

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **10 November 2023**

Public Authority: **Chief Constable of Lancashire Constabulary**
Address: **Police Headquarters**
Saunders Lane
Hutton
Lancashire
PR4 5SB

Decision (including any steps ordered)

1. The complainant has requested a written copy of a judgment from a civil court matter. Lancashire Constabulary cited section 40(5B)(a)(i) (personal information) of FOIA to neither confirm nor deny that it holds the requested information.
2. The Commissioner's decision is that the Constabulary was entitled to rely on section 40(5B)(a)(i) of FOIA to neither confirm nor deny that it holds the requested information. However, the Commissioner finds that the Constabulary breached section 17(1) of FOIA as it failed to issue a refusal notice within the statutory 20 working days.
3. The Commissioner does not require the Constabulary to take any further steps.

Request and response

4. On 4 June 2023, the complainant wrote to the Constabulary and requested information in the following terms:

“Please provide a written copy, by way of the Freedom of Information Act, of the judgment of HHJ Knifton QC in the matter of [redacted].”

5. The Constabulary responded on 6 July 2023. It stated that it could neither confirm nor deny that it holds any information relevant to the request, by virtue of section 40(5) of FOIA.
6. Following an internal review the Constabulary wrote to the complainant on 25 July 2023. It maintained its original neither confirm nor deny position, and clarified that it was relying on section 40(5B)(a)(i).

Reasons for decision

Neither confirm nor deny

7. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request. This is commonly known as “the duty to confirm or deny”. However, there are exemptions to this duty, whereby a public authority may neither confirm nor deny whether it holds the requested information.
8. 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 neither confirm nor deny responses in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.
9. The Constabulary has taken the position of neither confirming nor denying whether it holds the requested information, citing section 40(5B)(a)(i) of FOIA. The issue that the Commissioner has to consider is not one of disclosure of any requested information that may be held, it is solely the issue of whether or not the Constabulary is entitled to neither confirm nor deny whether it holds any information of the description set out in the request.

Section 40 – Personal information

10. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held 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 (‘UK GDPR’) to provide that confirmation or denial.

11. Therefore, for the Constabulary to be entitled to rely on section 40(5B)(a)(i) of FOIA to refuse to confirm or deny whether it holds the requested information 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?

12. Section 3(2) of the DPA 2018 defines personal data as:-

"any information relating to an identified or identifiable living individual".

13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
14. 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.
15. In the circumstances of this case the Commissioner is satisfied that the surname and case reference number quoted within the request are sufficient information to lead to the identification of the data subject, by anyone with related knowledge of the civil court proceedings. Therefore, if held, any information within the scope of the request would clearly be the personal information of the data subject.
16. The Commissioner is further satisfied that if the Constabulary were to confirm or deny whether it holds the requested information, this would in turn be disclosing information relating to the data – information which is not already available to the world at large in recorded form via any official sources.
17. The fact that confirmation or denial constitutes the disclosure of personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether confirmation or denial would contravene any of the DP principles. The most relevant DP principle in this case is principle (a).

Would confirmation or denial contravene principle (a)?

18. 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".
19. 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 or deny holding the requested information – if to do so would be lawful, fair and transparent.
20. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.
21. 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.
22. 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"¹
23. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:

¹ Article 6(1) goes on to state that:-

"Point (f) of the first sub-paragraph 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 UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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."

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether confirmation or denial that the information is held is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above legitimate interests override the interests and fundamental rights and freedoms of the data subject.
24. 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

25. In considering any legitimate interest(s) in providing confirmation or denial that the requested information is held under FOIA, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
26. 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. If the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted confirmation or denial to the general public is unlikely to be proportionate.
27. The Constabulary recognised that confirming or denying whether information is held can generally lead to a better-informed public and could promote public trust by demonstrating transparency and accountability. However, the Constabulary considers that confirming or denying that the outcome of civil court proceedings is held does not seek to uphold those principles.
28. The Constabulary explained that the request appears to be solely for the complainant's own personal interest in the data subject.

Necessity test

29. '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 confirmation or denial of whether the requested information is held unnecessary. Confirmation or denial under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

30. The Commissioner is satisfied with the Constabulary's position regarding transparency and accountability in this case. If held, a civil court judgment would not demonstrate how the Constabulary reaches decisions or how it applies its own policies and procedures, for example. Nor would it demonstrate accountability on the part of the Constabulary, as the Constabulary is not accountable for decisions made in a civil court matter.
31. However, the Commissioner considers that confirmation or denial does in fact appear to be the only means by which the complainant's own personal interest can be satisfied in this case.

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

32. 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 confirmation or denial.
33. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that confirming whether or not the information is held may cause;
 - whether the information (if held) is already in the public domain;
 - whether the information (if held) is already known to some individuals;
 - whether the individual expressed concern about confirmation being given as to whether the Constabulary held the information or not; and
 - the reasonable expectations of the individual.
34. In the Commissioner's view, a key issue is whether the individual concerned would have a reasonable expectation that the Constabulary would not confirm to the world at large whether or not the requested information is held. 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 a private individual, and the purpose for which the public authority may hold their personal information.
35. It is also important to consider whether confirmation or denial would be likely to result in unwarranted damage or distress to that individual.

36. The Commissioner considers that the data subject would have a reasonable expectation that the Constabulary would not confirm or deny whether it holds the requested information. If held, the requested information would relate to the individual's private life, and would not concern the general public. As such, providing confirmation or denial to the world at large would not be an appropriate or proportionate step to take. Due to the context of the request, the Commissioner agrees with the Constabulary that providing confirmation or denial is highly likely to cause damage and distress to the data subject.
37. 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 confirmation or denial as to whether the requested information is held would not be lawful.
38. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether confirmation or denial would be fair or transparent. He finds that the Constabulary is entitled to rely on section 40(5B)(a)(i) of FOIA to neither confirm nor deny that the requested information is held.

Procedural matters

39. Section 17(1) of FOIA provides that a public authority must issue a refusal notice, within 20 working days of the request, if it is relying on an exemption to neither confirm nor deny that information is held. As the Constabulary failed to issue a refusal notice within 20 working days, it has breached section 17(1) of FOIA.

Right of appeal

40. 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

41. 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.
42. 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
Group Manager
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Wycliffe House
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