about them, linked to them, has biographical significance for them or has them as its main focus.
20. The Commissioner is satisfied that if the MPS were to either confirm or deny it held the information, it would involve the disclosure of personal data of a third party i.e. it would reveal something about that named police officer and whether the officer was the subject of any disciplinary procedures or hearings. This clearly relates to him and he could be identified from this.
21. As far as the Commissioner is aware, there is nothing available in the public domain which reveals any of the more detailed information being sought here.
22. The first criterion set out is therefore met.
23. While the Commissioner accepts that the complainant may have specific reasons for wanting to access the requested information - as a local elected representative, the Commissioner has to take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public. She must therefore consider the wider public interest issues

and fairness to the named police officer when deciding whether or not the information is suitable for disclosure.

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

24. 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 the MPS from refusing to confirm whether 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. The Commissioner considers that the most relevant data protection principle is set out at Article 5(1)(a) of the GDPR (principal (a)).

25. 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”.

26. 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 (i.e. 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

27. 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”* lawful bases for processing listed in the Article applies.

28. The Commissioner considers that the condition most applicable on the facts of this case is contained in Article 6(1)(f) GDPR which states:

“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:

29. 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 confirming or denying that the requested information is held 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(s).
30. The Commissioner considers that the test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

31. In considering any legitimate interests in confirming whether or not the requested information is held in response to a FOIA request, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sake as well as case specific interests.
32. 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.
33. In this case, the Commissioner notes that the individual concerned holds a relatively senior role at the University and that, as part of that role,

“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, 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”.

will have access to types of information that will not be available to most staff members and students at the University. This elevates the need for whoever holds this role to have been thoroughly vetted by the University during the recruitment process. There is therefore a legitimate interest in ensuring the University is carrying out due diligence when appointing members of staff to positions of responsibility.

34. It is clear that the complainant considers that it is a matter of public interest and in the legitimate interests of student and staff welfare at the University, for the MPS to provide specific information relating to the disciplinary records of a named former police officer now employed by the University.
35. The Commissioner is also satisfied that there may be a wider legitimate interest in the transparency of the MPS's procedures when handling disciplinary issues. It is a matter of public interest for the MPS to confirm whether or not it took disciplinary action in a case.
36. The Commissioner therefore agrees that confirming or denying whether information is held in this case would go some way towards informing the public about the MPS's accountability in its disciplinary procedures, in public safety issues, and for student and staff welfare at the University. Therefore there is some legitimate interest in the confirmation or denial in this case.

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

37. '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 that the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
38. In this case, the Commissioner appreciates that the welfare and safety of both students and staff that the named former police officer may be responsible for at the University is paramount.
39. The Commissioner considers that the named police officer's place of work would ultimately be responsible for checking this. While it is not a matter for the Commissioner to investigate as it falls outside her statutory remit, when going through a recruitment process, it is likely that there will have been security and employment checks carried out to

make sure that the individual was thoroughly vetted by the University before taking up the role.

40. The Commissioner understands from the MPS's correspondence about its established policies and practices prior to 2015, that information about whether disciplinary proceedings have been carried out and the outcome of those proceedings, were considered private and were not published by MPS in a public forum. However, the Commissioner notes the wider societal benefits that may flow from transparency in the MPS's procedures when handling disciplinary issues.
41. The Commissioner is therefore satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

42. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if a data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOIA request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
43. The Commissioner notes that, in this case, the named police officer would have no reasonable expectation that the MPS would confirm or deny whether it held the requested information. As referred to above, the Commissioner understands that prior to 2015, information about disciplinary proceedings were considered private and were not published by MPS in a public forum.
44. The Commissioner also notes that the complainant's request indicates that the presence of disciplinary records held by MPS could be taken to relate to misconduct or impropriety. A substantive confirmation or denial could therefore allow an inference to be drawn about the reason for MPS holding or not holding the information.
45. Moreover, the Commissioner accepts that disclosure of information concerning such matters could cause a significant invasion of privacy for such individuals, particularly in cases where any disciplinary allegations proved to be unfounded. There is no presumption that openness and

transparency of the activities of public authorities should take priority over personal privacy.

46. However, each request for information has to be considered on its own merits. The Commissioner considers that there is some legitimate interest in disclosing whether a disciplinary hearing occurred, since this would inform the public whether a disciplinary issue was raised about the named police officer. She also considers that there is a legitimate interest in the public being able to scrutinise whether the MPS has undertaken appropriate disciplinary action in a particular case and this stems from the interest in public authorities' accountability.
47. The Commissioner agrees that confirming or denying whether information is held in this case would go some way towards informing the public about the MPS's accountability in terms of the disciplinary proceedings which it carries out, and therefore there is some legitimate interest in the confirmation or denial in this case.
48. It may also be reasonable to ask the MPS to confirm whether it took action about a disciplinary matter in 2003 given that since 2015 the MPS does now publish some misconduct outcomes on its website.
49. However, it is noted that the MPS said in its Internal Review response: *"Although the MPS publishes some misconduct outcomes², it does not routinely provide confirmation or otherwise of individual staff misconduct records or service records."* This makes clear that the MPS does not now routinely publish whether or not disciplinary proceedings have been carried out into any specific police officer. Whether or not any information about disciplinary proceedings is published on the MPS website depends on the outcome in each case.
50. The Commissioner is therefore satisfied that the named former police officer would have no reasonable expectation that the MPS would confirm or deny whether it held the information that has been requested in this case. The Commissioner is aware that it would not normally be in the public domain whether or not disciplinary proceedings into a named police officer had been carried out or not. She considers that it may be unfair to the police officer to confirm or deny whether any disciplinary matters may have been undertaken. She is also satisfied that confirming

² <https://www.met.police.uk/foi-aj/af/accessing-information/published-items/?q=&dt=Misconduct+outcome&fdte=&tdte=&ic=&icsc=&dir=>

or denying whether or not information is held may potentially cause reputational harm or professional embarrassment to the named police officer. She has therefore weighed this against the legitimate interests in disclosure in this case.

51. Whilst the Commissioner notes the complainant's argument that the information would assist with public safety, and the wider societal implication relating to MPS's conduct of disciplinary proceedings, information released under the FOIA is to the world at large.
52. Based on the above factors, the Commissioner has determined that, while the matter is finely balanced, there is insufficient legitimate interest to outweigh the named former police officer's fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful. She is not persuaded that revealing under the FOIA whether the MPS carried out disciplinary proceedings in this particular case is necessary in order to maintain public confidence. She is also satisfied that confirming or denying whether or not information is held may potentially cause damage and distress to the named former police officer.
53. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
54. The Commissioner has therefore decided that the MPS is able to rely on section 40(5B)(a)(i) of the FOIA to refuse to confirm whether or not it held the requested information.

Other matters

55. Since the end of the transition period following the UK's departure from the EU, the GDPR were replaced by the UK GDPR. As this request was received before the end of that transition period, the application of section 40(5B)(a)(i) has been decided by reference to the GDPR. However the Commissioner is also satisfied that the disclosure of the personal data to which that exemption was applied would not contravene the UK GDPR for exactly the same reasons.
56. The complainant did not specifically refer to the time taken for the MPS to respond to her request for internal review so the Commissioner has not considered it formally above. There is no statutory requirement to conduct an internal review under the terms of the FOIA. However, she

does note that the response was significantly delayed, taking over four months, so she has noted it here.

Right of appeal

57. 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: 0203 936 8963.

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

58. 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.
59. 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

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