

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 19 March 2018

**Public Authority:** Dyfed Powys Police

**Address:** [foi@dyfed-powys.pnn.police.uk](mailto:foi@dyfed-powys.pnn.police.uk)

### Decision (including any steps ordered)

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1. The complainant has requested various information in respect of a former Council tenant and his partner following a disturbance which was reported in the media and which necessitated the removal of individuals from the property by Dyfed Powys Police for their own safety. Dyfed Powys Police refused to confirm or deny whether it held relevant information citing section 40(5)(b)(i) of the FOIA. The Commissioner's decision is that Dyfed Powys Police was not obliged to confirm or deny if the requested information was held under section 40(5)(b)(i) of the FOIA. The Commissioner does not require the public authority to take the following steps.

### Request and response

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2. On 4 September 2017, the complainant wrote to Dyfed Powys Police (DPP) and requested the following information:

*"...following the disturbance at Gwilliam Court Mongton, Pembrokeshire, 11 July 2017 and the decision taken by Dyfed Powys Police to remove {for their own protection} the Council's tenant and partner, concerns have been drawn to my attention regarding protocol for managing offenders {including sex offenders} transferred to Pembrokeshire and Ceredigion on release from prison..."*

1. *Was the former Council tenant {and / or his partner} being managed under MAPP arrangements 1, 2 or 3.*

2. *Was the former Council tenant {and / or his partner registered on ViSOR*
3. *Was a Risk Management Plan in place in accordance with MAPP requirements"*
3. DPP responded on 19 September 2017. It refused to confirm or deny whether it held relevant information citing section 40(5)(b)(i) of the FOIA on the basis that confirmation or denial that such information were held would breach principle one of the Data Protection Act 1998 ('the DPA').
4. Following an internal review, DPP wrote to the complainant on 11 October 2017. It stated that it considered it had appropriately applied section 40(5)(b)(i) and that its original response remained valid.

## **Scope of the case**

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5. The complainant contacted the Commissioner 11 October 2017 to complain about the way his request for information had been handled. He stated that he could find no evidence that an independent review had been undertaken and informed the Commissioner that he remains of the view that his request does not require DPP to disclose personal information.
6. The Commissioner considers that the scope of her investigation is to consider whether DPP was correct to cite section 40(5)(b)(i) to refuse to confirm or deny whether it held relevant information. She has also considered in the 'Other matters' section of this notice, the complainant's concerns regarding the internal review.

## **Reasons for decision**

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### **Section 1 – general right of access to information held**

7. Section 1 of the FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities. These are:
  - the duty to inform the applicant whether or not requested information is held and, if so,
  - the duty to communicate that information to the applicant.

8. **Section 40(5)(b)(i) provides that:**

*"The duty to confirm or deny –*

- (a) 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), and*
- (b) does not arise in relation to other information if or to the extent that either –*
  - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or...."*

9. Therefore, for DPP to be correct in relying on section 40(5)(b)(i) to neither confirm nor deny whether it holds information falling within the scope of the complainant's request the following conditions must be met:

- Confirming or denying whether information is held would reveal personal data of a third party; and
- That to confirm or deny whether information is held would contravene one of the data protection principles.

10. In order to reach a view regarding the application of this exemption, the Commissioner has therefore firstly considered whether confirmation or denial of the existence of relevant information does in fact constitute personal data as defined by section 1(1) of the Data Protection Act 1998 ('the DPA').

**Is the requested information personal data?**

11. Personal data is defined at section 1(1) of the DPA as:

*"personal data means data which relate to a living individual who can be identified-*

- (a) from those data,*
- (b) from those data and other information which is in the possession of, or likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."*

12. When considering whether the information is personal data, the Commissioner has taken into consideration her published guidance: *"Determining what is personal data"*.<sup>1</sup>
13. On the basis of this guidance, there are two questions that need to be considered when deciding whether disclosure of information into the public domain would constitute the disclosure of personal data:
  - (i) *"Can a living individual be identified from the data, or, from the data and other information in the possession of, or likely to come into the possession of, the members of the public?"*
  - (ii) *"Does the data 'relate to' the identifiable living individual, whether in personal or family life, business or profession?"*
14. DPP has stated that within this particular request, the complainant has made reference to a disturbance at a named residential address on a specific date, with all three questions focusing on the Council tenant (and/or his partner) of that particular property. DPP has therefore argued that the request concerns third party individual(s).
15. However, the key point to consider here is whether these individuals are identifiable, not just by an ordinary member of the public, but by a determined individual with a particular reason to want to identify individuals.
16. DPP has informed the Commissioner that an update posted on its website at the time of the incident contained the address stated in the request, and confirms that as a result of concerns posted on social media locally in respect of individuals at the property it was necessary to attend a disturbance at that property.
17. It has further informed the Commissioner that the disturbance was reported in the BBC news, Daily Mail and local media, and provided hyper-links to these sources.
18. It has added that the fact that the complainant has not named the individuals indicates that he expects DPP to know who he is referring to

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[http://www.ico.gov.uk/upload/documents/library/data\\_protection/detailed\\_specialist\\_guides/what\\_is\\_data\\_for\\_the\\_purposes\\_of\\_the\\_dpa.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/what_is_data_for_the_purposes_of_the_dpa.pdf)

by providing the date and address of the disturbance. Additionally, the complainant's references to the Council tenant and partner suggests that the applicant is aware of the information already available in the public domain concerning the incident.

19. DPP therefore considers that should it confirm or deny whether it holds relevant information, that a living individual can be identified from that data, or from that data and other information in the possession of members of the public as stated in section 1(1)(b)(i) of the DPA.
20. The Commissioner has no hesitation in accepting that individual(s) could be identified as described above, and therefore considers that confirming or denying whether relevant information is held would disclose personal information.

*Is the information sensitive personal data?*

21. Sensitive personal data is defined in section 2 of the DPA. It is personal information which falls into one of the categories set out in section 2 of the DPA:
  - (a) the racial or ethnic origin of the data subject,*
  - (b) his political opinions,*
  - (c) his religious beliefs or other beliefs of a similar nature,*
  - (d) whether he is a member of a trade union,*
  - (e) his physical or mental health or condition,*
  - (f) his sexual life,*
  - (g) the commission or alleged commission by him of any offence, or*
  - (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.*
22. In correspondence with the Commissioner, DPP explained that the complainant is requesting to know if two specific individuals are being managed under MAPPA arrangements, registered on ViSOR and if there was a risk management plan in place for the individuals.
23. It has further informed the Commissioner that MAPPA stands for Multi-Agency Public Protection Arrangements, and is the process through which the Police, Probation and Prison Services work together to

manage risks posed by violent and sexual offenders living in the community, in order to protect the public.

24. The Commissioner notes that ViSOR stands for the Violent and Sex Offender Register database of those required to register with the police under the Sexual Offences Act 2003, those jailed for more than 12 months for violent offences, and those thought to be at risk of offending.
25. The Commissioner therefore considers that confirmation or denial of whether relevant information is held would effectively be confirming or denying whether the individuals subject to the request have committed such an offence, and as such falls under Section 2(g) of the DPA as sensitive personal data.
26. Having accepted that confirmation or denial of whether relevant information is held would disclose sensitive personal data of living individuals other than the applicant, the Commissioner must go on to consider whether disclosure of the information would contravene any of the data protection principles.
27. Dyfed Powys Police has argued that confirmation or denial of the disputed information would breach the first data protection principle.

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

28. The first data protection principle requires that the processing of personal data be fair and lawful and,
  - 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 met.
29. In this case, as it has been determined that confirmation or denial of relevant information would disclose sensitive personal data, such confirmation/denial must be able to demonstrate that processing would be both fair and lawful, and that both a schedule 2 **and** a schedule 3 condition is satisfied. If even one requirement cannot be satisfied, processing will not be in accordance with the first data principle.

*Would disclosure be fair?*

30. In her consideration of whether confirmation or denial of relevant information would be fair, the Commissioner has taken the following factors into account:
  - a. The reasonable expectations of the data subject.

- b. Consequences of disclosure.
- c. The legitimate interests of the public

*The reasonable expectations of the data subject*

- 31. In the Commissioner's view, a key issue to consider in assessing fairness is whether the individuals concerned had a reasonable expectation that their information would not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an individual in a professional capacity or to them as individuals and the purpose for which they provided their personal data.
- 32. In this particular case, DPP has explained that to disclose details in response to an FOI request confirming whether two individuals are subject to MAPPA conditions would be deemed not fair processing.
- 33. The Commissioner accepts that any individuals subject to MAPPA conditions and registered on ViSOR would reasonably expect that such information would remain confidential.

*Consequences of disclosure*

- 34. The Commissioner has therefore gone on to consider the consequences of such confirmation or denial. When considering the consequences of such a disclosure on the data subjects, the Commissioner will take into account the nature of the withheld information, and the fact that disclosure under the FOIA is effectively an unlimited disclosure to the public at large, without conditions.
- 35. In correspondence with the Commissioner, DPP has stated that it can be seen from newspaper reports how one comment on social media about an individual can create such a reaction that it involves police attendance, assistance from another police force and the removal of two individuals from their home.
- 36. The Commissioner has no hesitation in recognising the very real potential to cause damage or distress to the data subjects if such a confirmation or denial was provided.

*The legitimate public interest in disclosure*

- 37. Notwithstanding the data subjects' reasonable expectations, or any damage or distress caused to them by such confirmation, it may still be fair to confirm or deny the existence of relevant information if it can be argued that there is a more compelling public interest in disclosure.

38. The Commissioner appreciates that there is a general public interest in accountability and transparency and notes that the complainant has a personal interest in the information as part of a wider investigation aimed at establishing whether the general public have been placed at risk of harm.
39. The Commissioner is also cognisant of a general public interest in knowing whether MAPPA procedures are being followed and if someone is registered on ViSOR, since these individuals have a history of violent and/or sexual offences, with potentially significant implications for the safety of the general public.
40. On the other hand the Commissioner recognises that these legitimate interests must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of any individual who would be affected by confirming or denying that the requested information is held.

#### *Conclusion*

41. In weighing up the balance between the reasonable expectations of the data subjects and the consequences of such confirmation or denial, against any legitimate public interest in disclosure, the Commissioner notes that the complainant has a personal interest in obtaining this information and acknowledges that he does not consider such a confirmation or denial would disclose any personal information.
42. However, the Commissioner is mindful that the incident received widespread media attention and has already established elsewhere in this notice, that the potential risk of identification of these individuals is high.
43. In terms of the potentially significant implications for the general public, the Commissioner accepts that if the information were held, the risk to the general public is mitigated by MAPPA conditions and the ViSOR database yet she considers there is a far greater risk to the safety of the two individuals given the background to the request outlined in paragraph 35 of this notice.
44. Consequently, with due regard to the reasonable expectations of the data subjects, and the potential impact on them if the existence of their personal data were to be confirmed or denied, the Commissioner considers that it would be unfair to do so.
45. As the Commissioner has concluded that it would not be fair to confirm or deny the existence of relevant information, it is not necessary for her

to go on to consider whether such a confirmation or denial would be lawful, or whether a condition in both schedules 2 and 3 are met.

46. The Commissioner has therefore concluded that confirmation or denial as to whether the requested personal data is held would be in breach of the first data protection principle. She considers that the exemption

provided by section 40(5)(b)(i) is engaged and that, in this case, DPP was therefore not obliged to confirm or deny whether it held the information requested by the complainant.

### **Other matters – internal review**

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47. The Commissioner acknowledges that it is not a formal requirement for a public authority to conduct an internal review under the FOIA. However, the Section 45 Code of Practice recommends that public authorities do undertake an internal review and that where possible, it should be undertaken by someone different to the person who originally dealt with the request.

48. The Commissioner notes that DPP's communication of its internal review informed the complainant that:

*"The purpose of an internal review is to review and assess how your Freedom of Information request was handled and to determine whether the original decision given was correct. This is an independent review; I was not involved in the original decision."*

49. The Commissioner would point out that whilst it is considered good practice, a public authority is not required to appoint a different person to conduct its internal review. She also notes that the complainant was specifically informed that the person responsible for conducting the review had not been involved in the original decision. She can therefore find no evidence to support the complainant's comments that the internal review was not independent, and in the event that there were such evidence, the Commissioner would have no remit to hold DPP to account on that particular matter.

## Right of appeal

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50. 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)

51. 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.
52. 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** .....

**Catherine Dickenson**  
**Senior Case Officer**  
**Information Commissioner's Office**  
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**Wilmslow**  
**Cheshire**  
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