

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 November 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 following a fatal fire at a specified residential address in May 2002. Staffordshire Police confirmed it held some of the requested information but refused to disclose it under sections 30(1)(a) (investigations and proceedings conducted by public authorities), section 31(1)(g) (law enforcement) and section 38(1) (health and safety).
2. The Commissioner's decision is that the exemption at section 38 is engaged and that the public interest favours maintaining it; she has not therefore gone on to consider sections 30 or 31. Staffordshire Police is not required to take any steps.

Background

3. The complainant is a solicitor (not practicing) who leads an 'innocence project' that reviews potential miscarriages of justice. In this case, the complainant is representing the individual who was convicted of the murder of his wife who died following the fire at what the Commissioner understands to be the couple's home.
4. The 'request' was submitted to Staffordshire Police with no reference to FOIA, but was handled and responded to as an FOIA request. The complainant challenged this at internal review, stating that she had made her request on behalf of her client for *"a review of the case"*.

5. In reply, Staffordshire Police said it had considered whether the request met the grounds for a 'business as usual' response outside FOIA in that it did not specify FOIA, and where the information would be provided in 20 working days. It concluded that due to the sensitive nature of the information requested and because it was not going to disclose the information, the request could not be addressed as 'business as usual.' Please see the 'Scope' section below for the Commissioner's actions on this matter.

Request and response

6. On 6 October 2015 the complainant wrote to Staffordshire Police and requested information in relation to a fire at a specified address on a specified date:
 - *"Colour copies of all the fire scene photographs & videos (taken by police, fire service & forensic scientists).*
 - *Contemporaneous fire scene notes compiled by Station Officer [name redacted] of Staffordshire Fire & rescue Service and forensic scientist [name redacted].*
 - *The laboratory notes compiled by forensic scientist [name redacted]."*
7. Staffordshire Police responded on 29 October 2015 and refused to provide the requested information, citing the following exemptions of FOIA:
 - Section 30(1)(a) – investigations and proceedings conducted by public authorities;
 - Section 31(1)(g) – law enforcement, by virtue of sections 31(2)(a) and (e);
 - Section 38(1) – health and safety.
8. The complainant requested an internal review on 6 November 2015, which Staffordshire Police provided on 4 December 2015, following which it maintained its original position.

Scope of the case

9. The complainant initially contacted the Commissioner on 4 April 2016 to complain about the way her request for information had been handled. Although the complaint was submitted outside the normal three months' time limit allowed, the Commissioner is able to use her discretion and the circumstances in this case justified accepting the complaint.

10. A key factor in the Commissioner's decision to accept the case out of time is that the complainant is part of a project to review possible miscarriages of justice. In this case, the investigation into the circumstances of the fire in which a woman died subsequently progressed to a murder enquiry leading to a conviction of the complainant's client. The Commissioner therefore accepted the complaint on 20 June 2016.
11. As the complainant confirmed that she had not intended her request to be treated as an FOIA request, the Commissioner made enquiries with Staffordshire Police as to the means it has at its disposal for dealing with requests for such information in potential miscarriage of justice scenarios. Although the officer confirmed this was outside her area of expertise, she advised that the complainant should resubmit her request, making it clear that it was from a solicitor, and address it to the Force Solicitor. Additionally, this officer confirmed that requests made by solicitors/lawyers with a court case reference or court order will be handled by the relevant department within Staffordshire Police.
12. Having relayed this to the complainant, the Commissioner asked her to confirm whether she wished to pursue her complaint under FOIA; the complainant confirmed she wished to proceed because she felt that the other avenues suggested by Staffordshire Police would be "*equally fruitless*". The Commissioner therefore proceeded with her investigation.
13. In response to the Commissioner's investigation on 4 July 2016, Staffordshire Police advised (for the first time) that it does not hold a copy of the contemporaneous fire scene notes made by the named forensic scientist, nor the laboratory notes taken by the other forensic scientist named in the request (ie parts 2 and 3 of the request). It confirmed, however, it does hold a contemporaneous handwritten note made by the named Station Officer in part 2 of the request, which it wished to withhold under the previously cited exemptions.
14. Additionally, and again for the first time, Staffordshire Police said it wished to rely on section 40(2), personal information, because the information requested shows the home of the individual who is the complainant's client; and it therefore constitutes his personal data.
15. With a view to resolving this case informally, the Commissioner sought Staffordshire Police's consent to disclose a copy of its investigation response to the complainant, which was granted. On 23 August 2016, the complainant replied with her views which, following her consent, were provided to Staffordshire Police. On 2 September 2016 Staffordshire Police said it had nothing further to add.

16. As the complainant has neither objected to Staffordshire Police stating that it does not hold some of the requested information, nor to its reliance on section 40(2), the Commissioner has not considered these aspects further.
17. The withheld information in this case consists of three discs containing a number of photographs of the fire damaged property, a paper copy of nine colour photographs, a contemporaneous note written by a Station Officer and a fire scene DVD.
18. The Commissioner has therefore determined whether Staffordshire Police was correct to rely on sections 30, 31 and 38 in refusing the first part of the request (ie fire scene photographs and videos), and for the contemporaneous note by the Station Officer named in the second part of the request.
19. The Commissioner would also like to add, for the complainant's benefit, that she must investigate a case based on the circumstances at the time a request is made, in line with section 1(4) of the FOIA. Therefore, anything which occurs subsequent to this date cannot be taken into account.

Reasons for decision

Section 38 – health and safety

20. Section 38(1) of FOIA provides that:

"Information is exempt information if its disclosure under this Act would, or would be likely to –

- (a) endanger the physical or mental health of any individual*
- (b) endanger the safety of any individual".*

The prejudice test

21. Staffordshire Police has not cited which limb of section 38(1) it is relying on; however, from its submissions the Commissioner is satisfied that it intended to rely on section 38(1)(a). To determine whether Staffordshire Police is entitled to rely on section 38(1)(a) under the terms of FOIA, the Commissioner has considered the 'prejudice test', in this case whether disclosure of the information would, or would be likely to, cause endangerment to the physical or mental health of one or more individuals.
22. Unlike the other exemptions in the FOIA subject to the prejudice test, the word 'endanger' is used in section 38 rather than the word

'prejudice'. However, the Commissioner does not consider that the use of the term 'endanger' represents a significant departure from the test of prejudice.

23. In *Hogan v the Information Commissioner and Oxford City Council* (EA/2005/0026 and 0030) the Tribunal stated that:

"The application of the 'prejudice' test should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption ... Second, the nature of 'prejudice' being claimed must be considered...A third step for the decision-maker concerns the likelihood of occurrence of prejudice."

The applicable interest

24. As section 38(1)(a) of FOIA provides that information relating to the endangerment of the physical or mental health of an individual can be withheld, the prejudice involved in the disclosure of the requested information must therefore relate specifically to the physical or mental health of one or more individuals.
25. In this case the requested information consists of photographs, a DVD and a contemporaneous note about a fire which resulted in the death of a woman who was also a mother; she was subsequently found to have been a victim of murder. The applicable interests in this case are the physical or mental health of members of the deceased's family as well as an unknown number of members of the public; the Commissioner would assume this to cover friends and colleagues of the deceased.

The nature of the prejudice

26. The public authority has advised the Commissioner:

"The photographic evidence shows the devastating effects of the fire which resulted in the death of a woman. Any person related to her or who knew her would be upset by viewing these pictures. The fire occurred in [date redacted] and it would be upsetting to her child, who was [age redacted] years old and present at the time of the fire to have to revisit this sad episode....It would serve little purpose for any member of the public who did not know the individuals involved in this incident and it would drag back into the consciousness of all involved and who were hopefully moving on with their lives...The father of the victim has made statements which appear in the press describing the effect the incident has had on him. It would definitely cause him further mental ill health and would affect his Article 8 rights."

27. The latter statement was supported by links to articles and information available on the internet. (The Commissioner has not reproduced these here as they would be likely to lead to the identification of those concerned).
28. The Commissioner is satisfied that the level and nature of the prejudice identified would be likely to go beyond stress or worry and constitute an endangerment to the physical or mental health of the parties identified above.

The likelihood of prejudice

29. The Commissioner's duty is to consider whether disclosure of the requested information 'would', or 'would be likely to', pose a risk to the physical or mental health of the parties identified. Staffordshire Police did not state which level of likelihood it was relying on in this case. Where not stated, the Commissioner will consider the lower level of 'would be likely to'.
30. The Tribunal, in the case of *John Connor Press Associates Limited v Information Commissioner* (EA/2005/0005), stated that "*the chance of prejudice being suffered should be more than a hypothetical possibility, there must have been a real and significant risk*" (paragraph 15).
31. The Commissioner has interpreted this to mean that, in order for a public authority to satisfy her that disclosure of the requested information would be likely to endanger the health and safety of individuals, it must demonstrate that the risk of prejudice need not be more likely than not, but it must be substantially more than remote.
32. The Commissioner acknowledges that the physical or mental health of family members, and other members of the public, needs to be considered when disclosure 'to the world at large' is being made under FOIA. In the Commissioner's view, for these family members to discover that photographs and other evidence of the fire which led to the death of their loved one had been released in the public domain could have a significant impact on their physical and mental health. Not least, this could be caused by their belief that the case is considered to have been dealt with by the Court and a verdict of murder has been reached; they would therefore reasonably expect matters to be 'closed'. The prospect of finding what can only be described as photographs and evidence of a murder scene in the public domain would, in the Commissioner's view, have a substantially more than remote likelihood of endangering their mental or physical health.
33. Indeed, the Commissioner considers that even being aware that there is an ongoing consideration of releasing the photographs and other

material to the world at large is in itself likely to be detrimental. The family may not know that the deceased's husband was seeking to appeal his conviction and the possible discovery of this via a disclosure made under the terms of FOIA could in itself be detrimental. In support of this potential detriment, the Commissioner has necessarily anonymised some of the details in this decision notice.

34. Although to a lesser degree, the Commissioner also considers that there is likely to be a detrimental impact on friends and colleagues, and potentially even the wider public, who could find the photographs distressing.
35. The Commissioner is therefore satisfied that section 38(1)(a) of FOIA is engaged in relation to the requested information. As this is a qualified exemption, the Commissioner also needs to consider the public interest test.

Public interest factors in favour of disclosure

36. The public authority has advised the complainant that disclosure of the requested information would show openness and transparency.

Public interest factors in favour of maintaining the exemption

37. The public authority has advised the complainant that, although the murder was a number of years ago, information about the subsequent conviction of the complainant's client for murder was more recently placed in the public domain. It said:

"It has to be remembered there will be surviving members of family. Disclosure of information detailing the graphic nature of the crime would be likely to endanger mental health of family and friends of the victim and may cause significant emotional and psychological stress and anguish."

38. It also advised the Commissioner:

"FOI is a disclosure to the world. Once released the information would be deemed suitable for disclosure without restriction. Therefore, the information would not only be available to the family but also everyone else. They go on to undermine their own argument by stating that the only issue could be if they decide to appeal – which would make it obvious they were with provided with the information. If the client wanted to appeal, there are appropriate channels for this and FOI is not one of them."

The balance of the public interest test

39. In initially refusing the request Staffordshire Police concluded its public interest test by advising the complainant as follows:

"Although this case is concluded Staffordshire Police still has a duty to protect family members of the victim from any further emotional stress and to release the requested material Staffordshire Police would not be fulfilling its duty."

40. It advised the Commissioner that:

"The fact that the applicant wanted to use the information to make an appeal means that it would be brought back into the public domain. The public would be interested in what information is held relating to this investigation. Just because something would be of interest to the public does not automatically mean that the public should always be able to view information that is gathered as evidence."

41. The Commissioner also notes that the complainant repeatedly submits that any disclosure would only be to the innocence project or others involved in her client's legal representation. Whilst she does not doubt the sincerity and good intention of the complainant, the Commissioner must stress that there is no provision within FOIA for any such limitation in disclosure. Information which is released under the provisions of FOIA must be suitable for disclosure to anyone and everyone. In the Commissioner's opinion, the submission made by the complainant serves to reinforce the view that unfettered release of the requested information into the public domain is not suitable.
42. The Commissioner has balanced the real and significant threat to the health and safety of the family and friends/colleagues of the deceased, and indeed the general public as a whole, against the public interest arguments in favour of disclosure.
43. In conclusion, the Commissioner does not consider that disclosure of the photographs, DVD and contemporaneous note for the complainant's requirements justifies the apparent risk to the health and safety of others, primarily that of the immediate family and any other people who knew the deceased. In reaching this conclusion, the Commissioner notes that the case has been before the Court and that it has already concluded the deceased was murdered, and the person convicted of her murder was imprisoned. Although she notes that the complainant will not be satisfied with this outcome the Commissioner has to consider the wider public interest rather than the interests of an individual.

44. It is important to note again here that disclosure under FOIA is not discretionary and must be suitable for one and all. Therefore, whilst the complainant may have genuine aims, and have her own concerns about the legitimacy of her client's conviction for murder, on this occasion access to the required information via FOIA is not appropriate. If there was any possibility of a miscarriage of justice, the evidence should be obtained through formal legal channels rather than through an open disclosure as would be the case here.
45. The Commissioner has concluded that the public authority correctly relied on section 38(1)(a) of FOIA in respect of this request for information. As a result it is not necessary to go on to consider the citing of sections 30 and 31.

Other matters

46. Before drafting this notice, and with a view to assisting the complainant, the Commissioner sought further advice from Staffordshire Police to the routes available to the complainant to pursue her request outside FOIA. She understands that how Staffordshire Police handles cases involving potential miscarriages of justice depends upon the circumstances in which any miscarriage was brought to its attention. If there was a formal complaint made about the handling of the case, which upon investigation revealed information which would have affected the outcome of a case then Staffordshire Police would have a duty to refer this information to the Crown Prosecution Service (CPS).
47. Staffordshire Police said it would not normally be involved in any miscarriage of justice as this would be a matter for the CPS and the courts to deal with, unless of course an offence such as perjury etcetera was alleged in which case this would be recorded as a crime and investigated.
48. In terms of any request for information from a suspect or victim regarding a miscarriage of justice, Staffordshire Police advised that a request should be made in writing stating what is required, why and the legal basis for the request. If lawful, reasonable and proportionate then disclosure would be provided for the purpose requested under the terms of section 35 of the Data Protection Act 1998.

Right of appeal

49. 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

50. 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.
51. 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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