

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 April 2022

Public Authority: Durham Constabulary
Address: Police Headquarters
Aykley Heads
Durham
DH1 5TT

Decision (including any steps ordered)

1. The complainant has requested the name of the individual who placed a particular telephone call to Durham Constabulary. Durham Constabulary withheld the requested information under section 40(2) of FOIA (personal data).
2. The Commissioner's decision is as follows:
 - Durham Constabulary correctly withheld the requested information under section 40(2) of FOIA as disclosing the information would be unlawful. However Durham Constabulary breached section 17(1) as its refusal of the request was not adequate.
3. The Commissioner does not require Durham Constabulary to take any corrective steps.

Request and response

4. On 24 September 2019 the complainant wrote to Durham Constabulary and requested information in the following terms:

"Under the Freedom of Information Act I wish to urgently request the name of the individual who placed a call on [date redacted]-Incident number [number redacted]."

5. Durham Constabulary responded on 24 September 2019. It stated that the data protection legislation prohibited it from disclosing the requested information. Despite Durham Constabulary not offering an internal review in this correspondence, the complainant nonetheless requested one.
6. Durham Constabulary did not undertake a discrete review under FOIA. In correspondence dated 26 April 2021, it provided the complainant with a response to a general complaint they had submitted about Durham Constabulary. However, that correspondence does not appear to address its handling of the FOIA request of 24 September 2019.

Scope of the case

7. The complainant contacted the Commissioner on 24 May 2021 to complain about the way their request for information had been handled.
8. The Commissioner advised the complainant that Durham Constabulary had correctly applied section 40(2) to the information they had requested and invited them to withdraw their complaint. The complainant did not accept the Commissioner's view and the matter will therefore be concluded through a formal decision.
9. The Commissioner's investigation has focussed on whether Durham Constabulary was entitled to withhold the requested information under section 40(2) of FOIA. He will also consider its refusal of the request and will consider the matter of the internal review under 'Other matters'.

Reasons for decision

Section 40 personal information

10. Section 40(2) of the 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

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

processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('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 FOIA cannot apply.
13. Second, and only if the Commissioner is satisfied that the requested information is personal data, he 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. In this case, the complainant has requested the name of the individual who placed a particular telephone call to Durham Constabulary about an incident.
19. The Commissioner is satisfied that the information relates to the person who made the call (ie the data subject). He is satisfied that this information both relates to and could identify the person concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
20. 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 disclosure would contravene any of the DP principles.
21. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

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

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

23. 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.

24. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

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

25. Article 6(1) of the 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.

26. 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) 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”.

27. In considering the application of Article 6(1)(f) 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 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
28. 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

29. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
30. The complainant has a personal interest in the requested information. They have referred to a County Court judgement but have not provided further detail.

Is disclosure necessary?

31. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
32. Both Durham Constabulary and the Commissioner advised the complainant to consider any alternative routes through which they could access the information they are seeking, such as through a solicitor

under Schedule 2 Part 1 (5)(3) of the DPA 2018. As such, the Commissioner considers that disclosure under FOIA may well not be necessary. However, in the interests of completeness he will carry out the third part of the test, the balancing test.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

33. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
34. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause
 - whether the information is already in the public domain
 - whether the information is already known to some individuals
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual
35. In the Commissioner's view, a key issue is whether the individual concerned has a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
36. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
37. As noted, the requested information concerns a personal interest of the complainant; it has no wider public interest and the complainant has not presented a strong case, or any case, that supports their view that the information should be released. As has also been noted, there may be other routes through which the complainant can access the information.
38. Regarding the data subject's interests, the Commissioner is satisfied that the individual who placed a call to Durham Constabulary about an incident would not expect their name to be released to the world at large as the result of a request under FOIA. Given that expectation and the circumstances ie reporting an incident to the police, the

Commissioner believes that disclosing their name would cause that individual a good deal of harm or distress.

39. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so disclosing the information would not be lawful.
40. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's view

41. The Commissioner has therefore decided that Durham Constabulary was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Section 17 – refusal of request

42. Under section 17(1) of FOIA, a public authority which is relying on a claim that information is exempt information must give the applicant a notice which (a) states that fact, (b) specifies the exemption in question, and (c) states (if that would not otherwise be apparent) why the exemption applies.
43. In its refusal of 24 September 2019, Durham Constabulary confirmed it is withholding the requested information and discussed the data protection legislation, but it did not specify the exemption in question, section 40(2). The Commissioner therefore finds that Durham Constabulary's refusal notice did not fully meet the requirements of section 17(1).

Other matters

44. The Commissioner reminds Durham Constabulary that although provision of an internal review is not a requirement of FOIA, it is a matter of good practice. Internal reviews are discussed in part 5 of the 'FOI Code of Practice'³.

Right of appeal

45. 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

46. 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.
47. 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

Cressida Woodall
Senior Case Officer
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