

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 19 May 2016

**Public Authority:** Commissioner of the Metropolitan Police Service

**Address:** New Scotland Yard  
Broadway  
London  
SW1H 0BG

#### Decision (including any steps ordered)

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1. The complainant has requested statistics about arrests for threats to kill the Mayor of London. The Metropolitan Police Service (the 'MPS') would neither confirm nor deny holding any information by virtue of sections 40(5) (personal information) and 30(3) (investigations and proceedings). The Commissioner's decision is that section 40(5) is engaged and he has not therefore found it necessary to consider section 30(3). No steps are required.

#### Background

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2. The request can be followed on the "*What do they know?*" website<sup>1</sup>.

#### Request and response

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3. On 26 January 2016, the complainant wrote to the MPS and requested information in the following terms:
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<sup>1</sup> [https://www.whatdotheyknow.com/request/arrest\\_statistics\\_for\\_alleged\\_th\\_2](https://www.whatdotheyknow.com/request/arrest_statistics_for_alleged_th_2)

*"Please can you give me the statistics for arrests for alleged threats and threats to kill the Mayor of London between April 2009 and Dec 2015".*

4. The MPS responded on 9 February 2016. It would neither confirm nor deny ("NCND") holding information, citing sections 40(5)(a) and 30(3) of the FOIA as its basis for doing so.
5. Following an internal review the MPS wrote to the complainant on 26 February 2016. It revised its position in respect of section 40(5) changing it from (a) to (b)(i), it maintained its position in respect of 30(3).

### **Scope of the case**

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6. The complainant contacted the Commissioner on 11 March 2016 to complain about the way his request for information had been handled. He asked the Commissioner to investigate whether or not the MPS was entitled to NCND holding any information. He advised that he was aware of one man who had been charged with threats to kill Boris Johnson and all charges were dropped.
7. The Commissioner will consider this below.

### **Reasons for decision**

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8. Under section 1(1)(a) of the FOIA, a public authority is obliged to advise an applicant whether or not it holds the requested information. This is known as the "duty to confirm or deny". However, the duty to confirm or deny does not always apply and authorities may NCND through reliance on certain exemptions under the FOIA.

### **Section 40 – personal data**

9. The analysis below considers section 40(5)(b)(i) FOIA. The consequence of section 40(5)(b)(i) is that if a public authority receives a request for information which, if it were held, would be the personal data of a third party, then it can rely on section 40(5)(b)(i) to NCND whether or not it holds the requested information.
10. Consideration of section 40(5) involves two steps: first, whether providing the confirmation or denial would involve the disclosure of personal data, and secondly, whether disclosure of that personal data would be in breach of any of the data protection principles.

***Is the information personal data?***

11. The first step for the Commissioner is to determine whether the requested information, if held, constitutes personal data as defined by the Data Protection Act 1998 ("the DPA"). If it is not personal data, then section 40 cannot apply.
12. The DPA defines personal data as:

*"...data which relate to a living individual who can be identified  
a) from those data, or  
b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the 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. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
14. The requested information clearly relates to a specified individual, namely the Mayor of London during the period April 2009 to December 2015, ie Boris Johnson. Therefore, the Commissioner accepts that the requested statistics, if held, are the personal data of Boris Johnson.
15. The Commissioner will now go on to consider whether confirming or denying if the information is held would contravene any of the data protection principles.
16. The Commissioner considers that the first data protection principle is relevant in the circumstances of this case.

***Would confirmation or denial breach the first data protection principle?***

17. The first data protection principle states -

*"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –  
(a) at least one of the conditions in Schedule 2 is met ..."*
18. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request (in this case, disclosed when confirmation or denial as to its existence is given). This means that

confirmation or denial can only be given if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions. If it would fail to satisfy any one of these criteria, then the public authority is entitled to issue an NCND response.

19. The Commissioner has first considered whether such disclosure would be fair. In considering whether disclosure of personal information is fair he takes into account the following factors:
  - the individual's reasonable expectations of what would happen to their information;
  - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned);
  - any legitimate interests in the public having access to the information; and,
  - the balance between these and the rights and freedoms of the individuals who are the data subjects.
20. The Commissioner recognises that people have an instinctive expectation that the MPS, in its role as a responsible data controller, will not disclose certain information about them and that it will respect their confidentiality. Accordingly, the Commissioner considers that the data subject would not reasonably expect the MPS to place details of whether or not it had received any threats concerning his personal safety into the public domain.
21. As to the consequences of disclosure upon a data subject, the question – in respect of fairness - is whether disclosure would be likely to result in unwarranted damage or distress to that individual.
22. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the withheld information. He will also take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public at large, without conditions.
23. Given the nature of the request, and the sensitivity of the subject matter, the Commissioner considers that confirming or denying in this case could lead to an intrusion into the private life of the individual concerned and the consequences of any disclosure could cause him damage and distress.
24. Whilst the complainant has made reference to a relevant arrest which he says he is aware of, the Commissioner can find no evidence in the public domain to support this. Furthermore, he has found no evidence in the public domain which would suggest that the data subject has any idea as to whether or not the MPS has arrested anyone for making threats to

his life. It is therefore the Commissioner's view that the data subject would have little – if any - expectation that such details would be put into the public domain by way of a request under the FOIA.

25. Notwithstanding a data subject's reasonable expectations or any damage or distress caused, it may still be fair to disclose information, or in this case confirm or deny if information is held, if there is a more compelling public interest in doing so. Therefore the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in confirming or denying if the information is held.
26. The Commissioner would stress that this is a different balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Given the importance of protecting an individual's personal data the Commissioner's 'default position' is in favour of protecting the privacy of the individual. The public interest in confirming whether or not information is held must outweigh the public interest in protecting the rights and freedoms of the data subject if providing confirmation or denial is to be considered fair.
27. The interest in disclosure must be a public interest, not the private interest of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.
28. The Commissioner understands that the complainant requires the requested information for a documentary programme which he is involved with (he has also been provided with other background information which he is unable to reproduce in this notice). Whilst he therefore understands some of his reasons for wanting the information, he notes that this is very much a personal interest and he can see little wider public interest in this request.
29. In light of the nature of the information and the reasonable expectations of the data subject, the Commissioner is satisfied that confirming or denying if the requested information is held would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the data subject. He considers these arguments outweigh any legitimate interest in disclosure. He has therefore concluded that confirmation or denial in this case would breach the first data protection principle. He therefore finds the exemption at section 40(5) is engaged and the duty to confirm or deny does not arise.
30. As the Commissioner has determined that it would be unfair to confirm or deny if the information is held, it has not been necessary to go on to

consider whether this is lawful or whether one of the schedule 2 DPA conditions is met.

31. In light of these findings the Commissioner has not found it necessary to consider any other exemptions cited.

## Right of appeal

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32. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

33. 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.
34. 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**