

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 March 2022

Public Authority: Commissioner of Police of the Metropolis

Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant has requested information from the Metropolitan Police Service (the "MPS") about a certain criminal threshold and why an action taken by a named individual did not meet that threshold. The MPS refused to confirm or deny whether it held information regarding this, citing the exemptions at sections 40(5) (Personal information), 30(3) (Investigations and proceedings) of FOIA.
2. The Commissioner's decision is that the MPS was entitled to rely on section 40(5) of the FOIA to issue a neither confirm nor deny response. Therefore he did not consider the MPS' application of section 30(3) of FOIA to the requested information. No steps are required.

Request and response

3. On 22 October 2019 the complainant made the following request for information under the FOIA:

"Could you please inform me the criminal threshold which [name redacted]'s racist act against [name redacted] apparently did not meet."

4. The MPS responded on 8 November 2019. It would neither confirm nor deny whether it held the requested information, citing sections 30(3)

(investigations and proceedings) and 40(5) (personal information) of the FOIA.

5. The complainant again wrote to the MPS on 13 November 2019, stating that he had not requested any personal information, or any information that could enable a person to be identified. He also argued that no harm to any investigation could result from disclosing the requested information and that the information that the matter had been referred to the MPS had already been made public.
6. After correspondence with the ICO, the complainant was informed that he should exhaust the internal review process with MPS before the ICO could commence an investigation. The complainant requested an internal review response, which the MPS provided on 10 December 2019.
7. In its response of 10 December 2019, MPS maintained its application of sections 30(3) and 40(5) and provided further information in support of its reasoning.

Scope of the case

8. The complainant contacted the Commissioner on 8 November 2019 to complain about the way his request for information had been handled. After being told to go through the internal review process he did so, and again contacted the Commissioner on 21 January 2020.
9. The Commissioner has considered the way in which the MPS handled the complainant's request, in particular the application of the specified exemptions.

Reasons for decision

Neither confirm nor deny ("NCND")

10. Section 1(1)(a) of the FOIA requires a public authority to inform a requester whether it holds the information specified in the request.
11. The decision to use a NCND 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 NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.

12. The MPS has taken the position of neither confirming nor denying whether it holds any of the requested information in its entirety, citing sections 40(5) and 30(3) 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 MPS is entitled to NCND whether it holds any information of the type requested by the complainant.

13. The MPS has explained to the Commissioner:

"In line with ICO guidance, the MPS considers there to be the need to use the NCND response consistently over a series of separate requests, regardless of whether it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is, in fact, held.

From previous ICO decision notices it can be seen that it is sufficient to demonstrate that either a hypothetical confirmation, or a denial, would engage the exemption. As such, it is not necessary to show that both confirming and denying information is held would engage the exemption from complying with section 1(1)(a) of the FOIA."

Section 40 – Personal data

14. 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 General Data Protection Regulation EU2016/679 (GDPR) to provide that confirmation or denial.

15. Therefore, for the MPS to be entitled to rely on section 40(5B) FOIA to refuse to confirm or deny whether they hold 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 Data Protection Act 2018 (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. Clearly the requested information relates to a named party. Therefore any information, if held, would be their personal information.
20. For the reasons set out above the Commissioner is satisfied that if the MPS confirmed whether or not it held the requested information this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.

Criminal offence data

21. The MPS has also argued that confirming or denying whether it holds the requested information would result in the disclosure of information relating to the criminal convictions and offences of a third party.
22. 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.
23. The complainant wishes to know what particular criminal threshold an action carried out by a named individual did not meet. That information would also disclose whether or not the MPS had undertaken an investigation or enquiries regarding the alleged commission of offences by that named individual (the data subject). Were it to confirm or deny holding any relevant information, this would therefore reveal whether or not it had done so.
24. 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 FOIA

request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA 2018 can be met.

25. The Commissioner therefore asked the MPS to consider each of these conditions and whether any of them could be relied on to confirm or deny whether it held criminal offence data falling within the scope of this request. The MPS has informed him that none of the conditions can be met. Having regard for the restrictive nature of the Schedule 1, Parts 1 to 3 conditions, the Commissioner considers this to be entirely plausible.
26. Regarding this, the MPS advised: "I can confirm that the MPS has considered the conditions for processing as set out in Schedule 1, Parts 1-3 of the DPA 2018. The two which are relevant here are Part 3 paragraph 29 and 32 (consent and information manifestly made public by the data subject)." None of the conditions have been met in this case.
27. The complainant previously informed the Commissioner that the MPS had publicly stated that it was investigating an alleged offence by the named individual. The MPS informed the Commissioner, in response to the Commissioner raising this, that there is no official public confirmation or otherwise of a MPS investigation into this matter or that the individual concerned was arrested or charged with any offences. It stated: "*I am aware that there have been a number of media articles that assert this to be the case. However, this does not equate to official confirmation*". It also provided the Commissioner with some information from its Media Policy.¹
28. As none of the conditions required for processing criminal offence data are satisfied there can be no legal basis for confirming whether or not the requested information is held; providing such a confirmation or denial would breach data principle (a) and therefore the second criterion of the test set out above is met. It follows that the MPS is entitled to refuse to confirm or deny whether it holds the requested information on the basis of section 40(5)(B) of FOIA.
29. As the Commissioner finds that the MPS was entitled to rely on section 40(5) he has not found it necessary to consider its application of the other exemption cited.

¹ <https://www.met.police.uk/SysSiteAssets/foi-media/metropolitan-police/policies/media-policy-toolkit-non-composite.pdf>

Other matters

30. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern:

Information Notice

31. As the MPS failed to respond to the Commissioner's enquiries in a timely manner, it was necessary for him to issue an Information Notice in this case, formally requiring a response. The Information Notice will be published on the Commissioner's website.
32. The Commissioner will use intelligence gathered from individual cases to inform his insight and compliance function. This will align with the goal in his draft Openness by Design strategy² to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our Regulatory Action Policy.³

² <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

³ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

33. 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

34. 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.
35. 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

Deirdre Collins
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF