

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 January 2022

Public Authority: Chief Constable of Leicestershire Police
Address: Police Headquarters
Enderby
Leicestershire
LE19 2BX

Decision (including any steps ordered)

1. The complainant has requested information from Leicestershire Police, in relation to a road traffic incident that happened on a particular date, on a specific road.
2. The Commissioner's decision is that Leicestershire Police is entitled to rely on the exemption at section 40(2) of the FOIA to withhold the requested information.
3. The Commissioner does not require Leicestershire Police to take any further action in this matter.

Request and response

4. On 23 May 2021, the complainant wrote to Leicestershire Police and requested information in the following terms:

"Under the FOI act of 2000 I am requesting information about an RTA which occurred on [location of accident] at [time of accident] on the [date of accident] 2021.

The information I am requesting is not confidential, I do not want names, addresses or any personal information. The information I would like is did any of the Police Officers in attendance breathalyse and do a drug wipe on the driver of [make of car] registration number [vehicle registration number]?"

5. Leicestershire Police responded on 27 May 2021. It cited section 40(5) of the FOIA - refusing to confirm or deny that the requested information was held, explaining that to either confirm or deny that the information was held, would be releasing personal information and would therefore be a breach of the Data Protection Act 2018 ("DPA").
6. Following an internal review Leicestershire Police wrote to the complainant on 23 June 2021. It stated that it was maintaining its original position; it refused to confirm or deny that the information was held.
7. During the Commissioner's investigation, he wrote to Leicestershire Police to ask further questions regarding the exemption applied. Upon review of the Commissioner's questions, Leicestershire Police decided to amend its position and applied section 40(2) of the FOIA – personal information, and section 31(1) of the FOIA – law enforcement.

Scope of the case

8. The complainant contacted the Commissioner on 24 June 2021 to complain about the way their request for information had been handled.
9. The scope of the case is to determine whether Leicestershire Police is correct to withhold the information on the basis of section 40(2). If section 40(2) is engaged, then an analysis of section 31 will not be required.

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 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, 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. The withheld information comprises details of an individual, who was involved in a vehicle incident and if they were breathalysed and tested for drugs at the scene of the collision.
19. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to an individual. He is satisfied that this information both relates to and could lead to the identification of the person concerned. This is due to the information that not only the complainant holds (vehicle registration number, model and date/time of the collision), but also the information which Leicestershire Police released in a social media statement (this includes the area the collision happened, the age of the person involved and the area where they are from, along with which hospital they attended after the incident). The Commissioner considers that other information relating to the individual involved in the collision could also be known by others, which would lead to them being identified. 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). 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".
22. 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.

Criminal Offence data

23. The Commissioner must consider if the information within the scope of the request is 'criminal offence data' and, if so, would it be lawful for Leicestershire Police to process this data.
24. Information relating to criminal convictions and offences is given special status in the UK GDPR. 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.
25. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed (which includes confirming or denying whether the information is held in response to a FOI request) if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA 2018 can be met.
26. When considering the disclosure to the world at large required by the FOIA, the Commissioner determines it likely that only two of the Schedule 1, Part 3, conditions might ever justify such processing of personal information of this type. These are:

- a. that the data subject had given their explicit consent for the public authority to provide a confirmation (or a denial) that information is held; or (para 29)
 - b. that the data subject has manifestly made the information public themselves (para 32).
27. There is no evidence to suggest that the individual involved in the collision has provided any consent for Leicestershire Police to release information which could potentially identify them. Leicestershire Police is not required to seek consent from the individual and it seems likely that consent would not be given in any case.
 28. The Commissioner therefore considers that providing further information within the scope of the request, if held, would involve the processing of criminal offence data about the individual concerned. As none of the conditions required for processing criminal offence data are satisfied, there can be no legal basis for releasing this information. Providing such information would breach data principle (a) and therefore the second criterion of the test set out above is met.
 29. It therefore follows that Leicestershire Police are entitled to refuse to provide further information, beyond that already in the public domain, on the basis of section 40(2) of FOIA.
 30. The Commissioner decided that he did not need to investigate the application of section 31, as section 40(2) of the FOIA is sufficient to withhold the requested information in this case.

Right of appeal

31. 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

32. 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.
33. 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

Michael Lea
Team Manager
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Wycliffe House
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