

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 October 2018

Public Authority: Chief Constable of Merseyside Police
Address: Police Headquarters
Canning Place
Liverpool
Merseyside
L1 8JX

Decision (including any steps ordered)

1. The complainant has requested any information held about a deceased celebrity from Merseyside Police. Merseyside Police disclosed some information with redactions under sections 40(2) (personal information) and also advised that some information was already available in the public domain, citing section 21(1) (information accessible to applicant by other means); the complainant did not dispute the citing of either of these. It also cited section 30 (investigations and proceedings).
2. During the Commissioner's investigation, Merseyside Police revised its position advising that it would neither confirm or deny ("NCND") holding any further information relying on sections 30(3) (investigations and proceedings) and 38(2) (health and safety) of the FOIA.
3. The Commissioner's decision is that Merseyside Police was entitled to rely on section 30(3) to NCND whether any further information is held. No steps are required.

Request and response

4. On 17 March 2018 the complainant wrote to Merseyside Police and requested information in the following terms:

"I am requesting the Merseyside Police to release all information it holds on Force Systems concerning all contact and information with and about the deceased [identifiers removed]. I make this request

under the Freedom of Information Act 2000 citing public interest as the reason for disclosure”.

5. Merseyside Police responded on 17 April 2018. It advised that it held a limited record on the police national computer, the content of which was already in the public domain, and it therefore cited section 21 of the FOIA in respect of this information. It disclosed some information in respect of the deceased party’s funeral arrangements which contained redactions made under section 40(2) of the FOIA for its own staff. Further details of an operational order supporting the policing of the funeral arrangements were withheld as they were deemed outside the scope of the request.
6. When asking for an internal review the complainant clarified that the information he was trying to locate is:

“... information concerning any criminal activity including concerns or contact the Merseyside Police has had with him”.
7. Following an internal review Merseyside Police wrote to the complainant on 18 May 2018. It maintained reliance on the previously cited exemptions and added section 38 (health and safety) of the FOIA.
8. During the Commissioner’s investigation Merseyside Police revised its response. It advised her that, other than what it already confirmed holding, it would neither confirm nor deny (“NCND”) holding anything further citing sections 30(3) and 38(2) of the FOIA as its reasons for doing so.

Scope of the case

9. The complainant initially contacted the Commissioner on 25 May 2018 to complain about the way his request for information had been handled but did not provide all of the necessary documentation; this was subsequently provided on 11 June 2018.
10. The complainant did not dispute either the section 40 redactions which had been made in the disclosed funeral arrangements or the citing of section 21 in respect of information already in the public domain, therefore neither of these will be considered further. The Commissioner also accepts that the details of the operational order referred to above fall outside the scope of the request.
11. The Commissioner has considered below whether Merseyside Police was entitled to rely on section 30(3) of the FOIA to issue an NCND response. As her decision is that Merseyside Police was entitled to rely on section

30(3) of the FOIA, it has not been necessary for her to consider section 38.

12. It is not necessary for the Commissioner to be made aware as to whether or not Merseyside Police holds the requested information in order for her to consider its position. Nothing within this decision notice should be taken as implying that Merseyside Police does or does not hold the requested information.

Reasons for decision

Section 30 – investigations and proceedings

13. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request. However, there may be occasions when complying with the duty to confirm or deny under section 1(1)(a) would in itself disclose sensitive or potentially damaging information that falls under an exemption. In these circumstances, the FOIA allows a public authority to respond by refusing to confirm or deny whether it holds the requested information.
14. 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 in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.
15. 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. Merseyside Police has explained that:

"A response of 'Neither Confirm Nor Deny' may be provided in cases where information is held and in cases where no information is held. Its' [sic] use has to be applied consistently in circumstances similar to this request because any practice of confirming that no information is held in a specific case where that is true would undermine other NCND responses and provide an inference that information is held because it has not been confirmed in the response that no information is held".

16. It is sufficient to demonstrate that either a hypothetical confirmation, or a denial, would engage the exemption. In other words, it is not necessary to show that both confirming and denying information is held would engage the exemption in order to comply with section 1(1)(a) of the FOIA.

17. Merseyside Police said that the information described in the request, if it was held, would be exempt from disclosure by virtue of section 30(1)(a)(i).
18. Section 30(1)(a)(i) of the FOIA provides an exemption for information which has at any time been held for the purposes of an investigation with a view to ascertaining whether a person should be charged with an offence.
19. Section 30(3) of the FOIA provides an exclusion from the duty to confirm or deny whether information is held in relation to any information which, if it was held, would fall within sections 30(1) or 30(2) of the FOIA.
20. Consideration of section 30(3) of the FOIA involves two stages; first, the information described in the request must fall within the classes described in sections 30(1) or 30(2). Secondly, the exemption is qualified by the public interest. This means that if the public interest in the maintenance of the exemption does not outweigh the public interest in confirming or denying whether information is held, then confirmation or denial must be provided.
21. As a police force, Merseyside Police clearly has a duty to investigate offences and allegations of offences. Information held for the purposes of a police investigation will generally fall within the description at section 30(1)(a)(i) of the FOIA. In this case, the complainant framed his request by reference to specific criminal allegations he believed the named individual may have committed. The Commissioner therefore accepts that the information described in the request, if it was held, would be held by Merseyside Police for the purposes of an investigation and so would be within the class described in section 30(1)(a)(i).
22. The Commissioner is therefore satisfied that the exemption provided by section 30(3) of the FOIA is engaged.

The public interest test

23. Section 30(3) is subject to the public interest test. Although the exemption may be automatically engaged where the information described in a request would be exempt under either subsection (1) or (2), it may only be maintained in the public interest if confirmation or denial would interfere with the effective conduct of the investigations or proceedings.
24. In accordance with her guidance, when considering the public interest in maintaining exemptions, the Commissioner considers that it is necessary to be clear what they are designed to protect.

25. The purpose of section 30 is to preserve the ability of the police (and other applicable public authorities) to carry out effective investigations. Key to the balance of the public interest in cases where this exemption is found to be engaged, is whether the disclosure of the requested information could have a harmful impact on the ability of the police to carry out effective investigations. Clearly, it is not in the public interest to jeopardise the ability of the police to investigate crime effectively.

Public interest arguments in favour of disclosure

26. The complainant is concerned that Merseyside Police may be “shielding” the person concerned, meaning that he would not be brought to justice. He added that he had formerly worked for the force and was aware of “rumours” about the named party at that time. However, whilst these appear to be the complainant’s genuinely held beliefs, the Commissioner would note here that he has not provided any information or evidence to substantiate his allegations.
27. In further correspondence with the Commissioner the complainant also stated the following regarding his request:

“I would like to point out that when they claim that releasing the information can result in members of the Public being reluctant to come forward with information, that is not evidenced in other cases of high profile people like Jimmy Savile and Cyril Smith, Rotheram [sic] and Rochdale etc. Witnesses were reluctant to come forward through a lack of trust of the Police, which we now know was well founded. If the Merseyside Police are, as I know they are, I worked for them, covering up serious crimes like CSE [Child Sexual Exploitation] and CSA [Child Sex Abuse] there the only action taken on information from Witnesses is to do nothing, this has been seen to happen in Forces all over the North of England. I have attached a [sic] item from Laura Keay which evidences how people come forward when information of CSA and CSE is put into the public domain. She shows in regard to West Mercia Police how this would not have happened if the issue had not been made public.

This claim of witnesses being reluctant to come forward is connected to the “image” the Force wants to portray of itself to the Public they serve. That flies right in the face of the interim findings of Professor Jay during the Independent Investigation into Child Sex Abuse ... she pointedly states that cases are not been addressed because the public image of the organization is the priority.

Also, the claim that [name removed]’s home address is well known, in the Savile and Smith cases and other there is no record of the families of those individuals facing any vigilante actions. And Savile

was a bigger shock to the Country, it was huge but no members of his family were targeted.

Again I stress, [name removed] was so celebrated, and still is, worldwide, that the Public have a right to know if there is evidence he was known to have been questioned over his conduct with youths. It is not the job of the Police to present a false image of an individual due to his money and power of influence”.

28. Merseyside Police recognises that the public may be interested in any criminal investigations which concern the person named in the request.

Public interest arguments in favour of maintaining the exemption

29. Merseyside Police has argued as follows:

“Police investigations are conducted with due regard to the confidentiality and privacy of victims, witnesses and suspects. It is further recognised that in general the release of information concerning investigations may compromise any subsequent court proceedings. This is clearly not the case in this instance but would otherwise apply to living individuals.

For these reasons the police service will, in most cases, seek to apply an exemption under the Freedom of Information Act 2000, to prevent the release of information concerning investigations, particularly on-going investigations where to do so may disclose information which could either alert an offender to an investigation or potentially compromise any future prosecution.

Whilst adopting this general position, there is full recognition that in some cases there will be significant and compelling issues of public interest that require the disclosure of information. However, to override issues of personal privacy and possible harm to individuals involved in the investigation, which includes person immediately associated with them, this public interest must be significantly more than mere curiosity or interest in a particular investigation. The public interest has been stated to be information that is of tangible benefit to the public and not what would satisfy curiosity.

... There is a suggestion and inferences by the applicant in representations for an internal review that the subject has been involved in a form of criminal activity. There is no direct allegation made in the same representations which would justify ongoing investigations or enquiries, following the death of the subject. There is no significant public interest; that has tangible benefit to the public or to law enforcement in respect of disclosure of any information which may be held by Merseyside Police in respect of

investigative activities where the applicant may or may not have been connected to an investigation.

... the public at large would not expect information in respect of crime complainants, witnesses or suspects to be disclosed via a Freedom of information application where the bar for disclosure does not meet the high level justifying the breach of anticipated confidentiality. To make such a disclosure would undermined [sic] the ability of the Force and other investigative bodies in receiving the co-operation of the public in provided evidence to assist in law enforcement. Where members of the public do not support policing, law enforcement becomes far more difficult requiring a greater use of police resources, which is not in the public interest.

In order to ensure that these public interest issues are fully considered, all applications for information concerning investigations will be considered on a case-by-case basis in accordance with the requirements of the Act. In this case a duty to confirm or deny does not arise (NCND)".

Balance of the public interest test

30. In balancing its position, Merseyside Police argued as follows:

"When balancing the public interest it is necessary to consider the release of the requested information into the public domain were it to exist. The public interest is not what interests the public, but what would be of tangible benefit to the public as a whole...

Information which could lead to the disclosure of any information relevant to police investigation, where that information is not already in the public domain and may relate to an individual's involvement as a victim, witness of [sic] suspect undermines the trust of the general public to deal with such information confidentially. Loss of trust in the Force to treat information provided in a sensitive manner undermines the expectation of the public to deal with information in a secure manner. There is no compelling public interest in disclosure of information in respect of the matters recorded by Merseyside Police and therefore to make a disclosure under the Act would merely feed idle curiosity and not be of tangible benefit to the public at large.

The decision therefore is that the information sought in this case is exempt information (other than that which was provided with the initial response) for the reasons shown, with the ability of the applicant and the public to access that information which is held in public records by other means, should they wish to do so. There will be no disclosure made by Merseyside Police in relation to

information held by the Force which is not disclosed with this application as there is no tangible public interest in doing so”.

31. In reaching a conclusion on the balance of the public interest, the Commissioner has considered what public interest there is in Merseyside Police confirming or denying whether or not it holds any information of the type requested by the complainant. The Commissioner has also considered whether such confirmation or denial would be likely to harm any investigation, which would be counter to the public interest, and what weight to give to these competing public interest factors.
32. The purpose of section 30 is to protect the effective investigation and prosecution of offences. Clearly, it is not in the public interest to jeopardise the ability of the police to investigate crime effectively.
33. Set against this, the Commissioner recognises the importance of the public having confidence in public authorities that are tasked with upholding the law. Confidence will be increased by allowing scrutiny of their performance and this may involve revealing whether or not any actions have been necessary, or are potentially ongoing, in particular cases such as this one.
34. The Commissioner also accepts there is a legitimate public interest in transparency regarding any possible criminal allegations or investigations into people who are well known in the public domain.
35. However, she recognises that a confirmation or denial in relation to any ongoing investigation might be harmful to its responsibility to manage its investigations effectively. She also considers that disclosure of information that could identify Merseyside Police's investigative activity, could undermine its past, present and future investigations and thereby hinder its ability to conduct its policing functions, which would not be in the public interest.
36. The Commissioner also accepts that a public authority may issue a 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. For example, were no information held in this case then it would be a simple matter for Merseyside Police to say so. However, when a similar request is made where information is held and it does not wish to reveal this to be the case, then by taking a NCND stance only on that occasion it may be inferred that information is therefore held.
37. This does not mean that public authorities should use a NCND response in a blanket fashion. They should base their decision on the circumstances of the particular case with regard to the nature of the

information requested and with appropriate consideration given to the public interest test.

38. The Commissioner recognises that the subject matter of this case – allegations of potential sexual abuse - is a sensitive issue. She acknowledges that there is general public concern about how allegations of abuse have been handled in the criminal justice system. She also notes that considerable public concern remains about apparent historic failures to investigate high profile figures who allegedly committed offences against children.
39. However, the Commissioner also considers that confirming or denying would not allow the public to draw reliable conclusions about Merseyside Police's conduct. For example, confirmation that information was held could indicate that allegations had been received by the police but it may be that they were unfounded so no further action was necessary. The Commissioner therefore considers that confirmation or denial would do little to address the complainant's stated public interest concerns, especially as they are not accompanied with any evidence and therefore seem to be a "fishing expedition".
40. In the circumstances of this case, the Commissioner has accorded greater weight to the arguments surrounding the public interest in protecting the ability of Merseyside Police to conduct effective investigations.
41. The Commissioner considers that the act of confirming or denying in this case could create a perception among the wider public that individuals who cooperate with Merseyside Police (or any police force), whether as victim, witness or suspect, risk having this fact disclosed into the public domain, and that communications with the police may prove not to be truly confidential.
42. Clearly, it is vital that Merseyside Police is able to give a guarantee of confidentiality to anyone who wishes to complain or give evidence to it or who may be willing to cooperate with it about criminal matters. This guarantee extends to suspects who are entitled to expect that, at least until formally charged, information about them will not be disclosed for reasons not directly to do with and necessary for, the police investigation.
43. If the credibility of such guarantees is undermined, the perception that information provided to the police may be disclosed to the world at large might deter people from coming forward and cooperating with prosecuting authorities, particularly where sensitive offences are alleged. This would be likely to disrupt the flow of information and intelligence to Merseyside Police, and there would be an inevitable

impact on its ability to conduct efficient and well evidenced criminal investigations which would be strongly against the public interest.

44. Given the specific wording of the request, the Commissioner considers that confirmation or denial in this case would give rise to a perception that Merseyside Police is not able to guarantee confidentiality in its criminal investigations and that this would very likely disrupt the flow of information to the police, thereby jeopardising future investigations. There is a very significant public interest in avoiding that outcome and it is a factor of considerable weight in favour of maintenance of the exemption in this case.
45. The complainant's overall concern is that justice has not been done. However, confirming or denying in this case would not significantly further that end. If the complainant has specific information about the named individual's involvement in criminal matters, he may make a formal complaint to Merseyside Police. If he is dissatisfied with the outcome, the Commissioner is satisfied that the wider public interest in accountability is served by the formal channels which exist (via Merseyside Police's Professional Standards Department, or the Independent Office for Police Conduct), capable of scrutinising decisions taken in particular cases.
46. The Commissioner further notes that the complainant made a similar request to this¹ in respect of another deceased party who was well known, where she upheld the citing of section 30(3). Her decision was appealed and recently went to First-tier Tribunal [EA/2018/0046] where that Tribunal upheld the Commissioner's position. The case included similar allegations being made by the complainant and, in its findings, the Tribunal determined as follows:

"We agreed with the [Commissioner]'s concerns about a hypothetical confirmation of information being held resulting in perceptions being created about the culpability of the individual concerned, in the absence of any relevant facts or evidence. We considered this to be a very strong factor against confirmation/denial, notwithstanding that the individual is deceased. It seemed to us that there is a very strong public interest against disclosing information that could be widely interpreted as suggesting, without foundation, that an individual has been involved in serious criminal activity in view of the likely tarnishing

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2258386/fs50693653.pdf>

of his/her reputation and the potential damage and distress to family and friends”.

47. Having given due consideration to the arguments put forward by both parties, on this occasion the Commissioner accepts that the public interest favours maintaining the exemption at section 30(3) of the FOIA and that Merseyside Police was not obliged to confirm or deny whether it held the information described in the request.

Right of appeal

48. 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

49. 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.
50. 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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