

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

### **Decision notice**

**Date:** 19 September 2023

**Public Authority:** Chief Constable of Kent Police

**Address:** Sutton Road

Maidstone

Kent

ME15 9BZ

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

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1. The complainant has requested information about his vehicle. Kent Police would neither confirm nor deny holding any information, citing sections 40(5) (Personal information) and 31(3) (Law enforcement) of FOIA.
2. The Commissioner's decision is that Kent Police was correct to rely on section 40(5) of FOIA. No steps are required.

### **Request and response**

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3. On 9 June 2023, the complainant wrote to Kent Police and requested the following information:

“Please under the FOI act please provide the information of a police marker being placed on my work car and registration when pulled over [Vehicle Registration Mark ('VRM') redacted]”.
4. On 20 June 2023, Kent Police responded. It would neither confirm nor deny that information relevant to the request was held, citing sections 40(5) and 31(3) of FOIA.

5. The complainant wrote back to Kent Police on 20 June 2023. He requested that the refusal be translated into Punjabi and also provided further commentary around his request.
6. Kent Police dealt with the correspondence as a request for an internal review and responded on 21 July 2023. It maintained its position.

### Scope of the case

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7. The complainant contacted the Commissioner on 22 July 2023 to complain about the way his request for information had been handled. His grounds were as follows:

"Failure to disclose the information after internal review  
Information is a basic question that can be answered but they  
refused too [sic]  
Due to an illegal pullover for no reason  
I wish to raise Formal complaint against kent POLICE".

8. No reference was made to the request to have the refusal notice translated into Punjabi so this will not be further considered. However, the Commissioner's guidance on such matters is on his website<sup>1</sup>.
9. The Commissioner will consider the citing of exemptions below.
10. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of FOIA. FOIA is concerned with transparency of information held by public authorities. It gives an individual the right to access recorded information (**other than their own personal data**) held by public authorities. FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.

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<sup>1</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/means-of-communicating-information-section-11/>

## Reasons for decision

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### Neither confirm nor deny ("NCND")

11. 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 NCND whether it holds the requested information
12. 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.
13. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not 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.
14. Kent Police 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 31(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 Kent Police is entitled to NCND whether it holds any information of the type requested by the complainant.
15. Put simply, in this case the Commissioner must consider whether or not Kent Police is entitled to NCND whether it holds any information about the complainant's vehicle.

### Section 40 - Personal information

16. Section 40(1) of 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."

17. Section 40(5A) of FOIA states that:

"The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1)".

18. In other words, while section 40(1) of FOIA provides an exemption from the right to information if the requested information is the requester's personal data, section 40(5A) of FOIA provides an exemption from the duty to confirm or deny whether requested information is held, if to do so would disclose personal data of which the applicant is the data subject.

**Would confirmation or denial that the requested information is held constitute the disclosure of personal data?**

19. Section 3(2) of the DPA defines personal data as "any information relating to an identified or identifiable living individual".
20. The two main elements of personal data, therefore, are that the information must relate to a living person, and that the person must be identifiable.
21. 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 or an online identifier; or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
22. 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.
23. The Commissioner considers that a VRM is the personal data of the vehicle owner, and the complainant has clearly stated that it is his own vehicle in the request. Therefore, given the wording of the request, and the context provided by the complainant, the Commissioner is satisfied that the requested information, if held, would relate to the complainant personally. The information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
24. In his guidance<sup>2</sup> entitled "Neither confirm nor deny in relation to personal data", the Commissioner states:

"If the requested information is the requester's personal data, it is exempt under section 40(1) of FOIA. Furthermore, under section

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/2021/2619041/s40-neither-confirm-nor-deny-in-relation-to-personal-data-section-40-5-and-regulation-13-5-final-version-21.pdf>

40(5A), you are not required to confirm or deny if you hold the information. You can therefore respond to the freedom of information (FOI) request by saying that you neither confirm nor deny that you hold the personal data. This applies whether or not you do actually hold it. The issue to consider is not whether you hold it but rather, if you did hold it, would confirming or denying that it was held in itself disclose personal data relating to the requester?

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Therefore, if you receive an FOI or EIR request where confirming or denying whether you hold the information would involve disclosing the requester's personal data, you should treat this as a data protection subject access request. You should tell the requester that you will deal with the request under the data protection legislation, rather than FOIA or the EIR. You should carefully word any refusal notice to avoid implying whether you do or do not hold the information and to avoid inadvertently disclosing any personal data".

25. In this case, the Commissioner is satisfied that disclosure, by way of confirmation or denial, would reveal whether or not the complainant's car has some form of 'police marker' and also whether or not he had been pulled over by the police.
26. There is no right of access to an individual's own personal data under FOIA. The information, if it were held, would be exempt from disclosure under section 40(1) and therefore, under section 40(5A), the public authority is not required to confirm or deny that they hold it.
27. The Commissioner has therefore decided that Kent Police was entitled to refuse to confirm whether or not it holds the requested information on the basis of section 40(5A) of FOIA.
28. In light of that decision, the Commissioner has not considered the other exemption cited.

## Right of appeal

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29. 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)

30. 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.

31. 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 .....**

**Carolyn Howes  
Senior Case Officer  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**