

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 October 2022

Public Authority: Chief Constable of Bedfordshire Police
Address: Force Headquarters
Woburn Road Kempston
Bedford
MK43 9AX

Decision (including any steps ordered)

1. The complainant made a request for the current Local Policing Delivery Plan and burglary details that were previously published by Bedfordshire Police (but were no longer publicly available). Bedfordshire Police provided the current Local Policing Delivery Plan but refused to disclose the burglary details under section 40 FOIA.
2. The Commissioner considers that Bedfordshire Police incorrectly applied section 40(2) FOIA in this case.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Bedfordshire Police must disclose the burglary details withheld under section 40(2) FOIA.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. The complainant made the following information request to the Bedfordshire Police on 7 March 2022:

- “(a) A copy of your current Local Policing Delivery Plan, as the copy [name redacted] provided was out of date?
 - (b) The Burglary details that were published, which it is claimed constitute a data breach?”
6. On 3 May 2022 Bedfordshire Police responded. It provided the information requested at part (a) of the request. It refused to provide the information requested at part (b) as it said the previous publication of this information was a data breach and it would not therefore be disclosed under FOIA.
7. On 22 May 2022 the complainant asked Bedfordshire Police to carry out an internal review. On 9 June 2022 Bedfordshire Police provided the complainant with the result of the review it had carried out. It confirmed that the burglary details were being withheld under section 40 of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 21 April 2022 to complain about the way their request for information had been handled. At this point Bedfordshire Police had failed to respond to the request. Following the Commissioner’s involvement Bedfordshire Police responded to the request and subsequently provided an internal review. The Commissioner then accepted this case as eligible to investigate the application of section 40(2) FOIA to withhold the requested burglary details.
9. The Commissioner therefore considered the scope of his investigation to be to determine if Bedfordshire Police was correct to withhold the burglary details under section 40(2) FOIA (third party personal data).

Reasons for decision

Section 40 – personal information

10. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

11. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
12. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
13. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

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

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.
17. 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.
18. The withheld information is burglary details per street, date and time.
19. Bedfordshire Police explained that the ICO had advised them that disclosure of this material would constitute a data breach. However when the Commissioner asked for evidence of the basis of this advice, Bedfordshire Police said that this advice was provided via the ICO's helpline and that this was not followed up in writing. It also said that

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

victims of crime would not expect that their information would be disclosed on social media.

20. The Commissioner asked Bedfordshire Police a number of times to provide him with submissions to explain how victims of crime could be identified by disclosure of the withheld information. Bedfordshire Police has failed to provide the Commissioner with submissions on this point.
21. Whilst the Commissioner acknowledges that a particular address can be classified as the personal data of an identifiable individual or individuals at that address he is not clear how disclosure of a street name would identify a particular living individual (the victim of the burglary recorded on that street) without submissions from Bedfordshire Police explaining how this would be possible.
22. There does not appear to be a record of the advice provided via the ICO's helpline that disclosure of this information would constitute a data breach. The Commissioner can only therefore make a determination as to the application of section 40(2) FOIA based upon the submissions and supporting evidence presented to him in this case.
23. In the circumstances of this case, having considered the withheld information, due to the limited arguments provided by Bedfordshire Police, the Commissioner has no option but to conclude that the withheld information does not relate to identifiable living individuals. This information therefore does not fall within the definition of 'personal data' in section 3(2) of the DPA.
24. Section 40(2) FOIA was therefore incorrectly applied by Bedfordshire Police in this case.
25. However as the Commissioner has based this decision upon the lack of engagement and submissions on behalf of Bedfordshire Police, he does acknowledge that potentially neighbours on the streets contained within the withheld information may well be aware that a burglary took place on the street and which particular address it related to. In which case there is a hypothetical argument that the withheld information could constitute personal data, as victims of crime could potentially be identified by their neighbours.
26. Where information is deemed to constitute the personal data of an identifiable living individual this does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
27. The most relevant DP principle would be principle (a).

Would disclosure contravene principle (a)?

28. 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".

29. 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 if to do so would be lawful, fair and transparent.

30. 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.

Lawful processing: Article 6(1)(f) of the UK GDPR

31. Article 6(1) of the UK 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.

32. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) 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"*².

² 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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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".

33. In considering the application of Article 6(1)(f) of the UK 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 disclosure of the information 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.
34. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.
35. Whilst the Commissioner does not intend to go into detail regarding this hypothetical scenario, he would note that if the withheld information were classified as personal data for the reasons given at paragraph 25 above, this information (if known) would be known by neighbours of the victims of crime anyway (notwithstanding any disclosure under FOIA) and so the legitimate interests in disclosure of burglary details in the Bedfordshire area would outweigh the fundamental rights and freedoms of the victims of crime.
36. In this instance, the Commissioner would not consider that section 40(2) would be engaged.

Right of appeal

37. 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

38. 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.
39. 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.....

Gemma Garvey
Senior Case Officer
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Wycliffe House
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Cheshire
SK9 5AF