

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 January 2022

Public Authority: Commissioner of the Metropolis
Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant requested from the Metropolitan Police Service ("the MPS") information relating to a specific road traffic incident which occurred on the road where they live. The MPS withheld the requested information under section 40(5) – personal information (neither confirm nor deny) of the FOIA.
2. The Commissioner's decision is that the MPS is entitled to rely on section 40(5) to refuse to confirm or deny that it holds the information.
3. The Commissioner does not require the MPS to take any further steps.

Request and response

4. On 1 May 2021 the complainant wrote to the MPS to request information in the following terms:

"In the early hours of Sunday 26 July 2020 (around 1am) a car travelling east on [address redacted] collided with a parked car outside [address redacted]. The parked car was pushed into the road and badly damaged. It seems lucky that nobody was hurt. I have photos to show the extent of the damage. There was additional damage to a tree planted on the pavement. Can you please confirm if this incident has

been recorded and will show up in official collision statistics, including this website.” (website details provided).

5. The MPS responded on 23 May 2021 and refused to provide the information, citing section 40(5) of the FOIA – personal information (neither confirm nor deny), as the basis for doing so.
6. On 14 June 2021, the MPS upheld it’s original decision at internal review, giving further guidance on how they had reached their conclusion, including the public interest arguments.

Scope of the case

7. The complainant contacted the Commissioner on 29 June 2021 to complain about the way their request for information had been handled, and specifically that they did not consider that the MPS was entitled to withhold information under section 40(5).
8. Given his dual role as the regulator of data protection legislation, the Commissioner considers that he has sufficient experience and expertise to reach a decision in this case based on the request and responses already provided. The Commissioner has therefore not sought further submissions from the MPS as to why it handled the request in the way that it did.
9. The Commissioner considers that the matter to be decided is whether the MPS is entitled to rely on section 40(5) to refuse to either confirm or deny it holds the requested information.

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 MPS has taken the position of neither confirming nor denying whether it holds any of the requested information in its entirety, citing section 40(5) of the FOIA. 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 the MPS is entitled to 'neither confirm nor deny' whether it holds any information of the type requested by the complainant.
15. Therefore, for the MPS 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 constitute 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. For the MPS to confirm or deny whether information is held would disclose whether or not an individual(s) has been or is linked to contact with the police. The MPS stated:

“to confirm or deny whether personal information exists in response to your request is likely to publicly reveal information about individuals, thereby breaching the right to privacy”

20. The Commissioner acknowledges that collision statistics are a set of data that would not identify individuals. However, if the MPS were to confirm an individual incident was recorded in the statistics, then a motivated person could identify third parties relating to an incident. As a result, by revealing an incident was recorded and is in the official statistics, this could indicate whether a person is or is not the subject of a criminal investigation or a disciplinary process, therefore disclosing personal data.

21. The Commissioner is therefore satisfied, from reviewing the request, that if the MPS were to either confirm or deny it held the information, it would involve the disclosure of personal data.

22. While the Commissioner accepts that the complainant may have specific reasons for wanting to access the requested information, the Commissioner has to take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public. He must therefore consider the wider public interest issues and fairness to any third party individual/s when deciding whether or not the information is suitable for disclosure.

23. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party (or parties) does not automatically prevent the MPS from refusing to confirm whether it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.

24. The Commissioner considers that the most relevant data protection principle is principal (a).

Would confirming whether or not the requested information is held contravene one of the data protection principles?

25. Article 5(1)(a) UK GDPR states that:

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

26. In the case of a 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 – or as in this case, the public authority can only confirm whether or not it holds the requested information – if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) UK GDPR), be fair and be transparent.

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

27. 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” conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.

28. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) UK GDPR which provides as follows:

“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”¹.

¹ 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 2018) provides that:-

29. In considering the application of Article 6(1)(f) UK GDPR in the context of a request for information under 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 confirming or denying that the requested information is held 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(s).

30. 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

31. In considering any legitimate interests in confirming whether or not the requested information is held in response to an FOIA request, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sake as well as case specific interests.

32. Further, 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

“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 2018) 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”

33. The Commissioner accepts that there is a legitimate interest in the accountability of public authorities as a general principle. There is also the legitimate interest of the requester, the complainant.
34. In this case, it is clear that the complainant is seeking information relating to a specific incident which occurred on their road. The complainant has stated there is a public interest in the information for other residents and in knowing the MPS are carrying out their duties correctly.
35. The Commissioner considers that there is a legitimate interest in disclosure of this information.

Is confirming whether or not the requested information is held necessary?

36. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA that the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
37. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

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

38. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject(s)' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if a data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOIA request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
39. The Commissioner is mindful that disclosure under the FOIA is disclosure to the world at large and not just to the requester. It is the equivalent of the MPS publishing the information on its website.

40. Disclosing whether or not the information requested is held may cause unwarranted harm or distress to the interests of the individual(s). The Commissioner also notes that the individual(s) would have no reasonable expectation of their personal information being placed into the public domain.
41. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh a data subjects' fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful.
42. The Commissioner has therefore decided that the MPS were entitled to refused to confirm whether or not it held the requested information on the basis of section 40(5B)(a)(i) of the FOIA.

Right of appeal

43. 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

44. 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.
45. 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

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