

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 March 2013

Public Authority: Police and Crime Commissioner for Essex
Address: 3 Hoffmanns Way
Chelmsford
Essex CM1 1GU

Decision (including any steps ordered)

1. The complainant has requested a report into an internal investigation regarding expenses claimed by a named individual. The Essex Police Authority (now the Police and Crime Commissioner for Essex) ("PCC for Essex") refused to provide this citing section 40(2) (Unfair disclosure of personal data) as its basis for doing so. It upheld this position at internal review.
2. The Commissioner's decision is that the PCC for Essex is entitled to rely on section 40(2) as the basis for withholding the requested information.
3. No steps are required.

Background

4. The original request under consideration in this notice was made to the Essex Police Authority. This organisation ceased to exist following local elections for police and crime commissioners on 15 November 2012. The relevant public authority in this case is now the Police and Crime Commissioner for Essex.¹ The new role of police and crime commissioner was created as part of recent reforms enacted under the Police Reform and Social Responsibility Act 2011. Each force area in England and Wales (excluding London) now has an elected Police and

¹ <http://www.essex.pcc.police.uk/>

Crime Commissioner. The Police and Crime Commissioner's role replaces that of the local police authority.

5. Where correspondence refers to the period prior to 15 November 2012, this Notice will refer to the Essex Police Authority ("EPA") as the relevant public authority because the PCC for Essex did not exist prior to that date. However, for correspondence from 15 November 2012, this Notice will refer to the PCC for Essex as the relevant public authority.
6. For the avoidance of doubt, the public authority now responsible for the handling of this request is the PCC for Essex.

Request and response

7. On 19 September 2012, the complainant wrote to the EPA and requested information in the following terms:

"I am interested in the circumstances surrounding the repayment of excess expenses claimed by [named individual] in the period up to 2011/12. I see that your website states that 'The Authority's internal investigation into expense overpayments and the treatment thereof has now concluded. The outcome of the investigation has led to the former Chairman and a member of the Police Authority repaying expense overpayments totalling £15,500.93.'

I can't however find on your website a copy of the internal investigation, and wondered if you could e-mail it to me? If it is helpful or necessary, please treat this as a request under the Freedom of Information Act."

8. The EPA responded on 20 September 2012. It stated that it held information within the scope of the request "for lawful policing purposes" but argued that it was exempt from the requirement to disclose it under FOIA by virtue of section 40(2). This exemption applies where disclosure would contravene any of the data protection principles of the Data Protection Act 1998 (the "DPA").
9. Following an internal review the EPA wrote to the complainant on 27 September 2012. It stated that it upheld its original position.

Scope of the case

10. The complainant contacted the Commissioner on 4 October 2012 to complain about the way his request for information had been handled.
11. The Commissioner has considered whether the PCC for Essex is entitled to withhold the requested information under section 40(2) of the Act. He sought further submissions from the PCC for Essex and received them on 31 December 2012. The PCC for Essex also provided the Commissioner with a copy of the withheld information.

Reasons for decision

12. Section 40(2) of FOIA states that personal data is exempt if its disclosure would breach any of the data protection principles contained within the DPA. Section 40(2) can only apply to information that is personal data. This term is defined specifically in the DPA.²
13. The PCC for Essex has argued that the withheld information is personal data and that disclosing it would be unfair and thus in breach of the first data protection principle of the DPA. This states that:

'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.'
14. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:
 - The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;

² <http://www.legislation.gov.uk/ukpga/1998/29/contents>

- their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights;
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - particular circumstances of the case, e.g. established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
- The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor, the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so, the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
15. Furthermore, notwithstanding the individual in question's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.
16. In considering 'legitimate interests' in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the individual in question, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.
17. In determining whether information is personal data, the Commissioner has referred to his own guidance³ and considered the information in question. The Commissioner is satisfied that it is personal data. The information relates to a living individual. It is also biographically about that individual because it relates to his role at the EPA and matters of conduct and finance. The Commissioner also notes that the requested

³ http://www.ico.gov.uk/for_organisations/data_protection/the_guide/key_definitions.aspx

report includes some personal data of other individuals, in addition to the person named in the request.

18. Having concluded that the information is personal data, the Commissioner went on to consider whether disclosing that personal data would contravene either of the limbs of the first data protection principle. The key point to note is that both limbs of the first data protection principle must be satisfied for disclosure to be in accordance with that principle:
 - Is disclosure fair and lawful?
 - and
 - Can a condition from the relevant schedule(s) of the DPA be satisfied?
19. If one of the two limbs cannot be satisfied, disclosure would contravene the first data protection principle and the information is exempt from disclosure under section 40(2) of the FOIA.

The complainant's arguments

20. The complainant drew attention to the fact that the named individual held a senior position at the EPA. He also understood that the individual was a district and county Councillor. He therefore held public office at a senior level. This, in the complainant's view, added weight to arguments favouring transparency about how public expenditure had been incurred in respect of his expenses..
21. The complainant also drew attention to the published fact that the named individual had repaid a considerable sum following the investigation into his expense claims. The fact that financial restitution had been made indicated that errors had arisen in his expense claims. There was a legitimate interest in knowing more about how and why these errors had arisen and what steps had been taken (or needed to be taken) to avoid such errors in future.
22. The complainant argued that there was a legitimate interest in obtaining greater clarity on the reasons for the named individual's later resignation from the EPA, particularly as the individual continued to hold public office as a district and county councillor. He argued that disclosure would serve this interest. The named individual had said he had resigned from the EPA so that he would be able to stand for election as the PCC for Essex. Serving members of the EPA were not allowed to stand for election to this new role. Ultimately, the named individual did not stand for election as the PCC for Essex.

PCC for Essex's arguments

23. The PCC for Essex explained how and why the information constituted personal data to which the provisions of the DPA apply. The Commissioner agrees that the information satisfies the definition of personal data outlined above.
24. The PCC for Essex also set out what he considered to be the reasonable expectations of anyone identified in the withheld information, namely that this information would be held confidentially. As such disclosure would be unfair. It also argued that disclosure could constitute an actionable breach of confidence and would therefore be unlawful. The Commissioner would note, at this stage, that the PCC for Essex also introduced reliance on the exemption at section 41 (information provided in confidence).
25. The PCC for Essex also set out arguments about the competing interests in transparency for the public versus the expectation of privacy for the individual. The PCC commented on the extent to which these interests were legitimate, whether disclosure was necessary to serve the public interest and whether such disclosure would give rise to unwarranted harm to the individuals concerned. The Commissioner is unable to set out the detail of these arguments because they make specific reference to the withheld information. He has considered the separate arguments made in relation to each of the individuals identified in the report.
26. The PCC for Essex also provided arguments about the necessity of protecting the investigatory process in cases involving expense claims by individuals. The Commissioner would observe that the PCC's arguments in this regard were focussed more on operational concerns than on concerns about unwarranted harm to individuals' privacy. As such they are not particularly relevant to the provisions of section 40.

The Commissioner's position

27. The Commissioner has first considered whether there would be a reasonable expectation of privacy in this case. He has noted that the withheld information examines in detail the question of incorrect expense claims. He is satisfied that a person to whom this relates would have an expectation of privacy even if they were a public office-holder at the relevant time. The Commissioner is satisfied that this expectation would be reasonable in all the circumstances.
28. The Commissioner accepts that disclosure of the detail of the investigation report could give rise to distress to the individuals concerned. It might also give rise to reputational damage.

29. As noted above, even if an individual has a reasonable expectation of privacy, disclosure may still be fair if there is a more compelling and legitimate interest in making the information public.
30. The Commissioner recognises that the question of erroneous expense claims by those holding public office at a senior level remains a live topic of considerable interest to the public. Disclosure of that which is of interest to the public is not necessarily in the public interest. However, the Commissioner acknowledges that, in this case, there is a considerable and legitimate public interest in transparency and accountability about expense claims made by those in public office. In this case, there has been an acknowledged overpayment of expenses although sums have now been repaid. Arguably, there remains a compelling and legitimate public interest in disclosing greater detail about how this matter was handled by the EPA.
31. The Commissioner has concluded that the arguments for and against disclosure are finely balanced in this case. However, although he considers that full disclosure of the withheld information would serve the legitimate interests of the public in knowing more about EPA's actions, this would give rise to unwarranted prejudice for the individuals concerned. A certain amount of information is already in the public domain. Although full disclosure would reveal more, the Commissioner does not consider, in all the circumstances of this case, that full disclosure of the withheld information would be justified.
32. In balancing the legitimate interests of transparency and accountability with the rights of the individual in question, it is also important to adopt a proportionate approach and it may still be possible to meet the legitimate public interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.
33. The Commissioner has therefore considered whether partial disclosure would serve the legitimate interests of transparency and accountability without giving rise to unwarranted prejudice to individuals. He has concluded that, on the facts of this case, partial disclosure that was in any way meaningful and informative would give an incomplete picture and would, in effect, be more unfair to individuals.
34. Inevitably, an investigation into matters concerning expense claims made by those in public office looks at whether errors occurred and, if they did, how they occurred and the impact on the public purse. In such cases, an individual's conduct could potentially amount to the commission of a criminal offence. An investigation into inappropriate expense claims must inevitably address this possibility. This means that information about such an investigation falls within the DPA definition of

sensitive personal data because it concerns potential criminality. The Commissioner's consideration of this case has therefore taken account of this aspect.

35. In this case, therefore, the personal data that has been withheld also comes within the statutory definition of sensitive personal data. As outlined above, there are greater restrictions on disclosure of such information in that one of the conditions for processing in Schedule 3 of the DPA must also be satisfied. The Commissioner thinks that none of the DPA Schedule 3 conditions for processing are satisfied in this case.

Section 40 - Conclusion

36. In light of all the above, the Commissioner has concluded that disclosure of any of the withheld information would be unfair to the individuals concerned. The withheld information constitutes personal data to which the provisions of the DPA apply. The Commissioner has had due regard to the sensitivity of the personal data in question. He recognises the compelling and legitimate interest in greater transparency and accountability in this case. However, none of conditions for processing under Schedule 2 or 3 of the DPA apply in this case and would therefore contravene the first data protection principle.
37. Because the Commissioner is satisfied that disclosure would contravene the first data protection principle, the withheld information is exempt under section 40(2) of the FOIA. The EPA and the PCC for Essex were therefore acting correctly in withholding it.

Section 41

38. Because the Commissioner is satisfied that the information is exempt under section 40(2) of the Act he has not gone on to consider the application of section 41 in this case.

Right of appeal

39. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

40. 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.
41. 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

**Graham Smith
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