

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 March 2019

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 promotions of named parties and a report allegedly written about herself from the Metropolitan Police Service (the "MPS"). The MPS provided some information but would neither confirm nor deny (NCND) holding any further information by virtue of sections 40(5A) and (5B) (personal information) of the FOIA. The Commissioner's decision is that sections 40(5A) and (5B) are properly engaged. No steps are required.

Background

2. The complainant is an employee at the MPS.

Request and response

3. On 31 August 2018 the complainant wrote to the MPS and requested information in the following terms:

"Please provide below information in relation to the following vacancies/positions held by below within your OCU [Operational Command Unit] /Metcc [Met Command and Control]:

1. Are the below posts permanent or attachments, in both cases please provide information (what process/recruitment was followed) for each post?

2. *Please provide the original advertisement for each post with criteria?*
3. *Please provide HR recruitment reference numbers for each posts?*
4. *Have any of the below post holders below been promoted whilst working in the departments (this would also include temporary promotion & acting in a role)?*

[name redacted] – *Band C Business change team* & [name redacted] – *Band D Business Change team*

[name redacted] – *Band C Professional Standards unit*, [name redacted] – *Band D profession Standards Unit* & [name redacted] – *Band D professional Standards Unit* & [name redacted] – *Band C Employee Engagement & Improvement*

5. *Can you provide me a copy of the undisclosed report completed on [complainant's own name redacted] in her role as a PCS [Public and Commercial Services Union] representative by [name redacted] & other unknown parties not supplied under the SARS [subject access request] request?*

I would like the above information to be provided to me as paper or electronic copies. If this request is too wide or unclear, I would be grateful if you could contact me as I understand that under the Act, you are required to advise and assist requesters. If any of this information is already in the public domain, please can you direct me to it, with page references and URLs [Uniform Resource Locator] if need be.

If the release of any of this information is prohibited on the grounds of breach of confidence, I ask that you supply me with copies of the confidentiality agreement and remind you that information should not be treated as confidential if such an agreement has not been signed".

4. The MPS responded on 8 October 2018. It provided information in respect of parts (1) to (3) of the request. In respect of parts (4) and (5) it refused to confirm or deny whether any information is held by virtue of sections 40(5A) and (5B) of the FOIA.
5. Following an internal review the MPS wrote to the complainant on 27 October 2018. It maintained its position regarding the exemptions cited.

Scope of the case

6. The complainant contacted the Commissioner on 23 November 2018 to complain about the way her request for information had been handled.

7. On 9 January 2019 the Commissioner wrote to her asking for clarification of her grounds of complaint, explaining that some of the matters she had raised seemed to fall outside the Commissioner's jurisdiction.
8. The complainant responded on 23 January 2019 as follows:

"I believe that the ... requested information is of both personal and public interest. As the MPS has breached their own policies and filled vacancies that were never advertised, there is also a [sic] argument here regarding public interest. The vacancies should have been advertised and perhaps may have been applicable for non-MPS staff to also apply".
9. Although invited by the Commissioner to do so, the complainant did not comment about the MPS's response to parts (1) to (3) of her request, therefore this has not been further considered. The Commissioner will consider the citing of section 40(5A) and (5B) to parts (4) and (5) of the request 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 the FOIA. The FOIA is to do with transparency and provides for the disclosure 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. The 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.

Reasons for decision

11. As the MPS's refusal of the request was after 25 May 2018, the date the new Data Protection Act 2018 (DPA 2018) and General Data Protection Regulation (GDPR) legislation came into force, the Commissioner considers that the DPA 2018 applies.
12. 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 refuse to confirm or deny through reliance on certain exemptions under the FOIA.

Section 40 – personal information

Part 4 of the request

13. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.
14. Therefore, for the MPS to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request the following two criteria must be met:
 - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

15. Section 3(2) of the DPA 2018 defines personal data as:-

"any information relating to an identified or identifiable living individual".

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. 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.
18. The information being requested here clearly relates to named individuals and details of their employment / promotion at the MPS.
19. For these reasons the Commissioner is satisfied that, if the MPS confirmed whether or not it held the requested information, this would result in the disclosure of third party personal data. The first criterion set out above is therefore met.
20. The fact that confirming or denying whether the requested is held would reveal the personal data of a third party does not automatically prevent the MPS from refusing to confirm whether or not it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.

21. The Commissioner agrees that the most relevant data protection principle is principle (a).

Would confirming whether or not the requested information is held contravene one of the data protection principles?

22. Article 5(1)(a) GDPR states that:-

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

23. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed – or, as in this case, the MPS can only confirm whether or not it holds the requested information - if to do so would be lawful (ie it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), be fair and be transparent.

Lawful processing: Article 6(1)(f) GDPR

24. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies.
25. The Commissioner considers that the lawful basis most applicable is basis (f) which states:-

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child¹".

26. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under FOIA it is necessary to consider the following three-part test:-

¹ 4 Article 6(1) goes on to state that:- *"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks"*. However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:- *"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted"*.

(i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

(ii) **Necessity test:** Whether confirmation as to whether the requested information is held (or not) is necessary to meet the legitimate interest in question;

(iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

27. The Commissioner considers that the test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.

(i) Legitimate interests

28. In considering any legitimate interests in confirming whether or not the requested information is held in response to a FOI request, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.

29. Further, a wide range of interests may be legitimate interests. They can be the requester’s own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

30. The complainant is of the view that the posts she has enquired about have been unfairly advertised and filled. When requesting an internal review she stated:

“Metcc has been backfilling jobs through the back door including promotional opportunities without advert or following recruitment policy this breaching Equality Act 2010

Metcc has deliberately withheld some of the information as it would be admitting on paper that they backfill jobs by filling in vacancies not advertised by white Caucasian staff thus denying BME and other strands the opportunity to apply for these posts and enhance their career progression through equal opportunities”.

31. In her complaint to the Commissioner she added:

“... it is my believe that my particular workplace and management are institutionally racist. [This] is just one example of giving preferential treatment to white Caucasian staff both males and females.

I would like this information from my employer, once received I am then in a better position to refer to external agencies such as the EHRC [Equality and Human Rights Commission] for further investigation as below gives disadvantage to BME [Black and Minority Ethnic] staff. My employer isvside-tracking [sic] in their answers”.

32. The MPS has submitted that:

“... there may be a legitimate public interest in confirming or denying whether the information requested is held. A legitimate interest is inherent in the disclosure of the information for the benefit of enhancing transparency and accountability.

However the MPS do not believe there is strong legitimate interest in confirmation or denial in this case based on the requirement to by default disclose personal information relating to individuals employment history”.

33. The Commissioner accepts that the complainant has demonstrated a legitimate interest of some degree in requesting the information, sufficient to meet the requirement in Article 6(1)(f).

(ii) Is confirming whether or not the requested information is held necessary?

34. ‘Necessary’ means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves the consideration of alternative measures which may make confirming or denying whether or not the requested information is held unnecessary. Confirmation or denial under FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.

35. The MPS has advised that:

“It is possible to meet the public interest without confirming or denying whether the requested information is held. There is already an established internal route to deal with complaints and grievances for members of police staff. Due to the established procedures in place, I believe confirming or denying whether information is held in this case is not necessary to meet the legitimate public interest in disclosure”.

36. It is clear to the Commissioner that the complainant is aggrieved at what she perceives to be an unfair promotion process in her place of work; she believes that the positions concerned were not fairly advertised and, as a result, that her employer is racially biased.

37. In its original response to the complainant the MPS advised her as follows regarding the first three parts of her request:

"All posts in respect of Band C grades within MetCC are decided as part of an internal development postings process agreed with the PCS. This process take place every 6 months within MetCC and are deemed as temporary postings into each role. These roles can be internal to MetCC or if the OCU [Operational Command Unit] is requested to provide Band C grade staff role to external commands they can be external. This postings process is advertised to all Band C's in advance who are asked to select preferences for postings which are ultimately decided by the SLT [Senior Leadership Team]. As these are internal development postings they are not suitable adverts to be placed on the WCN [World Careers Network] system.

Outside of this postings process Band C's may apply to externally advertised attachment positions within the MPS.

Band D roles can either be advertised as permanent roles or roles to be filled on an attachment basis. All permanent roles or advertised roles are subject to an open advert application process which are authorised via the SLT direct or via the OCU Strategic Workforce Planning Meeting chaired by a Supt.

To confirm :-

- The Units that you have referred to within MetCC (Business Change and Professional Standards) have both permanent posts and staff attached on temporary basis.*
- Two adverts have been located relevant to your request.*
- No HR Recruitment numbers are held as they were internally recruited posts and so they were not on WCN".*

38. It is not clear to the Commissioner how knowing whether or not six named parties have been promoted would actually assist the complainant. If she thinks the recruitment process itself is unfair then she is already able to raise this as an internal complaint for due consideration by the appropriate department/s at the MPS. This would allow her full concerns to be properly addressed and for any inconsistencies or non-compliance with job advertising or recruitment policies to be properly considered. Therefore, the Commissioner considers that placing private employment details about non-senior staff into the public domain via the FOIA is not necessary in order for the complainant to address her legitimate interests.

39. As the Commissioner has decided in this case that confirmation or denial is not necessary to meet the legitimate interest, she has not gone on to conduct the balancing test.
40. As confirmation or denial is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
41. Given the above conclusion that confirmation or denial would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether confirmation or denial would be fair or transparent.

The Commissioner's view

42. The Commissioner has therefore decided that the MPS was entitled to refuse to confirm or deny whether or not it held the requested information on the basis of section 40(5B)(a)(i) of FOIA.

Part 5 of the request

43. Section 40(5A) of FOIA excludes a public authority from complying with the duty imposed by section 1(1)(a) of FOIA - confirming whether or not the requested information is held - in relation to information which, if held by the public authority, would be exempt information by virtue of subsection (1). In other words, if someone requests their own personal data, there is an exemption from the duty to confirm or deny whether it is held.
44. It is important to note that sections 40(1) and 40(5A) and are class based exemptions. This means there is no need to demonstrate that confirmation or denial under FOIA would breach an individual's rights under the DPA when engaging these exemptions.
45. Section 40(1) of FOIA states that:

"Any information to which a request relates is exempt information if it constitutes personal data of which the applicant is the data subject".

Would confirming or denying that the requested information is held constitute a disclosure of the complainant's personal data?

46. Section 3(2) of the DPA 2018 defines personal data as:-

"any information relating to an identified or identifiable living individual".

47. 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.
48. The complainant's request is for a report which she believes has been written about her. The Commissioner considers that this is an approach for information which can be linked to a named, living individual - the complainant herself. If it were held, it would therefore be her personal data, and fall within the scope of section 40(1).
49. It follows from this that to comply with section 1(1)(a) of FOIA (that is, to either confirm or deny holding the requested information) would put into the public domain information about the existence or otherwise of a report about the complainant personally. This would amount to the disclosure of information that is the personal data of the complainant, that is, exempt information.
50. For the reasons set out above, the Commissioner is satisfied that under section 40(5A), the MPS therefore has no duty to confirm or deny whether any such personal data is in fact held.

Right of appeal

51. 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

52. 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.

53. 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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