

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 June 2016

Public Authority: Commissioner of the Metropolitan Police Service

Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant has requested information about a residential address. The Metropolitan Police Service (the 'MPS') would neither confirm nor deny holding any information citing section 40(5)(b)(i)(personal information) of the FOIA. The Commissioner's decision is that it was entitled to do so. No steps are required.

Request and response

2. On 17 August 2015 the MPS received the following three information requests from the complainant:
 - *How many times has the Metropolitan Police attended the residence of [address removed], Swiss Cottage, London, [postcode removed] since 2006 till present*
 - *How many times has the Metropolitan Police found illegal drugs at the residence of [address removed], Swiss Cottage, London, [postcode removed] since 2006 till present*
 - *How many times has the Metropolitan Police arrested anybody for drug offences at the residence of [address removed], Swiss Cottage, London, [postcode removed] since 2006 till present*

3. The MPS responded on 19 August 2015. It refused to confirm or deny whether it holds any of the requested information citing section 40(5) of the FOIA.
4. Following an internal review the MPS wrote to the complainant on 6 February 2016. It maintained its position, clarifying its reliance on section 40(5)(b)(i).

Scope of the case

5. The complainant initially contacted the Commissioner prior to asking the MPS for an internal review of his request. He subsequently provided the necessary information to the Commissioner on 4 March 2016. No grounds of complaint were included so the Commissioner has used his discretion and will rely on his grounds for requesting an internal review therefore considering the application of section 40(5).

Reasons for decision

Section 40 - personal information

6. The analysis below considers section 40(5)(b)(i) of the 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 (or parties), then it can rely on section 40(5)(b)(i), to refuse to confirm or deny whether or not it holds the requested information.
7. 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?

8. The first step for the Commissioner to determine is whether the requested information, if held, constitutes personal data, as defined by the Data Protection Act 1988 (the "DPA"). If it is not personal data, then section 40 cannot apply.
9. 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."

10. 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.
11. The Commissioner considers that context is important here. In this case, the Commissioner accepts that there is no actual name of any party included in the request. However, the address is very specific and clearly relates to one or more persons who lived there during the time frame given. As such, confirmation or denial about whether or not the police attended the address for the reasons specified in the request will say something about those parties. The Commissioner is therefore satisfied that any information held about the address is the personal data of those living there at that time.

Is the information sensitive personal data

12. The MPS explained to the complainant:

"A statement confirming or denying whether information is held in relation to police attendance at an address, especially in relation to illegal drugs and/or arrests, could constitute sensitive personal data as such information is likely to relates to:

*the physical or mental health or condition of an individual
the commission or alleged commission of any offence
any proceedings for any offence committed or alleged to have been committed by the data subject, the disposal of such proceedings or the sentence of any court in such proceedings.*

Sensitive personal data could be inferred in relation to victims of crime and/or suspects.

The fact that your request relates to a specific location means that any related disclosure (i.e. confirmation or denial statement) would facilitate any attempt to link the information requested to individuals who can be identified based upon information known or accessible via other means. The fact that the information requested relates to sensitive personal data may increase the incentive for individuals to attempt to link this to identifiable individuals. In the

context of your request, even the absence of information could infer sensitive personal data when combined with information that may be known to individuals”.

13. Sensitive personal data is personal data which falls into one of the categories set out in section 2 of the DPA. As referred to in the MPS's comments above, the Commissioner accepts that the relevant categories in this instance are (e), (g) and (h). In this case, given that the request relates to information about police attendance, drug possession and possible arrests, the Commissioner is satisfied that the requested information falls under these sub-sections in relation to any individual who resided at the address concerned during the requested time period.
14. Having accepted that the request is for personal data, including sensitive personal data, of living individuals the Commissioner must go on to consider whether confirming or denying if the information is held would contravene any of the data protection principles.
15. 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?

16. 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, and
(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."*

17. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the disclosure, ie the confirmation or denial in this case, can only be given if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions and, in this case, one of the Schedule 3 conditions. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure. The Commissioner has first considered whether disclosure would be fair.
18. In considering whether disclosure of personal information is fair the Commissioner 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.
19. 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.
 20. Furthermore, the Commissioner considers that, in most cases, the very nature of sensitive personal data means it is more likely that disclosing it will be unfair. The reasonable expectation of the data subject is that such information would not be disclosed and that the consequences of any disclosure could be damaging or distressing to them.
 21. In light of the above, the Commissioner considers that information relating to the attendance of the police at an address, along with possible finding of drugs and arrests will carry a strong general expectation of privacy for those parties concerned.
 22. 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.
 23. 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.
 24. Given the nature of the request, and the sensitivity of the subject matter, the Commissioner considers that disclosure in this case could lead to an intrusion into the private lives of the individuals concerned and the consequences of any disclosure could cause damage and distress to any party concerned.
 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 if 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. When requesting an internal review the complainant explained to the MPS:
- "The reason why I am requesting this information and review is for use in an ongoing criminal case which is in the 'Public Interest' for this information to be disclosed and is therefore exempt from the data protection Act".*
28. The Commissioner does not know which "criminal case" the complainant is referring to and whether or not he has any personal connection with that case and the address. However, as it is a residential address, and based on his commentary above, the Commissioner would assume that he has some personal interest in the matters which are the subject of his request. The Commissioner here notes that if the information would form important evidence for a criminal case then access to it must be via the appropriate access regime for discovery rather than through disclosure via the FOIA which is considered to be unfettered disclosure to the world at large. Indeed, were disclosure made via the FOIA it may render it inadmissible for a criminal case. When considering disclosure under the terms of the FOIA, the interest in disclosure must be a public interest, not the private interest of the individual requester which seems to be the case here. The requester's interests are only relevant in so far as they reflect a wider public interest and the Commissioner does not consider there is any such wider interest in this case.
29. In light of the nature of the information and the reasonable expectations of the individuals concerned, 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 subjects. 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) engaged and the duty to confirm or deny did not arise.

Other matters

30. As mentioned above, the Commissioner does not know whether or not the applicant has a personal connection to the address given. However, he notes that the MPS also recognised this possibility and sent him details about how to make a subject access request under the terms of the DPA which would be the appropriate access regime for accessing his own personal data.

Right of appeal

31. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

32. 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.
33. 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
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