

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 December 2017

Public Authority: Chief Constable of Hampshire Constabulary
Address: Police Headquarters
Romsey Road
Winchester
Hampshire
SO22 5DB

Decision (including any steps ordered)

1. The complainant requested a copy of an investigation report, and associated information, into the use of procurement cards by former senior staff at the Association of Chief Police Officers' Criminal Records Office ('ACRO'). Hampshire Constabulary refused the request, citing the non-disclosure exemption at section 40(2) (personal information) of the FOIA. It also cited section 31 (law enforcement) and section 38 (health and safety), and for parts of the request and said it did not hold some of the requested information.
2. The Commissioner's decision is that Hampshire Constabulary was entitled to rely on section 40 to refuse parts of the request. As she has found section 40(2) to be engaged, she has not considered the other cited exemptions further. In relation to the remaining requested information, the Commissioner finds, on the balance of probabilities, that Hampshire Constabulary does not hold this information. However, by failing to issue its refusal notice within the statutory 20 working days' timescale, Hampshire Constabulary breached section 17(1) of FOIA.
3. The Commissioner requires no steps to be taken.

Background

4. The complainant, a journalist, has also submitted a related request to the Independent Police Complaints Commission ('IPCC'), which has been considered by the Commissioner under reference *FS50686094*.

Request and response

5. On 14 August 2017, referring to its investigation into the use of procurement cards by ACRO staff, the complainant wrote to Hampshire Constabulary and requested information in the following terms:

"1) Which officer or officers were responsible for the investigation

2) When the investigation report was concluded and who it was forwarded to for a decision

3) What opinion the investigator(s) reached in terms of whether there was a case to answer for misconduct, gross misconduct or no case to answer

4) Who/what the appropriate authority was that subsequently reached a conclusion of management action regarding [name redacted], ie was it a panel, a senior officer etc and who were they

5) What the management action was

6) Clarification of what happened to the process involving [name redacted] given he left the service part way through the investigation, ie did that bring it to a halt, did it continue with his co-operation when he was no longer an officer, did it continue regardless etc

7) A copy or copies of the investigation report(s)

8) At the start of this process, there was an indication an audit had taken place on the expenses. If that audit exists, I would also ask for a copy of that document."

6. Hampshire Constabulary responded, late, on 19 September 2017. It answered part 2 of the request and confirmed that (in relation to part 1) the officer who carried out the investigation was a Detective Constable from its Professional Standards Department, but withheld the name of that officer. It refused to provide some of the requested information (parts 1 (name of officer), 3 and 7 of the request) citing section 40(2), personal information. For parts 3 and 7, it also cited section 38(1)(a), health and safety. For part 7, it additionally cited section 31(1)(g), law enforcement, in conjunction with section 31(2)(b).
7. In relation to the remainder of the request (parts 4, 5, 6 and 8), Hampshire Constabulary advised that it did not hold the requested information.

8. The complainant already had a 'live' complaint with the Commissioner concerning an earlier request made to Hampshire Constabulary on the same subject matter (but with some differently worded questions). Following discussion with the Commissioner, the complainant decided to withdraw his earlier complaint in favour of seeking information on this up-to-date position. Given that the complainant had an existing complaint which he withdrew, the Commissioner has exercised her discretion and has investigated the more recent request without the need for an internal review.

Scope of the case

9. The complainant contacted the Commissioner on 20 September 2017 to complain about the way his request for information had been handled. With the complainant's consent, the full content of his written grounds of complaint was sent to Hampshire Constabulary for consideration as part of its investigation response.
10. As part of his grounds of complaint to the Commissioner, the complainant expressed concern that a lower ranking officer had carried out an investigation into a more senior ranking officer; however, that is not a matter which the Commissioner can consider, as it does not fall within her jurisdiction. Beyond this, the complainant did not complain to the Commissioner about the response to question 1 of the request and so the Commissioner has not considered it further.
11. The complainant also raised some concerns about the response to part 2 of his request, specifically that he was aware from another FOIA request that the investigation report was concluded 15 months prior to the date Hampshire Constabulary has told him the investigation ended, which the Commissioner has discussed with the public authority. She has been advised, in confidence, of the reason for this which is included in the confidential annex. However, as both questions in part 2 of the request have been answered by Hampshire Constabulary, the Commissioner has not considered this part of the request further.
12. The Commissioner has considered whether Hampshire Constabulary was entitled to cite section 40(2) for parts 3 and 7 of the request. She has also considered whether, on the balance of probabilities, Hampshire Constabulary holds any information in relation to parts 4, 5, 6 and 8 of the request.

Reasons for decision

Section 40 personal information – parts 3 and 7 of the request

13. The FOIA exists to place official information into the public domain. Once access to information is granted to one person under the FOIA, it is then considered 'public' information which can be communicated to any individual should a request be received. As an exemption, section 40 operates to protect the rights of individuals in respect of their personal data.
14. 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 the disclosure of that personal data would be in breach of any of the data protection principles.
15. Hampshire Constabulary has cited section 40(2) to withhold a copy of an investigation report it holds (part 7 of the request). The report was written by Hampshire Constabulary, which also conducted the investigation.
16. Hampshire Constabulary also sought to rely on section 40(2) for part 3 of the request, namely the opinion of the investigator as to whether or not there was a case to answer.

Is the requested information personal data?

17. In order to rely on section 40(2) the requested information must constitute personal data as defined in section 1 of the Data Protection Act 1998 ('DPA'). For information to constitute personal data, it must relate to an individual, and that individual must be identifiable from that information, or from that information and other information in the possession of the data controller.
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, has them as its main focus or impacts on them in any way.
19. Hampshire Constabulary applied section 40(2) to withhold the investigation report in its entirety. It said that it constituted the personal data of the individual who was the subject of the investigation, and other individuals named in the report.

20. The Commissioner has had sight of an un-redacted copy of the investigation report. It includes information about work-related travel and activities, both within work hours and outside of work hours, including restaurants visited, meals eaten, company kept and other biographical information. As such, the Commissioner agrees that it constitutes the personal data of the individuals named in the report within the meaning of section 1 of the DPA, as the information clearly relates to identifiable individuals.
21. Hampshire Constabulary has confirmed to the Commissioner that it does not consider any of the withheld information to constitute sensitive personal data within the meaning of section 2 of the DPA.

Would the disclosure of the personal data contravene any of the data protection principles?

22. Hampshire Constabulary argued that disclosure of the information would breach the first data protection principle, in that disclosure of the requested information would be unfair to the data subjects. The Commissioner agrees that the first data protection principle is relevant in this case.
23. The first principle deals with the privacy rights of individuals and the balance between those rights and other legitimate interests in processing personal data. In relation to non-sensitive personal data, it 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..."

24. In the case of an FOIA request, 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 conditions in schedule 2 of the DPA. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

Would it be fair to disclose the personal data?

25. Under the first principle, the disclosure of the information must be fair to the data subject. Assessing fairness involves balancing the data subject's rights and freedoms against the legitimate interest in disclosure to the public.
26. 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 individual'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 concerned); and
- the balance between the rights and freedoms of the data subject and the legitimate interests of the public.

Reasonable expectations

27. 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, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
28. Hampshire Constabulary confirmed that the data subject identified in the report had refused consent for his personal data to be disclosed in response to the request. Therefore, if the report was to be disclosed, it would be against the data subject's express wishes.
29. The Commissioner understands that the data subject held a senior, civilian post within ACRO. As a civilian, the investigation was dealt with as a private and confidential matter relating to conduct matters.
30. Because of its scope, the report included information about a member of the data subject's family, as well as those of his colleagues, about whom there were no allegations of wrongdoing. Hampshire Constabulary considered it would be reasonable for them to expect that their personal data would be held confidentially and not shared for purposes not directly connected with, and required by, the investigation.
31. Hampshire Constabulary said that the data subject was never publicly named by it or ACRO as being under investigation in connection with the allegations.
32. The IPCC noted that prior to making this request, the complainant had written an article for a national newspaper which identified the data subject as being under investigation regarding his expenses claims. The IPCC believed that the complainant had simply inferred the identity of the person who was under investigation from a response to a previous FOI request he had submitted to ACRO. It reiterated that neither Hampshire Police nor ACRO had ever placed the data subject's identity in the public domain.

33. Following on from this, the Commissioner has examined the extent to which there is information in the public domain which identifies the data subject as the subject of the investigation. To that end, she has conducted a number of internet searches. The only information she has been able to locate in which the data subject is identified as being the subject of the investigation is the complainant's own newspaper article, and a FOIA request on *Whatdotheyknow* (an online facility for submitting and archiving FOIA requests), which cites that newspaper article as its source. She is therefore satisfied that disclosure of the report would involve the disclosure of detailed and sensitive information about the data subject's work and personal life, which is not currently in the public domain.
34. The Commissioner considers that information about an individual's employment record, including the treatment of disciplinary-related allegations against them, will usually be inherently 'private' in nature and she recognises that former and current civilian police workers will have a high expectation that any information about such matters which relate to them, if not classified as "gross misconduct" or above, will not be placed in the public domain; they would expect that their privacy will be respected. She recognises that due to the seniority of the data subject, he should expect scrutiny of his work-related duties. However, Hampshire Police has said that the matter was dealt with confidentially, as an employment-related conduct matter.
35. The report also contains a significant amount of information about the complainant's private life while travelling for work, including details of expenditure on personal credit cards, and references to rest days. As such, the Commissioner considers that the data subject's reasonable expectation would be that such information would not be disclosed.

Consequences of disclosure

36. As to the consequences of disclosure upon the data subject, the question – in respect of fairness - is whether disclosure would be likely to result in unwarranted damage or distress to that individual.
37. Hampshire Constabulary disclosed to the Commissioner some information on this point which, due to its confidential nature with regard to the data subject's personal circumstances, cannot be discussed in the main body of this decision notice. Its arguments, and the Commissioner's assessment of them, are reproduced in a confidential annex to this decision notice, which has only been provided to the public authority.
38. From the information provided to her, the Commissioner is satisfied that disclosure would be likely to have adverse consequences for the data subject.

Balancing rights and freedoms with legitimate interests

39. 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 it can be argued that there is a more compelling, legitimate interest in its disclosure.
40. In considering 'legitimate interests', in order to establish if there is a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sake, as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach.
41. In this case the complainant considers the seniority of the data subject and the nature of the allegations against him mean that it is in the public interest that information about the investigation be placed in the public domain.
42. The Commissioner accepts that there is a legitimate interest in transparency regarding the scrutiny of expenses claimed by senior members of staff in public bodies, and that this interest would be served by the disclosure of the report.
43. In its submission to the Commissioner, Hampshire Constabulary said it considers that several factors carry significant weight in favour of the data subject's right to privacy. Due to their confidential nature, they cannot be discussed in the main body of this decision notice. They are reproduced, together with the Commissioner's assessment of them, in the confidential annex.
44. As set out in paragraph 40 above, when determining whether the legitimate interests in disclosure are capable of outweighing the data subject's right to privacy, the Commissioner is mindful of the need to be proportionate in her approach. In this case, while she accepts the public interest in transparency that would be served by disclosure, she is satisfied that there would very likely be serious consequences for the data subject.
45. Having considered both sets of arguments, the Commissioner considers that the legitimate interests in disclosure, although strong, do not outweigh the data subject's right to privacy.
46. Further, as the data subject has not consented to any further disclosure in relation to this matter, and in the particular circumstances of this case, the Commissioner considers that responding to part 3 of the request would breach the first data protection principle.

Conclusion

47. Having carefully weighed the competing arguments against each other, the Commissioner's decision is that Hampshire Constabulary was entitled to rely on section 40(2) to refuse to disclose the requested information requested in parts 3 and 7 of the request.
48. She is satisfied that disclosure would not be within the data subject's reasonable expectations, that it would be likely to have detrimental consequences for him and that the legitimate interests that would be served by disclosure are not capable of outweighing the data subject's expectation of, and right to, privacy. The Commissioner therefore accepts that it would be unfair to the data subject to disclose the requested information and that to do so would breach the first data protection principle.
49. Since the Commissioner has determined that disclosure would be unfair, it is not necessary to go on to consider the application of schedule 2. However, given the particular circumstances of this case, the Commissioner considers it unlikely that any of the schedule 2 conditions would permit the disclosure of the investigation report.

Section 1 – information not held (parts 4, 5, 6 and 8 of the request)

50. Hampshire Constabulary stated that no information was held in relation to parts 4, 5, 6 and 8 of the request. The complainant submitted arguments in support of his view that this information must be held, which, following his consent, were relayed to the public authority.
51. Section 1 of the FOIA states that anyone making a request for information to a public authority is entitled to be informed whether the public authority holds the information, and, if so, to have that information communicated to them.
52. The Commissioner is mindful that when she receives a complaint alleging that a public authority has stated incorrectly that it does not hold the requested information, it is seldom possible to prove with absolute certainty whether the requested information is held. In such cases, the Commissioner will apply the normal civil standard of proof in determining the case and will decide on the 'balance of probabilities' whether information is held.
53. As part of her 'information not held' investigation, the Commissioner asked Hampshire Constabulary about the searches it had undertaken in order to respond to the complainant's request. As part of its investigation response, it advised that for part 8, it had spoken to the Head of Professional Standards, who, upon speaking to the appropriate officer, confirmed that no audit information is held or has ever been held.

54. With regards to parts 4, 5 and 6 of the request, Hampshire Constabulary said it did not need to conduct any searches due to the nature of the questions and its knowledge of the Professional Standards Department's investigation.
55. The Commissioner has spoken with Hampshire Constabulary regarding the searches (in relation to parts 4, 5 and 6 of the request), and has satisfied herself that, on the balance of probabilities, the remaining requested information is not held by Hampshire Constabulary. Further details are include in the confidential annex.

Procedural issues – section 17(1) breach – late refusal notice

56. Section 1(1) of FOIA states:

(1) Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

57. Section 10 of FOIA states:

(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

...

(3) If, and to the extent that –

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given."

58. Section 17(1) of FOIA states:

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to

the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.

59. If, as in this case, Hampshire Constabulary decides that information should be withheld, it has an obligation to provide a requester with a refusal notice within 20 working days of receipt of the request. Hampshire Constabulary failed to issue its refusal notice within the statutory timeframe, thereby breaching section 17(1) of FOIA.

Right of appeal

60. 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

61. 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.

62. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF