

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 February 2016

Public Authority: Chief Constable of Staffordshire Police
Address: Police Headquarters
PO Box 3167
Stafford
ST16 9JZ

Decision (including any steps ordered)

1. The complainant requested information from Staffordshire Police relating to its pensions provision having been outsourced to a contractor. Staffordshire Police disclosed some information, but withheld the remainder under the following sections of the FOIA:
 - 14(1) (vexatious requests)
 - 40(2) (personal information)
 - 42(1) (legal professional privilege)
 - 43(2) (prejudice to commercial interests)
2. The Commissioner's decision is that sections 14(1) and 43(2) were cited correctly, so Staffordshire Police was not obliged to disclose the information withheld under those provisions. The Commissioner's view is that the information for which section 42(1) was cited was either not within the scope of the request, or is the personal data of the complainant and so was exempt under section 40(1) of the FOIA. In relation to section 40(2), the Commissioner's finding is that this exemption is not engaged and Staffordshire Police is now required to disclose the information withheld under that section. Staffordshire Police also breached sections 10(1) and 17(1) of the FOIA by failing to respond to the request within 20 working days of receipt.
3. The Commissioner requires Staffordshire Police to take the following steps to ensure compliance with the legislation.

- Disclose to the complainant the information withheld under section 40(2).
4. Staffordshire Police must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

Request and response

5. On 1 June 2015 the complainant wrote to Staffordshire Police and requested information in the following terms:

"In respect of Police Pension provision and the private company Mouchel.

Staffordshire Police have/are spending public money to implement this policy and therefore under the provision of the above act I require you to provide full disclosure of all related documents and copies of:

Written documents.

Electronically generated documents including e-mails.

Minutes/notes of meetings with any interested parties regarding this issue.

A copy of the 'Legal Advice' obtained by Mrs Birchall.

A copy of the contract and disclosure of the costs of the contract with Mouchel".

6. After a delay, Staffordshire Police responded on 21 July 2015. Some of the information was disclosed, but the remainder was withheld under the exemptions provided by the following sections of the FOIA:

40(2) (personal information)

42(1) (legal professional privilege)

43(2) (prejudice to commercial interests)

7. The complainant responded on 27 July 2015 and requested an internal review. Staffordshire Police failed to respond with the outcome of the internal review promptly.

Scope of the case

8. The complainant contacted the Commissioner initially to complain about the delay in Staffordshire Police responding to his information request. After it had been established that Staffordshire Police had responded to the request, the complainant was advised to contact the ICO again if he was dissatisfied following the completion of the internal review.
9. The complainant subsequently contacted the ICO on 27 October 2015 and stated that he still had not received the outcome of the internal review by that time. In view of this delay in completing the review, this case, concerning whether the part refusal of the request by Staffordshire Police was correct, was commenced at that stage without waiting any longer for the review to be completed.
10. During the investigation of this case, Staffordshire Police confirmed that it relied on sections 40(2), 42(1) and 43(2) and also introduced reliance on section 14(1) (vexatious requests) of the FOIA. The analysis below covers those sections, as well as the breach of the FOIA through the failure by Staffordshire Police to respond to the complainant's request within 20 working days of receipt.
11. In the same correspondence in which the complainant made the information request set out above, he also requested his own personal data. That request, which fell to be dealt with under the Data Protection Act 1998, was not included within the scope of this case and is not covered in this notice.

Reasons for decision

Sections 10 and 17

12. Sections 10(1) and 17(1) of the FOIA require that a response to an information request is sent within 20 working days of receipt of the request. In this case Staffordshire Police did not respond within 20 working days of receipt of the request and in so doing breached the requirements of sections 10(1) and 17(1) of the FOIA.

Section 14

13. Section 14(1) of the FOIA provides that a public authority is not obliged to comply with a request that is vexatious. Staffordshire Police cited section 14(1) in relation to the request for emails. Its reasoning for doing so was the volume of emails falling within the scope of the request and the work that would be required to prepare these emails for

disclosure. It stated that this would impose a significant burden on Staffordshire Police, to the point that the request was vexatious.

14. The burden in this case arises from the time that Staffordshire Police stated it would be necessary to spend on identifying and redacting exempt information from the emails prior to disclosure. The costs provision (section 12) cannot be claimed on the basis of time spent applying exemptions. However, the Commissioner's published guidance on section 14(1)¹ allows for the possibility that a request can be refused as vexatious on this basis. The guidance states that:

"an authority is most likely to have a viable case where:

- *The requester has asked for a substantial volume of information **AND***
- *The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the ICO **AND***
- *Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material."*

15. The guidance also states that the Commissioner considers *"there to be a high threshold for refusing a request on such grounds"* and *"we would expect the authority to provide us with clear evidence to substantiate the claim that the request is grossly oppressive"*.
16. Staffordshire Police stated that there were 1,693 pages consisting of 405 emails within the scope of the request. Its main concern was that some of this information would be the personal data of third parties and it would be unfair to those individuals to disclose this information, hence it would require redaction under the exemption provided by section 40(2) of the FOIA.
17. Staffordshire Police also referred to *"sensitive contractual information"*, but did not explain under which section it believed that such information may be exempt, nor provide any evidence to substantiate this reasoning. The Commissioner has not considered this point further.
18. On the issue of information it believed would be exempt under section 40(2), the concern of Staffordshire Police appeared to be about two

¹ <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

main categories of personal data - names and email addresses of staff members who had been the senders or recipients of the emails, and other personal information appearing within the emails, including individuals' salaries.

19. In relation to the first category, the Commissioner is not convinced that it would be necessary for this information to be redacted under section 40(2), or at least not all of it. In general, it will be less likely to be unfair to disclose information that relates to an individual in their professional capacity, rather than information concerning their private life. In this case, the Commissioner does not regard it as clear that it would be necessary to spend time on redacting names of staff members that sent or received emails in their professional capacity as it is unlikely that this information would be exempt under section 40(2) of the FOIA. As a result the Commissioner's view is that the amount of time it would be necessary to spend on redacting personal data would be somewhat less than suggested by Staffordshire Police.
20. In relation to the second category, Staffordshire Police supplied to the ICO a sample of emails within the scope of the request. These emails included information that it clearly would be necessary to redact under section 40(2), including salary information. The Commissioner recognises that it would be necessary to spend time on ensuring that this personal data was all removed prior to disclosure and that, given the volume of information in question, this would be a significant amount of time. Of particular note is that information included within the body of emails is likely to be scattered throughout the information, rather than being possible to isolate easily.
21. Having accepted that it would be necessary to spend a significant amount of time on redacting exempt material, the next issue is whether the work involved in disclosing this information would be disproportionate to the value of the complainant's information request. The complainant would argue that this request is of significant value due to what he perceives to be issues with the outsourcing of pensions provision by Staffordshire Police. The Commissioner would agree that there is value to the request where this would lead to disclosure of information that would explain more about the actions taken during the outsourcing process and would answer any legitimate questions that remain unanswered about that process.
22. However, the unfocussed nature of the complainant's request means that it is of less value than might otherwise have been the case. What value the request has would only apply in relation to emails that are relevant to the complainant's cause. It is likely that most of the emails exchanged between Staffordshire Police and Mouchel will be administrative in nature and their disclosure would be of no use to the

complainant. Had the complainant made a more focussed request for information that he believes may be of particular interest, the value of his request would have been higher.

23. The complainant appears to have accepted that his request would impose a burden on Staffordshire Police and that it would be possible for him to make a more focussed request when responding to the letter from Staffordshire Police informing him that section 14(1) was cited. In that response, the complainant indicated that he had not anticipated the volume of information that would fall within the scope of this request and made an amended request for emails dating from a limited time frame. After doing this, however, the complainant maintained that he wished the ICO to consider whether his original request was vexatious.
24. In conclusion, the Commissioner has accepted the evidence from Staffordshire Police that preparing the requested information for disclosure would impose a significant burden on it. He also notes that the complainant also appears to have recognised this. As to whether the request was nevertheless of such value that this burden would be proportionate, the Commissioner's view is that it would not. Whilst the Commissioner does not dispute that there is some value to this request, this is less than would have been the case had it been more focussed on information likely to be of interest to the complainant. The finding of the Commissioner is, therefore, that the part of the request requiring emails was vexatious and section 14(1) provided that Staffordshire Police was not obliged to comply with it.

Section 40

25. Staffordshire Police cited section 40(2). This section provides an exemption for information that is the personal data of any individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles. Consideration of this exemption involves two stages. First, whether the information in question constitutes the personal data of any third party and, secondly, whether disclosure of that personal data would be in breach of any of the data protection principles.
26. Covering first whether the information in question here constitutes personal data, the definition of personal data is given in section 1(1) of the Data Protection Act 1998 (DPA):

“personal data’ means data which relates 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".

27. The information in relation to which section 40(2) has been cited is names of individuals within meeting minutes. Clearly this information both relates to and identifies those individuals and so it is their personal data according to the definition given in section 1(1) of the DPA.
28. The next step is to consider whether disclosure of that personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on the first data protection principle, which states that personal data shall be processed fairly and lawfully. In particular, the focus here is on whether disclosure would be, in general, fair to the data subjects.
29. In forming a conclusion on this point the Commissioner has taken into account the reasonable expectations of the data subjects and what consequences disclosure may have. He has also considered what legitimate public interest there may be in disclosure of the information in question.
30. Covering first the reasonable expectations of the data subjects, the personal data in question relates to the data subjects in their professional capacities. The general approach of the Commissioner is that it will be less likely to be unfair to disclose information relating to an individual in their professional capacity than it would be in relation to information concerning an individual's private life. The likelihood of disclosure will generally increase where the relevant information relates to a publicly funded role they fulfilled at the time the information was recorded.
31. The information records contributions made by these individuals in meetings. Their contributions were made solely in their professional capacities and the Commissioner's view is that the loss of privacy to those individuals through the disclosure of this information would be minimal. Given that this information relates to these individuals acting in a professional and publicly funded role, and that the Commissioner's view is that any loss of privacy would be minimal, he believes that the data subjects could reasonably hold only a very limited expectation that this information would not be disclosed.
32. As to the consequences of disclosure upon the individuals named in the withheld content, the question here is whether disclosure would be likely to result in damage and distress to those individuals. On this point, the Commissioner accepts that some minor distress may occur through disclosure contrary to the very limited expectation of confidentiality

referred to above. He does not, however, believe that any more material damage would be likely to occur.

33. The next step is to consider whether there would be any legitimate public interest in the disclosure of this information. Whilst section 40(2) is an absolute exemption and not qualified by the public interest, the public interest is relevant here as it is necessary for there to be a legitimate public interest in order for disclosure to be compliant with the DPA.
34. The Commissioner is aware that the issue of the outsourcing of pensions by Staffordshire Police has been a matter of some controversy. The Commissioner believes that there is a legitimate public interest in disclosure of information on this subject, where this can be accomplished with a minimal loss of privacy to any individual. This public interest extends to full disclosure of the minutes in question here.
35. For disclosure to be in line with the first data protection principle, it must be *necessary* in order for the legitimate interests identified above to be satisfied. This is required by Schedule 2 Condition 6 of the DPA. The Commissioner's published guidance² on this matter states that disclosure should be necessary in order to satisfy a pressing social need. It also states that:

"...the general need for transparency regarding public bodies may constitute a sufficiently 'pressing social need'".
36. In this case, as well as the general need for transparency, the Commissioner is of the view that there is a specific need for transparency in relation to this information for the same reasons as referred to previously when covering the public interest.
37. A second issue that must be addressed when considering necessity is whether the information may already be available elsewhere. In this case the Commissioner relies on the refusal of Staffordshire Police to disclose the information as evidence that it is not available elsewhere.
38. For the first data protection principle to be satisfied, disclosure must be lawful, as well as fair. The approach of the Commissioner to the issue of lawfulness under the first data protection principle is that he will find

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http://www.ico.org.uk/for_organisations/guidance_index/~ /media/documents/library/Freedom_of_Information/Detailed_specialist_guides/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf

that disclosure would be lawful unless the public authority has advanced convincing arguments as to why disclosure would be unlawful. In this case Staffordshire Police advanced no arguments on the issue of lawfulness and the Commissioner has no reason to believe that disclosure would not be lawful.

39. The Commissioner has found that disclosure of the information in question would be both fair and lawful and, therefore, would satisfy the first data protection principle. As there would be no breach of the first data protection principle through the disclosure of this information, the overall conclusion of the Commissioner is that the exemption provided by section 40(2) is not engaged. At paragraph 3 above Staffordshire Police is now required to disclose the information withheld under section 40(2).

Section 42

40. Staffordshire Police cited section 42(1). This section provides an exemption for information that is subject to a claim of legal professional privilege. Consideration of this exemption involves two stages. First the information must be subject to legal professional privilege and, secondly, this exemption is qualified by the public interest. This means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
41. Turning to whether the information is subject to legal professional privilege, Staffordshire Police supplied to the Commissioner two email exchanges that it stated was the information withheld under section 42(1). The Commissioner notes first that one of these exchanges is dated 27 October 2015, several months after the date of the request. As this information was not held at the time of the complainant's information request, it is not within the scope of that request and, therefore, neither is it within the scope of this notice.
42. As for the second email exchange, whilst this dates from prior to the request and so is within its scope, the Commissioner's view is that this information is the personal data of the complainant. It concerns, and partly consists of, a draft letter to the complainant. The Commissioner's view is that this information both identifies and relates to the complainant and so is his personal data.
43. This means that this information engages section 40(1), which provides an absolute exemption from the FOIA in relation to any information that is the personal data of the requester. As that exemption applies, the Commissioner has not also considered whether that information is

subject to section 42(1). The Commissioner comments further on this information in the "Other matters" section below.

Section 43

44. Staffordshire Police has cited section 43(2), which provides an exemption for information the disclosure of which would, or would be likely to, prejudice the commercial interests of any party. Similarly to the exemptions covered above, consideration of this exemption involves two stages. First, prejudice to commercial interests must be at least likely to occur as a result of disclosure. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
45. Covering first whether this exemption is engaged, the withheld information in question here is parts of a contract for a private sector contractor to provide pensions administration services. The contract was disclosed in redacted form and this analysis covers the redacted content. Staffordshire Police has argued that prejudice would be likely to occur both to its own commercial interests and to the commercial interests of the contractor. The Commissioner has focussed here on whether prejudice would be likely to occur to the commercial interests of Staffordshire Police.
46. The Commissioner has considered whether prejudice *would be likely* to result through disclosure of this contract, rather than the higher test of *would* result. In order for the Commissioner to accept that prejudice would be likely to result, there must be a real and significant likelihood of that outcome occurring, rather than that outcome being of remote likelihood.
47. The reasoning of Staffordshire Police for the citing of this exemption was that disclosure of this information would discourage private sector contractors from making tender bids to it in future. This would result in a less competitive environment for securing contracts with Staffordshire Police, with an attendant impact on the price Staffordshire Police will be required to pay contractors.
48. The Commissioner has reviewed an unredacted version of the contract and notes that this, as would be expected, sets out in detail the responsibilities and liabilities of the contractor, as well as the charges for the operation of this contract. The Commissioner's view is that it is not clear what harm could occur through the disclosure of some of the redactions when that content is viewed in isolation. However, his view is also that the argument from Staffordshire Police is sound when the contract is considered in its entirety; as evidenced by the contractor

having asked for parts of the content to be redacted when it was consulted about this information request, the Commissioner accepts that a contractor would be likely to object to disclosure of an unredacted version of this contract.

49. Following from this, the Commissioner accepts that there is a real and significant risk of disclosure in this case leading to contractors being deterred from entering into tendering exercises with Staffordshire Police, and that this would be likely to adversely impact on the price required to be paid by Staffordshire Police to future contractors. For these reasons, the Commissioner finds that the exemption provided by section 43(2) is engaged.
50. Having found that the exemption is engaged, the next step is to consider the balance of the public interests. In forming a view here, the Commissioner has taken into account the general public interest in the transparency of Staffordshire Police, as well as specific factors that apply in relation to the information in question.
51. Covering first factors that favour maintenance of the exemption, there is public interest in avoiding prejudice to the commercial interests of Staffordshire Police. Particularly at a time of pressure on police budgets, the Commissioner recognises the considerable weight of the public interest in avoiding the outcome that he has accepted above would be likely to occur.
52. In general, there is public interest in preserving an environment in which public bodies can enter into contracts with private sector service providers on the best terms. Whilst private sector contractors must recognise the possibility for disclosure when working with public sector clients, it is reasonable for contractors to expect that the most sensitive information would be protected.
53. Turning to factors that favour disclosure of the information, as mentioned in the section 40(2) analysis above, the outsourcing of pension services by Staffordshire Police has been a matter of some controversy. Given this, the Commissioner recognises that there is public interest in disclosure of a full version of the contract in order that the full details of the arrangement with the contractor are publicly known. This is a factor in favour of disclosure of the information in question of some weight.
54. The Commissioner is of the view that there is also public interest in general in disclosure of full details of dealings between public sector bodies and private sector service providers, in order to enhance public knowledge and understanding of such arrangements. This adds to the weight of the public interest in disclosure of the information in question.

55. In conclusion, the Commissioner has recognised valid factors in favour both of withholding and disclosing the withheld parts of the contract. The Commissioner considers it significant that the issue here is whether the *parts* of the contract that have been withheld should be disclosed; it is not the case that the contract was withheld entirely.
56. The Commissioner's view is that the weight of the public interest in favour of disclosure is not as great as would have been the case had the entire contract been withheld. Given this, his finding is that the public interest in the maintenance of the exemption outweighs the public interest in disclosure and so Staffordshire Police was not obliged to disclose the redacted parts of the contract.

Other matters

57. As well as the finding above that Staffordshire Police breached sections 10(1) and 17(1) of the FOIA through failing to respond to the request within 20 working days, the Commissioner notes that there was a further delay at internal review stage, leading to the Commissioner commencing his investigation without waiting for the review to be completed. Staffordshire Police should note that the Commissioner expects internal reviews to be completed within a maximum of 40 working days. A separate record of the various delays in this case has been made and this issue may be revisited should evidence from other cases suggest that there are systemic issues within Staffordshire Police that are preventing it from responding promptly.
58. At paragraph 43 above, the Commissioner found that some information withheld under section 42(1) is the personal data of the complainant and hence is covered by section 40(1). The Commissioner expects public authorities to handle requests for an individual's personal data as a subject access request made under section 7 of the DPA, including in situations where such a request has ostensibly been made under the FOIA. In this case, the Commissioner has included no step to this effect in this notice as he is aware that the complainant has made a number of requests for his own personal data to Staffordshire Police. Staffordshire Police should ensure that when responding to these subject access requests the email exchange and draft letter mistakenly withheld under section 42(1) has been identified as amongst the personal data relating to the complainant that it holds and that it should be provided unless exempt under the provisions of the DPA.

Right of appeal

59. 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: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

60. 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.

61. 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

Ben Tomes
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