

## **Freedom of Information Act 2000 (FOIA) Decision notice**

**Date:** 10 November 2021

**Public Authority:** Gloucestershire Constabulary  
**Address:** Police Headquarters  
No 1 Waterwells  
Waterwells Drive  
Quedgeley  
Gloucestershire  
GL2 2AN

### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to complaints of sexual misconduct about a named individual.
2. The Commissioner's decision is that Gloucestershire Constabulary (the Constabulary) correctly applied section 40(5B) FOIA in its initial response to neither confirm nor deny (NCND) that it held information within the scope of the request.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

### **Request and response**

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4. On 7 October 2020, the complainant wrote to the Constabulary and requested information in the following terms:  
  
*"Please provide me with the number of female suspects who have made complaints of sexual misconduct against [redacted] or sometimes known as [redacted] or also known as [redacted], who worked as a [redacted] at Gloucester Police Station between 2012-2015."*
5. The Constabulary responded on 4 November 2020 and cited section 40(5B) FOIA to neither confirm nor deny (NCND) that any information was held.

6. Following an internal review the Constabulary wrote to the complainant on 17 March 2021 and amended its position, and instead sought reliance on section 40(2) FOIA – third party personal data.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 15 March 2021 to complain about the way their request for information had been handled.
8. The Commissioner has consistently taken the view that public authorities in receipt of similar requests should, in most circumstances, neither confirm nor deny that they hold relevant information as, to do otherwise would risk exposing the personal data of a third party. The analysis that follows explains why this is appropriate in this case.
9. The Commissioner considers it is appropriate to explain that it appears the complainant has misunderstood what information the exemption was applied to in this case. They believe it has been applied to the information of the individuals making the allegations whereas it has, in fact been applied to the individual named in the request.
10. It further appears to the Commissioner that the individual who carried out the internal review may also have misunderstood what information was under consideration.

## **Reasons for decision**

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### **Section 40 – Personal data**

11. 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.
12. Therefore, for the Constabulary to be entitled to rely on section 40(5B) FOIA to refuse to confirm or deny whether they hold 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?*

13. Section 3(2) of the Data Protection Act 2018 (the DPA 2018) defines personal data as:

*'any information relating to an identified or identifiable living individual'.*

14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. 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.
16. In this case, the request relates to the number of complaints about a named individual. If the Constabulary were to confirm that it held information it would be confirming that it had in fact received complaints about an identifiable individual. Information of this type relates to an identified individual, is about them and has them as its main focus. Therefore it is categorised as personal data.

*Would confirmation or denial contravene one of the data protection principles?*

17. The fact that confirming or denying whether the requested information is held would reveal the personal data of a specific individual does not automatically prevent the council from refusing to confirm whether or not they hold the 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 (Principle (a)) which states:

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

18. 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 – or as in this case the public authority should only confirm whether or not they hold 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.

*"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".*

19. In considering the application of Article 6(1)(f)<sup>1</sup> of the GDPR in the context of a request for information under the 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.
20. 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*

21. 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.
22. 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. However, the more personal or more trivial the interest, the less likely it is that such an interest will outweigh the rights of the data subject in the balancing test.
23. In this case, the complainant has stated that they "*believe the public has a right to be informed of the allegations made and the number of women who have made allegations disclosed. [redacted] was acting in a position of trust with vulnerable women, and if he cannot be trusted the public has a right to know.*"

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<sup>1</sup> 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, 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".

24. Clearly this would be an important aspect for the Commissioner to consider, if the Constabulary did in fact hold any of the requested information, and she would accept that there is a legitimate interest in disclosure of the information requested.

*Necessity test*

25. '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; 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 held must therefore be the least intrusive means of achieving the legitimate aim in question.
26. The Commissioner is aware that there is nothing in the public domain about any complaints or allegations against the named individual.
27. She is therefore satisfied that disclosure would be necessary in this case in order to meet the legitimate interest in confirmation or denial of whether the requested information was held.

*Balance of legitimate interests and the data subject's interests*

28. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject's interests, fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject (the named individual) would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI 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.
29. The Commissioner is satisfied that the data subject would have no reasonable expectation that the Constabulary would confirm or deny whether it held the information that has been requested in this case.
30. She is also satisfied that confirming or denying whether or not information is held may potentially cause damage and distress to the data subject.
31. She has therefore weighed this against the legitimate interests in disclosure in this case.

32. The Commissioner considers that there is some legitimate interest in disclosing whether individuals maintain appropriate standards whilst in a position of trust.
33. She also considers that there is some legitimate interest in the public being able to scrutinise whether the conduct of such individuals meets the standards expected.
34. However, while she considers there is a legitimate interest in maintaining public confidence, in this particular case there is an official complaints process and investigation procedure by a professional regulatory standards authority.
35. The Commissioner is not persuaded that confirming or denying under the FOIA whether the Constabulary has received any complaints, or the nature of those complaints, would provide any additional scrutiny. It should also be noted that although complaints may have been made about an individual it does not equate to any indication of guilt.
36. The Commissioner has considered her decision alongside a number of previous decision notices which have been issued in similar circumstances, and alongside the decision of the First-tier Tribunal in *Foster v Information Commissioner and General Medical Council* EA/2016/02492.
37. Based on the circumstances of this case, and in line with the decisions above, the Commissioner has determined that there is insufficient legitimate interest in this case to outweigh the data subject's fundamental rights and freedoms.
38. She has therefore determined that confirming whether or not the requested information is held would not be lawful.

*Fairness/Transparency*

39. Given the conclusion the Commissioner has reached above on lawfulness, which included considerations of fairness, the Commissioner does not need to go on to separately consider whether confirming or denying whether the information is held would be fair and/or transparent.
40. The Commissioner has determined that the public authority was correct to refuse the request on the basis of section 40(5B)(a)(i) of FOIA.

## Other matters

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41. After reviewing the Constabulary's responses to the complainant the Commissioner notes that there is a lack of clarity and detail relating to the exemption, particularly in the internal review. This led the complainant to believe that, as the internal review had not upheld the initial response, the information would be provided to them.
42. The Commissioner therefore recommends that the Constabulary refer to her guidance on section 17 – refusing a request<sup>2</sup>, as a refresher for those staff that deal with responses to FOI requests.

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<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1628/refusing\\_a\\_request\\_writing\\_a\\_refusal\\_notice\\_foi.pdf](https://ico.org.uk/media/for-organisations/documents/1628/refusing_a_request_writing_a_refusal_notice_foi.pdf)

## **Right of appeal**

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43. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

44. 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.
45. 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**

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