

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

### **Decision notice**

**Date:** 26 May 2022

**Public Authority:** Chief Constable of West Midlands Police  
**Address:** Lloyd House  
Snow Hill Queensway  
Birmingham  
B4 6DG

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

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1. The complainant requested information relating to a phone call he understands was made to West Midlands Police.
2. West Midlands Police refused to confirm or deny whether it holds the requested information, citing section 40(5) (personal information) of FOIA.
3. The Commissioner's decision is that West Midlands Police was entitled, by virtue of section 40(5A) of FOIA, to neither confirm nor deny holding the requested information.
4. The Commissioner requires no steps to be taken as a result of this decision.

#### **Request and response**

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5. On 13 February 2022, the complainant wrote to West Midlands Police and requested information in the following terms:  

"I would like a copy of the phone recording of the time I was unlawfully arrested during 25th April 2021. When they called the police why did they say I was the one who assaulted the paramedics'? The public servant in question who arrested was [redacted] who carried out no initial investigation".
6. The request was made using the 'whatdotheyknow' website.

7. West Midlands Police responded on 17 February 2022. It refused to confirm or deny whether it holds the requested information. West Midlands Police advised the complainant that the Subject Access provisions of the UK General Data Protection Regulation (UK GDPR) and the Data Protection Act 2018 (DPA) give an individual the right to request a copy of any personal data held on them.
8. Following an internal review, West Midlands Police wrote to the complainant on 8 March 2022 maintaining that position.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 14 March 2022 to complain about the way his request for information had been handled.
10. The Commissioner has taken into account that while West Midlands Police cited section 40(5) in its correspondence with the complainant, it also explained:

"Should the information exist, it would pertain to your own personal data and/or that of third parties, and personal data is not available under the FOI Act".
11. The analysis below considers whether West Midlands Police was entitled to neither confirm nor deny holding the requested information. In light of West Midlands Police's correspondence with the complainant, the Commissioner first considered whether section 40(5A) applies in respect of the requester. If the Commissioner considers that it has been incorrectly cited, he will then consider whether section 40(5B) applies in respect of third parties.

## **Reasons for decision**

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### **Section 40 personal information**

12. Section 40(1) of FOIA states that:

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."
13. Section 40(5A) of FOIA states that:

"The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1)".

14. In other words, while section 40(1) of FOIA provides an exemption from the right to information if the requested information is the requester's personal data, section 40(5A) of FOIA provides an exemption from the duty to confirm or deny whether requested information is held, if to do so would disclose personal data of which the applicant is the data subject.

**Would the confirmation or denial that the requested information is held constitute the disclosure of personal data?**

15. Section 3(2) of the DPA defines personal data as "any information relating to an identified or identifiable living individual".
16. The two main elements of personal data, therefore, are that the information must relate to a living person, and that the person must be identifiable.
17. 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 or an online identifier; or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
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 Commissioner acknowledges that the context of the request in this case is a phone call that the complainant believes was made about him.
20. He told the Commissioner:

"I have requested key evidence from the West Midlands Police in order to present at future Court hearings, ... When they called the police why did they say I was the one who assaulted the paramedics' ? .... I want to know why they said I was assaulting them when I wasn't".
21. Given the wording of the request, and the context provided by the complainant, the Commissioner is satisfied that the requested information, if held, relates the individual who was the subject of the call. He is further satisfied that the individual is identifiable from that information. The information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
22. West Midlands Police argued that confirmation or denial in this case would lead to disclosure of the requester's personal information.

23. In his guidance<sup>1</sup> entitled 'Neither confirm nor deny in relation to personal data', the Commissioner states:

"If the requested information is the requester's personal data, it is exempt under section 40(1) of FOIA. Furthermore, under section 40(5A), you are not required to confirm or deny if you hold the information. You can therefore respond to the freedom of information (FOI) request by saying that you neither confirm nor deny that you hold the personal data. This applies whether or not you do actually hold it. The issue to consider is not whether you hold it but rather, if you did hold it, would confirming or denying that it was held in itself disclose personal data relating to the requester?

...

Therefore, if you receive an FOI or EIR request where confirming or denying whether you hold the information would involve disclosing the requester's personal data, you should treat this as a data protection subject access request. You should tell the requester that you will deal with the request under the data protection legislation, rather than FOIA or the EIR. You should carefully word any refusal notice to avoid implying whether you do or do not hold the information and to avoid inadvertently disclosing any personal data".

24. In this case, the Commissioner is satisfied that disclosure, by way of confirmation or denial, would reveal whether or not the requester was the subject of a phone call in the context described in the request,
25. There is no right of access to an individual's own personal data under FOIA. The information, if it were held, would be exempt from disclosure under section 40(1) and therefore, under section 40(5A), the public authority is not required to confirm or deny that they hold it.
26. The Commissioner has therefore decided that West Midlands Police was entitled to refuse to confirm whether or not it holds the requested information on the basis of section 40(5A) of FOIA.

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/2021/2619041/s40-neither-confirm-nor-deny-in-relation-to-personal-data-section-40-5-and-regulation-13-5-final-version-21.pdf>

27. In light of that decision, the Commissioner has not considered whether the information, if held, also comprises the personal information of a third party. However, in the context of the request and mindful of its wording, he considers it likely that, if held, the information comprises mixed data, with the requester's personal data inextricably linked to that of other data subjects.

### **Other matters**

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28. In the Commissioner's view, it is appropriate that any decision as to whether or not a data subject is entitled to be told if personal data about them is being processed should be made in accordance with the subject access provisions of the DPA.
29. The Commissioner is satisfied that West Midlands Police advised the complainant in this case with respect to making a subject access request under the DPA. From the correspondence he has seen, he is also satisfied that it provided relevant advice in response to the requester saying he needed the information for legal purposes.

## Right of appeal

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

31. 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.
32. 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 .....**

**Laura Tomkinson**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**