

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 3 June 2015

**Public Authority:** Information Commissioner's Office  
**Address:** Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF

**Note:** This decision notice concerns a complaint made against the Information Commissioner (the Commissioner). The Commissioner is both the regulator of the FOIA and a public authority subject to the FOIA. He is therefore under a duty as regulator to make a formal determination of a complaint made against him as a public authority. It should be noted, however, that the complainant has a right of appeal against the Commissioner's decision, details of which are given at the end of this notice. In this notice the term 'ICO' is used to denote the ICO dealing with the request, and the term 'Commissioner' denotes the ICO dealing with the complaint.

### **Decision (including any steps ordered)**

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1. The complainant made a freedom of information request to the ICO for correspondence between the ICO and the Independent Police Complaints Commission regarding the Chief Constable of Avon and Somerset Police. The ICO disclosed some of the requested information but withheld other information under the exemptions in section 31(1)(g) (law enforcement), section 40(2) (personal information) and section 44(1)(a) (prohibitions on disclosure).
2. The Commissioner has investigated the complaint and found that the section 31(1)(g), section 40(2) and section 44(1)(a) are all engaged and that in the case of section 31 the public interest in maintaining the

exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

## **Request and response**

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3. On 15 October 2014 the complainant made a request for information to the ICO which read as follows:

*"Please provide copies of all correspondence and communications between the ICO and the IPCC between July 1, 2014, and October 13, 2014, relating to the Avon and Somerset chief constable Nick Gargan. This includes but is not limited to alleged breaches of the Data Protection Act by Mr Gargan."*

4. The ICO responded to the request on 12 November 2014 when it disclosed a quantity of information falling within the scope of the request. However some of the requested information was withheld by relying on the exemptions in section 31 (Law enforcement), section 40(2) (Personal information) and section 44 (prohibitions on disclosure). Section 44 was applied by virtue of section 59 of the Data Protection Act 1998.
5. On the same day the complainant asked the ICO to carry out an internal review of its handling of the request, challenging its use of the exemptions.
6. The ICO presented the findings of its internal review on 11 December 2014 which upheld the initial decision to refuse to disclose some of the requested information.

## **Scope of the case**

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7. On 14 January 2015 the complainant contacted the Commissioner to complain about the ICO's decision to refuse to disclose some of the information he had requested.

## Reasons for decision

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8. The withheld information in this case is a set of communications between the ICO and the Independent Police Complaints Commission (IPCC) regarding a possible breach of the Data Protection Act by the Chief Constable of Avon and Somerset Police. Section 44 has been applied to information obtained from the IPCC whereas section 31 has been applied to information generated by the ICO. Section 40 has been used to redact the direct contact details of individuals referred to in the documents. The Commissioner has first considered the application of section 44.

### Section 44 – Prohibitions on disclosure

9. Section 44(1)(a) of FOIA provides that information is exempt if disclosure is prohibited under any other law or enactment. In this case the relevant statutory prohibition is section 59 of the DPA 1998. Section 59(1) states that neither the Commissioner nor his staff shall disclose;

*"any information which:*

*(a) has been obtained by, or furnished to, the Commissioner under or for the purposes of the information Acts,*

*(b) relates to an identified or identifiable individual business, and*

*(c) is not at the time of disclosure, and has not been available to the public from other sources,*

*unless the disclosure is made with lawful authority."*

10. In this case it is apparent that the information withheld under this exemption has been obtained by the ICO for the purposes of the Data Protection Act. That is to say, the ICO would not have obtained the information were it not the regulator of the DPA 1998. Therefore this part of the test is satisfied. The information also relates to an identifiable person, the Chief Constable of Avon and Somerset Police, and the Commissioner is satisfied that the information is not publicly available. Therefore the test for applying the statutory prohibition test is met.
11. However, section 59(1) also makes clear that information can be disclosed where disclosure is made with lawful authority. This is defined in section 59(2) which provides that:

*"...a disclosure of information is made with lawful authority only if, and to the extent that—*

*(a) the disclosure is made with the consent of the individual or of the person for the time being carrying on the business,*

*(b) the information was provided for the purpose of its being made available to the public (in whatever manner) under any provision of the information Acts,*

*(c) the disclosure is made for the purposes of, and is necessary for, the discharge of—*

*(i) any functions under the information Acts, or*

*(ii) any EU obligation,*

*(d) the disclosure is made for the purposes of any proceedings, whether criminal or civil and whether arising under, or by virtue of, the information Acts or otherwise, or*

*(e) having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest."*

12. In responding to the request the ICO considered these 'gateways to disclosure' and found that none applied. The Commissioner does not intend to go through each of these in any length as not all are relevant. Instead he would simply confirm that none of the gateways would allow for disclosure in this case. However, the complainant did specifically raise the issue of whether section 59(2)(e) applied and so the Commissioner considers it appropriate to say a little more about whether disclosure is necessary in the public interest.
13. It is important to note that this is a different test from the one normally applied under FOIA when considering whether the public interest in maintaining a qualified exemption outweighs the public interest in disclosure. For section 59 (2)(e) the presumption is that the information should be withheld. This approach follows the findings of the Information Rights Tribunal in *Lamb v Information Commissioner EA/2009/0108*:

*"Although a determination under section 59(2)(e) is based on a public interest test it is a very different test from the one commonly applied by the Information Commissioner and this Tribunal under FOIA section 2(2)(b), when deciding whether information should be disclosed by a public authority even though it is covered by a qualified exemption. The*

*test there is that disclosure will be ordered unless the public interest in maintaining the exemption outweighs the public interest in disclosure. Under section 59 the information is required to be kept secret (on pain of criminal sanctions) unless the disclosure is necessary in the public interest. There is therefore an assumption in favour of non-disclosure and we are required to be satisfied that a relatively high threshold has been achieved before ordering disclosure."*

14. This has also been endorsed by the Tribunal in a different case, *Cialfi v Information Commissioner & Cabinet Office – EA/2014/0167* where it reached the same conclusion that there is a high threshold for disclosure. Having taken these decisions into account it is clear that in this particular case disclosure cannot be said to be 'necessary in the public interest'. Whilst disclosure would provide for greater transparency and accountability, the case is not sufficiently compelling to override the public interest in protecting the confidentiality of information passed to the ICO, given the importance of this for the effectiveness of the ICO regulatory functions.
15. In any event, it is important to note that whilst section 59(2) allows for disclosure in certain cases, it does not compel the ICO to disclose the information. It is only at the ICO's discretion whether information can be disclosed. As with other statutory prohibitions, such 'gateways to disclosure' allow a public authority discretion to disclose information where it considers that to do so would not be in breach of the particular statutory prohibition. However, it is not for the Commissioner to question or challenge the exercise of a public authority's discretion.
16. For these reasons the Commissioner has decided that section 44(1)(a) is engaged by virtue of section 59(1) of the DPA 1998.

### **Section 31 – Law enforcement**

17. The ICO has refused to disclose some of the requested information by relying on section 31(1)(g) of FOIA which provides that information is exempt if its disclosure would or would be likely to prejudice the exercise by any public authority of its functions for any of the purposes specified in section 31(2).
18. In its initial response to the request and in its internal review the ICO said that disclosure would prejudice its functions for the purposes specified in section 31(2)(a) and (c):

*(a) the purpose of ascertaining whether any person has failed to comply with the law,*

*(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.*

19. However, during the course of the Commissioner's investigation the ICO said that it was now seeking to rely on section 31(2)(b) instead – that disclosure would be likely to prejudice functions for:

*(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper.*

20. In order to engage the exemption the Commissioner requires the function identified by the public authority for the purposes of section 31(1)(g) to be a function which is:

- designed to fulfil one of the purposes specified in section 31(2) and,
- imposed by statute (or in the case of a government department, authorised by the Crown) and,
- specifically entrusted to the relevant public authority to fulfil (rather than just a general duty imposed on all public authorities).

21. The ICO had originally suggested that the prejudice caused would be to its ability to conduct investigations. However, when providing its submission to the Commissioner it clarified that the prejudice it envisaged was that which would be caused to the IPCC, Avon and Somerset Police and the local Police and Crime Commissioner (PCC). It explained that the IPCC had conducted an investigation and provided a report to the Avon and Somerset PCC who had subsequently arranged for an independent hearing due to take place in April 2015.

22. It is important to remember that section 31 does not just apply to the public authority to whom a request for information has been made. The exemption refers to functions being exercised "*by any public authority*". This means that the prejudice does not have to relate to the public authority who is dealing with the request but can relate to another public authority who is exercising a function for a relevant purpose.

23. The Commissioner notes that the IPCC has powers under the Police Reform Act 2002 to consider complaints made about the conduct of persons serving with the police, including the conduct of such persons which constitutes or involves the commission of a criminal offence. Equally, Police and Crime Commissioners have powers under the Police Reform and Social Responsibility Act 2011 to suspend from duty or call upon a Chief Constable to retire. Therefore the Commissioner is satisfied

that these two bodies have specific statutory responsibilities covered by section 31(2)(b) of FOIA.

24. The ICO had argued that disclosure would be likely to prejudice the ongoing proceedings being conducted by the relevant authorities. It also said that organisations need to be able to come to the ICO for advice or opinion and trust that, where appropriate, they are able to do so in confidence. It was, it said, important that the ICO is consulted about potential offences under the DPA 1998 and especially so where the person concerned was in a position of authority as was the case here.
25. The Commissioner has considered the arguments and is satisfied that disclosure would be likely to lead to the prejudice envisaged by the ICO. The crucial factor here is that the investigation into the Chief Constable was still very much a live issue and a final decision as to any disciplinary action had not been taken. Disclosure at the time of the request would have made it harder for the PCC and the independent hearing to reach its conclusions as effectively as possible, especially given the high profile and sensitive nature of the investigation and the likely attention disclosure would bring.
26. The Commissioner has also considered the effect that disclosure would have on the IPCC's relationship with the ICO. In his view, disclosure would discourage the IPCC from seeking the views of the ICO in similar cases in future for fear that the information might be released against its wishes. It is important that investigative authorities like the IPCC are able to access the expertise of the ICO when considering possible offences under the DPA 1998 and any investigation would suffer if this was not available.
27. The Commissioner is satisfied that section 31(1)(g) is engaged and he has now gone on to consider the public interest test, balancing the public interest in disclosure against the public interest in maintaining the exemption.

### **Public interest test**

#### **Public interest arguments in favour of disclosure**

28. The complainant argued that the public interest favoured greater transparency as this would help demonstrate to the public what advice, considerations and actions the ICO took in this case and also help dispel any suggestion that it wished to shield a Chief Constable from accountability.

29. The ICO acknowledged that there was a public interest in increased transparency in the way in which the ICO carries out its regulatory functions.
30. It also accepted that there was a public interest in increased understanding of the decisions taken by the ICO in relation to the legislation it enforces, especially in relation to whether or not formal regulatory action is taken.

### **Public interest arguments in favour of maintaining the exemption**

31. As regards the public interest in maintaining the exemption, the ICO said that it had taken the following factors into account:
  - Maintaining its ability to conduct investigations into potential breaches in an appropriate manner.
  - Maintaining its ability to discuss and exchange views frankly with Data Controllers in relation to potential data protection breaches.
  - Maintaining Data Controllers' trust and confidence that their engagement with the ICO will be given appropriate level of confidentiality, enabling it to carry out our regulatory function more effectively.
32. In its submission to the Commissioner the ICO refocused its arguments and said that in maintaining the exemption it had taken into account the public interest in allowing the police complaints and disciplinary process to be allowed to proceed unencumbered and uninterrupted by unwarranted disclosures of information. It said that in its view there was a considerable public interest in these processes being able to happen in an effective way.
33. The ICO went on to say that where it was party to information about this disciplinary process there would need to be a very considerable public interest in disclosing the background material when the investigation was still ongoing, there was no agreement over disclosure and the outcome of its involvement had already been made known.
34. Finally, the ICO said that there are times when it needs to be able to communicate with other organisations in confidence and the public interest in making sure this happens in a free and frank manner outweighed the public interest in transparency.



## **Balance of the public interest arguments**

35. In balancing the public interest the Commissioner has first considered the arguments in favour of disclosure. He recognises that there is a public interest in transparency in how the ICO contributed to the investigation into the Chief Constable of Avon and Somerset Police and what advice they gave. However, the Commissioner also considers that this public interest has largely been met by the fact that a broad summary of the ICO's involvement has been made public. In particular, the Commissioner notes that the IPCC and the PCC have made the following statement

*"The investigation also had to consider whether, in cases where personal data had been disclosed, CC Gargan may have breached the Data Protection Act 1998 and if so whether an offence contrary to section 55 of the Act had been committed. "However having consulted the Information Commissioner's Office, the IPCC did not consider that he could have committed the offence. This was solely because CC Gargan was the registered data controller for Avon and Somerset police and the offence can only be committed by someone who is not the data controller.*

36. In the Commissioner's view this goes a long way towards meeting the public interest in greater transparency.
37. As regards the public interest in maintaining the exemption, the Commissioner's approach is that there is a strong and inherent public interest in protecting the conduct of investigations and proceedings. In his view there will always be a strong public interest in withholding information where an investigation is ongoing. This allows a public authority a safe space to complete an investigation and decide how to proceed without outside interference. Whilst in this case it appears that at the time of the request the IPCC's investigation had concluded, the issue was still very much live as the PCC was due to conduct a separate misconduct hearing in relation to allegations about the Chief Constable taking in to account the findings of the IPCC's investigation. The Commissioner has accepted that disclosure at this point in time would be likely to prejudice this hearing and this would not be in the public interest.
38. In the Commissioner's view the arguments around allowing the ICO a safe space to communicate with other organisations in confidence also carries weight in the circumstances of this case. Disclosure of internal thinking and exchange of views would be likely to discourage the IPCC and other organisations from seeking the expert opinion of the ICO in future cases. This would not only make it harder for the ICO to

investigate breaches of the DPA 1998 but would mean that investigations by the IPCC and other investigations would not benefit from the involvement of the ICO which could lead to poorer quality investigations and decisions.

39. Given the timing of the request, the high profile nature of the investigation and the lack of a compelling case for disclosure the Commissioner has decided that the public interest in maintaining the exemption outweighs the public interest in disclosure.

#### **Section 40 – Personal information**

40. The ICO also redacted a very small amount of information featured in the correspondence under the section 40(2) exemption. Section 40 provides that information is exempt if it is the personal data of someone other than the applicant and disclosure would contravene one of the data protection principles. In this case the ICO said that disclosure would contravene the first data protection principle which requires that personal data be processed fairly and lawfully.

41. When deciding whether section 40(2) applies the first thing to consider is whether the withheld information is personal data. Personal data is defined in the Data Protection Act 1998 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 intentions of the data controller or any other person in respect of the individual;"*

42. The withheld information in this case are the contact details of IPCC officials and a reference to an ICO member of staff's leave arrangements. The names of the officials were disclosed. This information obviously allows for their identification and so is clearly personal data.
43. The next thing to consider is whether disclosure would contravene the first data protection principle. In considering whether disclosure of personal data would be unfair, and thus contravene the principle, the Commissioner takes into account a number of factors including:

- Does the information relate to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life)?
  - What reasonable expectations does the individual have about what will happen to their personal data?
  - Has the individual named been asked whether they are willing to consent to the disclosure of their personal data?
  - Considering any legitimate interests in disclosure.
44. In its response to the Commissioner the ICO confirmed that it did not have the consent of the individuals concerned to disclose their personal data. It also said that it would be outside the expectations of the individuals to disclose their contact details in any greater level of detail. It said that it did not seem reasonable, or in the reasonable expectation that just by virtue of communicating with the ICO over a legitimate enquiry their contact details are then disclosed into the public domain.
45. The Commissioner has considered the arguments and accepts the ICO's position that disclosure would not be in the expectations of these individuals. In reaching this view he is mindful that the individuals appear to be in relatively junior roles that are not public facing. Whilst it is unlikely that disclosure would be particularly distressing, the Commissioner has also taken into account the fact that the ICO has disclosed the names of the officials and that this satisfies any legitimate interest in knowing who was involved in raising this issue with the ICO. Disclosure of the very small amount of information redacted under section 40(2) would add nothing to public understanding of the issues involved therefore the Commissioner is prepared to accept that disclosure without the consent of the individuals and contrary to their expectations would be unfair. Consequently the Commissioner has decided that disclosure would contravene the first data protection principle and that section 40(2) is engaged.

## Right of appeal

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46. 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)

47. 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.
48. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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