

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 April 2022

Public Authority: Independent Office for Police Conduct
Address: 90 High Holborn
London
WC1V 6BH

Decision (including any steps ordered)

1. The complainant requested the name of the employee at the Independent Office for Police Conduct ('IOPC') who dealt with the review of the outcome of a police complaint.
2. The IOPC initially withheld the name under section 40(2) FOIA - third party personal data. During the course of the Commissioner's investigation, the IOPC revised its position. It withdrew reliance on section 40(2) and instead cited section 40(5A) FOIA, to 'neither confirm nor deny' ('NCND) the information was held.
3. The Commissioner's decision is that the IOPC has correctly cited section 40(5A) FOIA in response to the request as, if held, the information would be the complainant's own personal data.
4. The Commissioner does not require the IOPC to take any further steps.

Background

5. Police forces deal with the majority of complaints against police officers and police staff. However, the IOPC can independently consider applications for a review from people who are unhappy with the outcome of their complaint or the way it has been handled by a police force.

6. In early 2021, the complainant made an application to the IOPC for a review following the outcome of a complaint they had made about a named police force.
7. On 30 June 2021, the IOPC provided the complainant with the outcome of its review. The IOPC concluded that the outcome of the complainant's complaint by the named police force was reasonable and proportionate.

Request and response

5. On 5 July 2021 the complainant set out his objections to the IOPC's review decision and made the following request for information:

"I refer to the letter showing your review findings which was sent to me recently.

To begin with your letter states "We are independent of the police". To this end can you provide data on how many employees who handled the complaint are former police officers or currently serving officers on sabbatical? Additionally the name of the person who dealt with the review is not printed on the letter. This should be provided as a matter of good practice."

6. The IOPC responded on 4 August 2021 and confirmed that no one with a policing background was involved in the handling of the review. IOPC refused to provide the name of the person who dealt with the review citing the FOIA exemption: section 40(2) – personal data of a third party.
7. On 5 August 2021, the complainant requested an internal review. The IOPC provided an internal review on 7 September 2021 in which it maintained its position.

Scope of the case

8. The complainant contacted the Commissioner on 8 September 2021 to complain about the way their request for information had been handled.
9. On 8 March 2022, the Commissioner wrote to the IOPC asking for more information about the case. The IOPC responded to the Commissioner and revised its position - it cited section 40(1) FOIA and section 40(5A) FOIA (personal data of the requester) and refused to confirm or deny whether the IOPC held the requested information.

10. The Commissioner considers that the scope of this case is to determine whether the IOPC is correct to rely on section 40(5A) FOIA in relation to this request.

Reasons for decision

11. Section 1(1) FOIA provides two distinct but related rights of access to information, that impose corresponding duties on public authorities:
 - a) the duty to inform the applicant whether or not the information they have requested is held; and, if so
 - b) the duty to communicate the information to the applicant.
12. Section 1(1)(a) is commonly known as 'the duty to confirm or deny'. However, the duty does not always apply and a public authority may refuse to confirm or deny whether it holds information through reliance on certain exemptions under FOIA. It follows that where section 1(1)(a) is disapplied, there is no duty on a public authority to go on to comply with section 1(1)(b).
13. The Commissioner will first consider whether any part of the request would relate to personal data which is that of the complainant, if it was held. Second, he will consider whether the IOPC were correct to NCND that the requested information was held.

Section 40(5A) - Personal data of the applicant (or complainant)

14. Section 40(5A) FOIA excludes a public authority from complying with the duty to confirm or deny in relation to information which, if held, would be exempt information by virtue of section 40(1) of FOIA.
15. Section 40(1) FOIA states that:

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."
16. Therefore, where the information requested is the requester's own personal data within the meaning of section 40(1) of FOIA, the effect of section 40(5A) is that a public authority is not required to confirm or deny whether it holds the information.
17. 'Personal data' is defined in sections 3(2) and (3) of the Data Protection Act 2018 and means 'any information relating to an identified or identifiable living individual'. 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.

18. The Commissioner considers that any information that the IOPC holds about the initial police complaint and the IOPC's review would specifically be the complainant's own personal data. The request is based on the premise that they applied to the IOPC for a review. In other words, the request identifies the complainant as the person whose police complaint investigation was the subject of an IOPC review. If he had not applied for this review, information identifying the person who decided the review would not exist and the IOPC would be unable to identify which employee name the complainant was seeking.
19. It follows that the Commissioner considers that the complainant is the data subject within the meaning of the exemption at section 40(1) of FOIA. It is therefore the complainant's personal data and so would be exempt from disclosure under section 40(1) FOIA.
20. In addition, the provisions of section 40(5A) FOIA mean that the IOPC is not required to comply with the duty to confirm or deny whether the information is held, as the duty to confirm or deny does not arise in relation to information which is exempt information by virtue of subsection (1).
21. The Commissioner is satisfied that, in complying with section 1(1)(a) in this case (confirming or denying that IOPC holds relevant information), the IOPC is confirming that it previously dealt with an application for review by the complainant about a police complaint. The request therefore relates to information on a review decision made about the complainant, the complainant is clearly linked to that information and is identifiable via the request that the complainant submitted. Simply confirming whether or not the IOPC holds the personal data could itself reveal something about the complainant. Therefore any information the IOPC held would be the complainant's own personal data – although it may also be the personal data of others too.
22. The Commissioner notes that the First Tier Tribunal in *Kenneth Heywood v Information Commissioner* (EA/2021/0031P) recently upheld a decision notice in which the Commissioner had proactively applied

section 40(5A) of the FOIA in respect of a personal data premise-based request.¹

23. The complainant obviously knows whether or not they made a review application to the IOPC – and the IOPC will also know. However, the world at large does not know and responses provided under the FOIA are considered to be provided to the world at large – not just to the individual who made the request.
24. The Commissioner therefore considers that the IOPC could not confirm or deny holding information within the scope of this request without disclosing personal information relating to the complainant. The information would be exempt from disclosure under section 40(1) and therefore, under section 40(5A), the IOPC is not required to confirm or deny whether it holds it. As this covers the whole wording of the request, the Commissioner does not find it necessary to consider any third party personal data concerns, such as the name of the employee who carried out the review.
25. Section 40(5A) is an absolute exemption, there is no requirement for the Commissioner to consider the balance of the public interest.
26. As the exemption is engaged in respect of any information which came or would have come within the scope of the request, the IOPC was not obliged to supply any information in response.

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[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2822/Decision%20Haywood,%20Kenneth%20Michael%20\(EA-2021-0031\)%20Dismissed.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2822/Decision%20Haywood,%20Kenneth%20Michael%20(EA-2021-0031)%20Dismissed.pdf)

Right of appeal

27. 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

28. 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.
29. 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
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