

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 July 2022

Public Authority: Chief Constable of Kent Police
Address: Police Headquarters
Sutton Road
Maidstone
ME15 9BZ

Decision (including any steps ordered)

1. The complainant requested, from Kent Police, information about an allegation of indecent exposure he believed had been made against a former police officer. Kent Police would neither confirm nor deny whether it held the requested information, citing section 30(3) (Investigations and proceedings) and section 40(5B)(a)(i) (Personal information) of FOIA.
2. The Commissioner's decision is that section 40(5B)(a)(i) of FOIA was properly engaged.
3. No steps are required as a result of this decision.

Request and response

4. On 9 July 2021, the complainant wrote to Kent Police and requested information in the following terms:

"[Name redacted] was accused of flashing six years ago but Kent Police failed to investigate. [Details of subsequent conviction, redacted].

REQUEST

Disclose all information relating to the accusation of [name redacted] flashing. You may redact all personal data, as defined by FOIA, relating to the alleged victim(s).

There is a legitimate interest in the public knowing if you acted properly. When replying please list the information held in date order."

5. On 10 August 2021, Kent Police responded. It would neither confirm nor deny whether it held the requested information, citing sections 30(3) (Investigations and proceeding) and 40(5B) (Personal information) of FOIA.
6. The complainant requested an internal review on 17 August 2021.
7. Kent Police provided the outcome of the internal review on 25 August 2021. It maintained that its application of sections 30(3) and 40(5B)(a)(i) was correct.

Scope of the case

8. The complainant contacted the Commissioner on 30 September 2021 to complain about the way his request for information had been handled. He disagreed with Kent Police's decision to neither confirm nor deny whether it held the requested information, saying that, at the time of his request, there was information in the public domain about the matter.
9. The analysis below considers Kent Police's application of section 40(5) of FOIA to neither confirm nor deny whether it held the requested information. As the Commissioner found it was correctly engaged, he has not considered Kent Police's application of section 30(3) of FOIA.

Reasons for decision

Section 40 - personal information

10. 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 UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.
11. Therefore, for Kent Police to be entitled to rely on section 40(5B)(a)(i) 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:
 - (a) Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data;
and

- (b) Providing this confirmation or denial would contravene one of the data protection principles.

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

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

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

13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
14. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
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. The requested information was about criminal allegations the complainant believed had been made against a living individual who was named in the information request. Therefore, disclosing whether or not any information was held would reveal something about that individual, (ie it would reveal whether or not they were the subject of an allegation of indecent exposure several years ago).
17. For the reasons set out above, the Commissioner is satisfied that, if Kent Police confirmed whether or not it held the requested information, this would result in the disclosure of third party personal data. The first criterion set out in paragraph 11 is therefore met.
18. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether confirming or denying whether Kent Police held the requested information would contravene any of the Data Protection principles.
19. The most relevant Data Protection principle in this case is principle (a).

Would confirming or denying whether Kent Police held the requested information contravene principle (a)?

20. Article 5(1)(a) of the UK GDPR states that:

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

21. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. In this case, disclosure, by way of confirmation or denial as to whether or not the information was held, can only be made if to do so would be lawful, fair and transparent.
22. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.
23. In addition, if the requested data is criminal offence data, in order for disclosure to be lawful and compliant with principle (a), it must also meet the requirements of Article 10 of the UK GDPR.
24. Although not argued by Kent Police, the Commissioner finds it appropriate to consider whether confirming or denying whether Kent Police held the requested information would result in the disclosure of criminal offence data.

Is the requested information criminal offence data?

25. Information relating to criminal convictions and offences is given special status in the UK GDPR.
26. Article 10 of UK GDPR defines ‘criminal offence data’ as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA 2018, personal data relating to criminal convictions and offences includes personal data relating to:
 - (a) The alleged commission of offences by the data subject; or
 - (b) Proceedings for an offence committed or alleged to have been committed by the data subject of the disposal of such proceedings including sentencing.
27. The requested information in this case is about whether or not a named individual (the data subject) was the subject of allegations of indecent exposure several years ago. Indecent exposure falls within the scope of sexual assault, a criminal offence under the Sexual Offences Act 2003. The Commissioner’s guidance on the UK GDPR¹ confirms that unproven allegations fall within the definition of criminal offence data. The

¹ <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/criminal-offence-data/>

Commissioner therefore finds that the requested information comprises the criminal offence data of the data subject, in its entirety.

28. The complainant has claimed that there was information in the public domain about the matters referred to in his request, and this means that Kent Police should comply with his request without recourse to a neither confirm nor deny response. However, criminal offence data is particularly sensitive and it warrants special protection. Regardless of information which may, or may not, be in the public domain, the Commissioner's guidance on personal data² is clear that criminal offence data may only be processed in response to a FOIA request if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA 2018 can be met.
29. Only two conditions will be relevant to allow a public authority to lawfully disclose criminal offence data under FOIA. These are:
 - consent from the data subject; or
 - the processing relates to personal data which has clearly been made public by the individual concerned.
30. If a relevant condition cannot be met, a public authority must not disclose the information, as disclosure would be unlawful and therefore in contravention of principle (a).
31. Having considered the information which has been requested, the Commissioner has determined that, were it held, it would be criminal offence data. He has not asked Kent Police for its representations on this point; he does not consider this to be necessary in light of his role as regulator for data protection matters.
32. As regards the conditions for processing set out in paragraph 29, the Commissioner has seen no evidence or indication that the data subject has specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
33. Having regard for the restrictive nature of the Schedule 1, Parts 1 to 3 conditions, the Commissioner does not consider that any of the conditions for processing can be met.

² <https://ico.org.uk/media/for-organisations/documents/2619056/s40-personal-information-section-40-regulation-13.pdf>

34. As none of the conditions required for processing criminal offence data are satisfied there can be no legal basis for confirming whether or not the requested information is held; providing such a confirmation or denial would breach principle (a) and therefore the second criterion of the test set out in paragraph 11, above, is met.
35. It follows that Kent Police was entitled to refuse to confirm or deny whether it held the requested information on the basis of section 40(5B)(a)(i) of FOIA.

Right of appeal

36. 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

37. 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.
38. 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

Samantha Bracegirdle
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF