

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 4 April 2023

**Public Authority:** Chief Constable of Hampshire Constabulary  
**Address:** Tower Street  
Winchester  
SO23 8ZD

#### **Decision (including any steps ordered)**

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1. The complainant requested from Hampshire Constabulary information in relation to an incident which occurred in police custody.
2. The Commissioner's decision is that Hampshire Constabulary correctly relied on Section 40(5B)(a)(i) of FOIA to refuse to confirm or deny whether it held information falling within the scope of the request.
3. The Commissioner does not require Hampshire Constabulary to take any steps as a result of this decision notice.

#### **Request and response**

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4. On 8 August 2022, the complainant wrote to Hampshire Constabulary and requested information concerning the death in custody of a named individual in the following terms:

"What were the exact allegations made by (name redacted) against (name redacted)?

Upon arrest, What was (name redacted) response to the allegations made against (redacted)?

Did (redacted) undergo a Proper medical examination, following (redacted) allegations of (redacted) against (redacted)? IF NOT WHY NOT??

How did the police view (redacted) allegations at that point in time, back in (date redacted)?

Were the Police going to release (name redacted) back then, but could not release (redacted) because (redacted) had already committed suicide?"

5. Hampshire Constabulary responded on 15 August 2022 and stated it could neither confirm nor deny that it held the information requested as the duty under Section 1(1)(a) of FOIA did not apply by virtue of Section 40(5)(a)(i).
6. The complainant was unhappy with Hampshire Constabulary's response and requested an internal review on 18 August 2022.
7. Hampshire Constabulary responded on 23 August 2022 stating it was standing by its original response. A copy of this response was resent to the complainant on 11 October 2022.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 23 January 2023, to complain about the way his request for information had been handled.
9. On 27 February and 7 March 2023 the Commissioner contacted Hampshire Constabulary to request any further arguments and information it may wish to provide in relation to the complainant's request.
10. Hampshire Constabulary responded on 7 March providing its final reasoning in which it clarified that it was refusing to confirm or deny whether it held information in respect of the complainant's request under Section 40(5B)(a)(i) of FOIA and not Section 40(5A) as it stated in its response to the complainant.
11. Hampshire Constabulary also stated in an email to the Commissioner dated 15 March 2023 that, as a 'competent authority', if it did hold any data, it would be under Part 3 of the Data Protection Act 2018 (DPA).
12. The scope of the Commissioner's investigation will be to consider whether the Council is entitled to rely on Section 40(5B)(a)(i) of FOIA in relation to the complainant's request.

### **Reasons for decision**

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## **Duty to confirm or deny**

19. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in a request. This is commonly known as 'the duty to confirm or deny'. However, there may be occasions when complying with the duty to confirm or deny under Section 1(1)(a) would itself disclose sensitive or potentially exempt information. In these circumstances, Section 2(1) of FOIA allows a public authority to respond by refusing to confirm or deny whether it holds the requested information.

## **Section 40 – Personal information**

20. Section 40(5A) of 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 – i.e., the applicant's own personal information.
21. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny does not arise in relation to other information – i.e. third party personal information - if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the UK GDPR to provide that confirmation or denial.
22. 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.
23. Therefore, for Hampshire Constabulary to be entitled to rely on Section 40(5B)(a)(i) of FOIA to refuse to confirm or deny it holds information falling within the scope of the complainant's 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 either the complainant's or a third party's personal data?**

24. Section 3(2) of the Data Protection Act 2018 (DPA) defines personal data as:-

“any information relating to an identified or identifiable living individual”.

25. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

26. 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.

27. In the circumstances of this case the Commissioner accepts that, if held, any information within the scope of the request would clearly be the personal information of identified or identifiable individuals, that being the person who made the allegations which saw (name redacted) arrested and held in custody. Therefore, he is satisfied that if Hampshire Constabulary were to confirm or deny whether it holds the requested information, this would in turn be disclosing personal information to the world at large.

28. As far as the Commissioner is aware, there is nothing available in the public domain which reveals any of the more detailed information being sought here.

29. The first criterion set out is therefore met.

30. 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 the named individual when deciding whether or not the information is suitable for disclosure.

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

31. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent the Constabulary refusing to confirm or deny 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. The Commissioner considers that the most relevant data protection principle is set out at Article 5(1)(a) of the GDPR (principal (a)).

32. Article 5(1)(a) GDPR states that:

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

33. 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) GDPR), be fair and be transparent.

### **Lawful processing: Article 6(1)(f) GDPR**

34. 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” lawful bases for processing listed in the Article applies.

35. The Commissioner considers that the condition most applicable on the facts of this case is contained in Article 6(1)(f) UK GDPR 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”<sup>1</sup> .

36. 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;

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<sup>1</sup> 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”.

- (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).

37. 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.**

38. In considering any legitimate interests in confirming whether or not the requested information is held in response to a 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.

39. 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<sup>2</sup>.

40. In this case, it is clear the complainant is concerned about the circumstances surrounding the death of a named individual in police custody.

41. The Commissioner accepts there may be wider public interest relating to any death that occurs in police custody. However, in these circumstances procedures and practices already exist to investigate and address such matters.

42. The Commissioner agrees with the complainant that confirming or denying whether information is held in this case would go some way towards informing the public about accountability for deaths in police

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<sup>2</sup> 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 subparagraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

custody. Therefore, there is a legitimate interest in the confirmation or denial in this instance.

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

43. '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.
44. The Commissioner accepts, that if such an incident took place, it would have been referred to the appropriate body or bodies to be independently investigated.
45. The Commissioner is satisfied there are other appropriate procedures for achieving the legitimate interests identified. It therefore does not meet the requirements of principle (a).

**Conclusion.**

46. The Commissioner has decided that Hampshire Constabulary correctly engaged Section 40(5B)(a)(i) of the FOIA to refuse to confirm whether or not it held the requested information.

## Right of appeal

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47. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

48. 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.
49. 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 .....**

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