

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 March 2022

Public Authority: Chief Constable of North Wales Police

Address: FreedomofInformationTeam@nthwales.pnn.police.uk

Decision (including any steps ordered)

1. The complainant requested information about the number of arrests in connection with a specific incident. North Wales Police refused to confirm or deny that the requested information was held, citing section 40(5) (personal information) of FOIA. The Commissioner's decision is that North Wales Police was not obliged to confirm or deny whether it held the requested information in accordance with section 40(5) of FOIA. The Commissioner does not require North Wales Police to take any steps as a result of this notice.

Request and response

2. On 19 April 2021, the complainant wrote to North Wales Police regarding an incident which took place on a specific date and requested information in the following terms:

"I also request, with no personal information entered, how many others were arrested and subsequently charged with an offence, from that evening and connected to the incident in the [location redacted] or [full name of individual redacted]'s apprehension".
3. North Wales Police responded on 28 April 2021 and refused to confirm or deny whether the requested information was held by virtue of section 40(5) of the FOIA.
4. On 28 April 2021 the complainant requested an internal review into the handling of the request. She confirmed that she was not seeking

access to personal data, other than the total arrests and/or number charged.

5. On 12 May 2021 the complainant forwarded a response from a different FOI request on the whatdotheyknow.com website showing that similar information to what she had requested had previously been disclosed by North Wales Police.
6. North Wales Police responded on 12 May 2021 and confirmed that it maintained its position that section 40(5) applied to the request. North Wales Police also pointed out that the other request referred to by the complainant was not considered to be a request for personal data as it referred to information for a whole local policing area as opposed to a specific incident at a very specific location.
7. On 14 May 2021 North Wales Police provided the outcome of its internal review and upheld its position that section 40(5) applied to the request.

Scope of the case

8. The complainant contacted the Commissioner on 17 May 2021 to complain about the way her request for information had been handled.
9. The scope of the Commissioner's investigation is to determine whether North Wales Police was entitled to neither confirm nor deny holding information within the scope of the request by virtue of section 40(5) of the FOIA.

Reasons for decision

Section 40(5) – neither confirm nor deny

10. 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'.
11. There are however exemptions from the duty to confirm or deny. It should be noted that when applying an exemption from the duty to confirm or deny, a public authority is not restricted to only considering the consequences of the actual response that it would be required to provide under s1(1)(a). For example, if it does not hold the information, the public authority is not limited to only considering what would be revealed by denying the information was held, it can also

consider the consequences if it had to confirm it did hold the information and vice versa.

12. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny 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 EU2016/679 ('UK 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 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 North Wales Police is entitled to 'neither confirm nor deny' whether it holds any information falling within the scope of the complainant's information request.
15. Therefore, for North Wales Police to be entitled to rely on section 40(5B) 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 involve 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 request in this case names a living individual and a location/premises where a specific incident took place. The individual named in the request is clearly known to, and has a connection to the complainant as she is aware of the circumstances surrounding the incident and personal information relating to the named individual.
20. North Wales Police's position is that the complainant has asked for very specific information about whether any third parties were arrested/charged in connection with an incident involving the individual named in the request. As such, North Wales Police contends that :

"...by confirming or denying that information is or is not held we would be providing information into the public domain about individuals connected to an individual/incident/premises at a specific time".
21. In addition, North Wales Police argues that if it were to confirm whether any information falling within the scope of the request was held it would essentially be confirming to the public at large whether or not the individual named in the request was arrested.
22. A test used by both the Commissioner and the First-tier Tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to identify an individual as a result of disclosure of the confirmation or denial if they were intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of re-identification of an individual from information which, on the face of it, appears anonymised.
23. The ICO's Code of Practice on Anonymisation¹ notes that: "The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA". In summary, the motivated intruder test is that if the risk of identification is "reasonably likely" the information should be regarded as personal data.

¹ <https://ico.org.uk/media/fororganisations/documents/1061/anonymisation-code.pdf>

24. Whilst the complainant has not asked for the names of any other third parties who were arrested and or charged in connection with the incident in question she is clearly aware of, and has a close connection to the individual named in the request. As this person was involved in the incident it is likely that they may have a more detailed personal knowledge of other individuals who may have been involved in the incident. In addition, as the incident took place in a specific premises, a public house, anyone else who was present at the premises on the night in question may also have witnessed, and/or been involved in some way in the incident. The Commissioner accepts, therefore, that the complainant and others who were present at the location and time specified in the request could link the knowledge gained through disclosure of the confirmation or denial to identifiable individuals.
25. The Commissioner acknowledges that the complainant has not asked for the names of any individual(s) who may or may not have been arrested and/or charged in relation to the incident in question. Rather, she has asked for information as to the number of other individuals who were arrested and charged with an offence in connection with the incident in question. On the face of it, therefore, the request is for statistical information. However, the Commissioner is mindful of the fact that the request relates to an incident at a specific time and premises involving a named individual.
26. Given the circumstances of this case, the Commissioner accepts that if North Wales Police was to confirm whether or not it held information falling within the scope of the request, it would be possible to identify third parties relating to the incident in question. The Commissioner considers that the risk of identification would be greatest in terms of any persons who may have been present at the premises during the incident, which would include the individual named in the request.
27. In addition, the Commissioner accepts that confirming or denying whether information within the scope of the request is held would also be confirming to the public whether or not the individual named in the request was apprehended.
28. The Commissioner is therefore satisfied, from reviewing the request, that if North Wales Police was to either confirm or deny whether it held the requested information, it would involve the disclosure of third party personal data. The first criterion set out above is therefore met.

Is the information 'criminal offence data'?

29. North Wales Police has also argued that, due to the specific nature of the request, confirming or denying whether it holds the requested information would result in the disclosure of information relating to the criminal convictions and offences of third parties which may be known

to the individual named in the request as it refers to an incident that the individual was involved in.

30. Information relating to criminal convictions and offences is given special status in the GDPR. Article 10 of 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 or the disposal of such proceedings including sentencing.
31. Having considered the particular wording of the request, the Commissioner finds that it is a request for criminal offence data within the meaning of section 11(2)(a) of the DPA. He has reached this conclusion on the basis that the request refers to individuals who were arrested and/or charged in connection with a particular incident. Confirmation or denial in this case would therefore disclose whether or not the individual named in the request and any other third parties had been apprehended in connection with the alleged commission of a criminal offence.
32. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed (which includes the disclosure that would occur as a result of confirming or denying whether information within the scope of the complainant's request is held) if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met. These are:
- Consent from the data subject; or
 - The processing relates to personal data which has clearly been made public by the individual concerned.
33. The Commissioner therefore asked North Wales Police to consider each of these conditions and whether any of them could be relied on to confirm or deny whether it held criminal offence data falling within the scope of this request. North Wales Police's position is that none of the conditions can be met. The Commissioner is aware of no evidence from any other source suggesting that these conditions have been met.
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. This means that disclosure of the confirmation or denial in response to the complainant's request would breach data protection principle (a) and therefore the second criterion

of the test set out above is met. It follows that the North Wales Police is entitled to refuse to confirm or deny whether it holds the requested information on the basis of section 40(5)(B) of the FOIA.

Right of appeal

35. 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

36. 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.
37. 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

Joanne Edwards
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