

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 25 May 2016

**Public Authority:** The Chief Constable Lincolnshire Police  
**Address:** Lincolnshire Police Headquarters  
PO Box 999  
Lincoln  
LN5 7PH

#### Decision (including any steps ordered)

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1. The complainant requested information relating to officers issued with misconduct / gross misconduct notices. Lincolnshire Police provided some information within the scope of the request but refused to provide the remainder citing section 40(2) (personal information) of the FOIA.
2. The Commissioner's decision is that Lincolnshire Police is entitled to rely on section 40(2) and is not obliged to disclose the withheld information.
3. The Commissioner requires no steps to be taken as a result of this decision.

#### Request and response

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4. On 4 January 2016, the complainant wrote to Lincolnshire Police via the *whatdotheyknow* website and requested information in the following terms<sup>1</sup>:

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[https://www.whatdotheyknow.com/request/misconduct\\_and\\_gross\\_misconduct#incoming-773291](https://www.whatdotheyknow.com/request/misconduct_and_gross_misconduct#incoming-773291)

*"1. I would like to know how many of your officers have been issued with misconduct / gross misconduct notices during the past 3 months.*

*2. Details for what type of notice was issued, the date of each notice served.*

*3. Details of the allegations being investigated for each notice.*

*4. Details of rank of each officer issued with notice.*

*5. How many of the notices relate to the same case-s".*

*I would like to stress that I am not requesting any personal information that would identify any of the officers, just the rank of each officer".*

5. Lincolnshire Police responded on 26 January 2016. It disclosed the number of notices issued and cited Regulation 15 of the Police Conduct Regulations. However it refused to provide the remaining information within the scope of the request. It cited the following exemption as its basis for doing so:

- section 40(2) personal information.

6. The complainant requested an internal review of Lincolnshire Police's application of section 40(2). When doing so, she said that the same request, made to other police forces, had been answered in full. In later correspondence she told the Lincolnshire Police:

*"No other force has refused to answer any part of the requests, they have not engaged section 40(2) either".*

7. Lincolnshire Police provided an internal review on 25 February 2016 in which it maintained its original position.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 25 February 2016 to complain about the way her request for information had been handled.

9. She told the Commissioner:

*"The same request was made to a number of other police forces. Many answered the requests in full".*

10. Although the Commissioner understands from this that other police forces would appear to have complied with a similar request, this does not set an automatic precedent for disclosure under the FOIA. Each case must be considered on its merits.
11. The analysis below considers Lincolnshire Police's application of section 40(2) to the withheld information. That information relates to the date of each notice served (as requested at part 2 of the request) and the information within the scope of parts 3-5 of the request.

## Reasons for decision

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### *Section 40 personal information*

12. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3) or 40(4) is satisfied.
13. In this case the relevant condition is contained in section 40(3)(a)(i). This applies where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act 1998 (DPA).
14. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data then section 40 cannot apply.
15. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

### *Is the information personal data?*

16. Section 1 of the DPA defines personal data as:

*" ...data which relate to a living individual who can be identified*

*a) from these 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 intention of the data controller or any other person in respect of the individual."*

17. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable.
18. 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.
19. During the course of the Commissioner's investigation Lincolnshire Police confirmed that the information in question is the personal information of the officers concerned. It told the Commissioner that, by its very nature, the request relates to the professional life of the individuals concerned, for example because it asks for the specific rank of the officer and the specific nature of the allegations.
20. The Commissioner is satisfied that information about a notice recording that there has been an allegation made about the conduct of an officer relates to the individual, is biographically significant and constitutes their personal data.
21. The second part of the test is whether the withheld information identifies any individual.
22. The complainant told the Commissioner:

*"The information I requested would clearly not identify any individual police officer. I did say when I made the request that I did not require the names of any of the officers, only their ranks. I'm sure the Information Commissioner would agree that every police force around the United Kingdom has so many Constable's, Sergeants and other senior officers and therefore releasing such information would not identify any particular individual officer".*
23. During the course of his investigation, Lincolnshire Police argued that providing the requested information could lead to the identification of individual officers.
24. The Commissioner notes that the request relates to a short timeframe – three months. He also considers that the number of notices within the scope of the request – information provided to the complainant in response to part (1) of the request – is low.
25. A test used by both the Commissioner and the First-tier tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of re-

identification of an individual from information which, on the face of it, appears truly anonymised.

26. The ICO's Code of Practice on Anonymisation<sup>2</sup> notes that The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated:

*"that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA".*

27. In summary, the motivated intruder test is that if the risk of identification is reasonably likely the information should be regarded as personal data.
28. The Commissioner has considered the withheld information and the number of individuals involved. In his view, context will be all important when considering if and how information can be anonymised. In that respect, he is mindful that the information within the scope of the request includes the rank of the officer and details of the allegation.
29. The Commissioner considers that the level of detail requested in all except for part (1) of the request and the amount of information within the scope of the request increases the likelihood that if the information was disclosed it could be linked to one or more individuals to provide particular information about those individuals.
30. In the circumstances of this case, the Commissioner is satisfied that the individuals concerned would be reasonably likely to be identifiable, by a 'motivated intruder', from that information when combined with other information in the public domain.
31. The Commissioner is satisfied that, given the nature of the information, the information withheld by virtue of section 40(2) constitutes information that falls within the definition of 'personal data'. In other words, he is satisfied that it relates to living individual(s) who may be identified from that data.

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1061/anonymisation-code.pdf>

*Would disclosure breach any of the data protection principles?*

32. Having accepted that the withheld information constitutes the personal data of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach any of the data protection principles.
33. The Commissioner notes that Lincolnshire Police considers that disclosure would breach the first and second data protection principles.
34. The Commissioner has first considered the extent to which the first data protection principle is relevant in this case.
35. The first data protection principle states:

*"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."*

*Would disclosure contravene the first data protection principle?*

36. 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 if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions (and one of the Schedule 3 conditions if relevant). If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

*Would disclosure be fair?*

37. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public.
38. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
  - the data subject(s) reasonable expectations of what would happen to their information;
  - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual(s) concerned); and
  - the balance between the rights and freedoms of the data subject(s) and the legitimate interests of the public.

*Reasonable expectations*

39. In the Commissioner's view, a key issue to consider in assessing fairness is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy and also the purpose for which they provided their personal data.

40. In this case, Lincolnshire Police acknowledged that its officers know that their personal data is potentially disclosable. In that respect it explained that:

*"names of individuals appear on an array of websites along with their ranks..."*

41. However, it went on to argue that it would not be within an officer's reasonable expectation that details of allegations of misconduct would be disclosed.

42. The Commissioner recognises that people have an instinctive expectation that a public authority, in its role as a responsible data controller, will not disclose certain information, such as personnel matters, and that it will respect their confidentiality.

43. He considers that it is highly likely to be the case that, regardless of their rank, police officers, as the data subjects would hold a strong and reasonable expectation that such information, particularly where it has not yet been determined whether an allegation is baseless or should be upheld, would not be disclosed.

*Consequences of disclosure*

44. Lincolnshire Police argued that disclosure in this case could lead to individuals being the subject of media articles or the target of physical or verbal abuse by members of the public.

45. The Commissioner accepts that disclosure of the type of information the requester has asked for could have a detrimental or distressing effect on the individuals concerned, particularly as he has found that disclosure of the information would not have been within their reasonable expectations.

*The legitimate public interest*

46. Assessing fairness also involves balancing the individuals' rights and freedoms against the legitimate interest in disclosure to the public. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to



disclose the requested information if there is a more compelling public interest in its disclosure.

47. As disclosure under the FOIA is considered to be disclosure to the public at large and not to the individual applicant, it is the legitimate interests of the public in disclosure that must be balanced against the interests of the data subject(s), including their right to privacy.
48. The interest in disclosure must be a public interest, not the private interest of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest: the Commissioner must consider whether or not it is appropriate for the requested information to be released to the general public.
49. The Commissioner accepts that legitimate interests include the general public interest in transparency. In that respect, the Commissioner notes that Lincolnshire Police has disclosed some information in response to this request.
50. However he has not seen any evidence to indicate that there is a sufficient wider legitimate public interest in this case which would outweigh the rights and freedoms of the data subjects and support further disclosure.

### *Conclusion*

51. Having taken into account all the circumstances of the case, and having considered the reasonable expectations of the data subject(s), the potential consequences of disclosure, and the public interest factors, the Commissioner has concluded that there is no legitimate public interest in disclosure which would outweigh the detriment which might be caused to the data subject(s) as a result of disclosure of the requested information. Therefore, disclosure would be unfair and would breach the first data protection principle.
52. Having concluded that it would not be fair to disclose the information the Commissioner has not gone on to consider whether any condition of Schedule 2 to the DPA is satisfied or whether disclosure would breach the second data protection principle.
53. The Commissioner is therefore satisfied that Lincolnshire Police was entitled to withhold the information under section 40(2) by way of section 40(3)(a)(i).



## Right of appeal

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54. 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)

55. 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.
56. 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** .....

**Jon Manners**  
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