

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 March 2018

Public Authority: Chief Constable of Leicestershire Police

Address: Police Headquarters
St Johns
Enderby
Leicester
LE19 2BX

Decision (including any steps ordered)

1. The complainant has requested to know the number of complainants who had made sexual abuse allegations about Greville Janner. Leicestershire Police disclosed some information. However, it also withheld some information, citing the exemptions at section 31 (law enforcement) and section 38 (health and safety) of the FOIA.
2. The Commissioner investigated its application of the exemptions at sections 31(1)(a), (b) and (c).
3. The Commissioner's decision is that Leicestershire Police was entitled to rely on section 31 to withhold the requested information. However, the Commissioner found procedural breaches of sections 1, 10 and 17 of the FOIA in the way Leicestershire Police handled the request.
4. The Commissioner requires no steps to be taken.

Background

5. Operation Enamel was established by Leicestershire Police in 2013, to investigate allegations of historic child sexual abuse against Greville Janner and other individuals. Some of the allegations had first been made to the police in 1991, and in 2016 a report commissioned by the Crown Prosecution Service found that there had been sufficient evidence from which charges could be brought against Lord Janner in 1991, 2002 and 2007¹. However, it was not until shortly before his death in 2015 that Lord Janner was formally charged with 22 offences.
6. Criminal proceedings against Lord Janner ended with his death. However, the allegations against him are currently under posthumous consideration by the Independent Inquiry into Child Sexual Abuse (IICSA) as part of its wider inquiry into the extent to which State and non-State institutions have failed in their duty of care to protect children from sexual abuse and exploitation. Leicestershire Police has disclosed evidence it gathered via Operation Enamel, to the IICSA.

Request and response

7. On 3 January 2017, the complainant, a journalist, wrote to Leicestershire Police and requested information in the following terms:

"I am seeking information about Operation Enamel. When I say 'sexual offences' I mean alleged incidents or activities considered to be an [sic] sexual offences by Operation Enamel.

- 1. The start and end dates for Operation Enamel.*
- 2. The total number of individuals who gave statements to Operation Enamel.*
- 3. The total number of complainants who were (a) interviewed by officers from Operation Enamel and who (b) gave statements to Operation Enamel.*
- 4. The total number of these complainants who, during the course of Operation Enamel, made sexual offences allegations against Lord*

¹ <http://www.bbc.co.uk/news/uk-35352809>

Greville Janner; and, of this number, the total number of complainants who, prior to the inception of Operation Enamel, had previously made sexual offences allegations against Lord Greville Janner to Leicestershire Police."

8. Having received no response, the complainant chased a response to the request. On 3 April 2017 Leicestershire Police wrote to the complainant apologising for the delay and stating that a response would be forwarded shortly.
9. On 26 April 2017, Leicestershire Police responded to the request. It disclosed information in response to the first three questions. It omitted any reference to question 4 in its response. The complainant says he was told separately by the officer dealing with the request that the information covered by that question was exempt from disclosure and that he would forward details of the exemptions that applied "...when I can".
10. On 4 May 2017 and again on 21 June 2017, the complainant wrote to Leicestershire Police asking it to specify the exemptions it was relying on. He also says that he telephoned Leicestershire Police asking for a response. Despite this, he heard nothing further from Leicestershire Police.

Scope of the case

11. The complainant contacted the Commissioner on 12 July 2017 to complain about the way his request for information had been handled. He said that the information requested at question 4 remained outstanding and that Leicestershire Police had failed to specify which exemption it was relying on to withhold the information.
12. The Commissioner wrote to Leicestershire Police on 21 September 2017, asking it to either disclose to the complainant the information requested at question 4, or notify him of the exemption under which it was being withheld, by 5 October 2017. She also asked it to forward a copy of its response to her. Neither the Commissioner nor the complainant received any response from Leicestershire Police regarding the matter.
13. After a further letter to Leicestershire Police went unanswered, the Commissioner issued an information notice on 7 November 2017, asking Leicestershire Police to disclose to her the withheld information and to specify which exemption it was relying on to withhold it.
14. Leicestershire Police responded on 1 December 2017. It disclosed the withheld information to the Commissioner and identified the relevant

exemptions as section 31 (law enforcement) and section 38 (health and safety) of the FOIA. It provided an outline of its reasoning for the application of these exemptions, which it also forwarded to the complainant.

15. The Commissioner normally requires a complainant to seek an internal review of the application of an exemption, before she will consider a complaint about it. However, in view of the 11 month delay between the complainant submitting his request and Leicestershire Police fully setting out its reasons for why he was not entitled to the information at question 4, and her belief that Leicestershire Police would be unlikely to substantially alter its position at this stage, the Commissioner decided that in this case it would be unreasonable to require the complainant to request an internal review. She therefore exercised her discretion to examine Leicestershire Police's application of section 31 and section 38 in the absence of an internal review.
16. This decision notice considers Leicestershire Police's application of section 31 of the FOIA to withhold the information requested at question 4 of the request. It also examines Leicestershire Police's failure to respond to the request within the statutory timescale for compliance. Given the Commissioner's decision that Leicestershire Police was entitled to rely on section 31 to withhold the requested information, it has not been necessary to consider the application of the exemption at section 38.

Reasons for decision

Section 1 – general right of access

Section 10 - time for compliance

Section 17 – refusal of request

17. Section 1(1) of the FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.

18. Section 10(1) of the FOIA states that:

"... 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".

19. Section 17(1) of the FOIA requires that where a public authority is relying on a non-disclosure exemption to withhold information, it must

inform the requester of that fact, specify the exemption relied on and explain why it applies (if not apparent), within 20 working days.

20. The complainant requested information on 3 January 2017 and Leicestershire Police issued a response on 26 April 2017. Leicestershire Police therefore breached section 1(1) and section 10(1) of the FOIA by failing to respond to the request within 20 working days. It also breached sections 17(1)(b) and (c) of the FOIA by failing to specify the exemption it was relying on to withhold information in respect of question 4, and by failing to explain why it applied, within the time for compliance.
21. As well as issuing this notice, the Commissioner has made a separate record of these failures and these issues may be revisited should evidence from other cases suggest that this is necessary.

Section 31 – law enforcement

22. Leicestershire Police is relying on sections 31(1)(a), (b) and (c) to withhold the information requested at question 4. These state:

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(a) the prevention or detection of crime,

(b) the apprehension or prosecution of offenders,

(c) the administration of justice..."

23. Section 31 is a prejudice based exemption and is subject to the public interest test. This means that not only does the information have to prejudice one of the purposes listed, but it also can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure.

24. In order to be engaged, the following criteria must be met:

- the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption (in this case, the prevention or detection of crime, the apprehension or prosecution of offenders and the administration of justice);
- the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is

designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and

- it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
25. Leicestershire Police said that it is tasked with efficiently conducting criminal investigations with the purpose of preventing and detecting crime and apprehending offenders. In order to obtain the public's cooperation with this, it is crucial that the public has confidence in its ability to conduct enquiries confidentially and with integrity.
 26. It said that the level of confidence that members of the public have in the police service has a direct impact on their willingness to come forward and work with the police to prevent and detect crime, and to bring offenders to justice. For example, valuable prevention work can be undertaken with individuals who feel at risk of domestic violence when they feel confident that they can approach the police and that their concerns will be taken seriously and treated confidentially, so as not to expose them to further risk.
 27. Leicestershire Police said that the information the complainant is asking for would effectively allow the public to compare the number of complainants who had come forward before the allegations against Lord Janner received widespread publicity, with the number who came forward after. It considered that this would inevitably lead to public speculation about the motives and credibility of some of the later complainants.
 28. Leicestershire Police said that many of the alleged victims in this case, who have come forward both recently and in the past, are extremely vulnerable individuals who have struggled to cope with the public scrutiny that their allegations against Lord Janner have inevitably attracted. Any speculation which casts doubt on complainants' credibility and motives, even as a group, would be likely to adversely affect the mental health and wellbeing of many of them as individuals. Leicestershire Police foresaw a real possibility that the additional pressure and emotional distress that they would experience as a result would cause at least some alleged victims to disengage from the various inquiries and investigations that are currently underway (including the IICSA), at a time when their engagement is critical to the success of these investigations.
 29. Leicestershire Police said that it also had to consider that any disclosure of information into the public domain now will affect how future victims

of crime engage with the police in the investigative process. It said that if the public perception is that the police will disclose information about how many victims of crimes have come forward to report high profile or sensitive crime, those victims will, quite rightly, worry about the extent to which they may be identifiable, and the scrutiny that comes with publication will understandably make them reluctant to come forward.

30. It said that the impact of disclosure was such that "*...in the circumstances...our law enforcement capabilities will be affected if disclosure takes place*". It said that the impact on future cases of this type will also be significant and will fundamentally damage public trust. It therefore assessed the level of prejudice as being that prejudice "*would*" occur.
31. The Commissioner has considered the applicability of the exemption at section 31 of the FOIA. With regard to the first criterion of the three limb prejudice test described above, the Commissioner accepts that the potential prejudice to law enforcement activity that Leicestershire Police has described, relates to the applicable interests which sections 31(1)(a), (b) and (c) are designed to protect.
32. With regard to harm being caused by disclosure, if individuals are deterred from coming forward to report crime, and from cooperating with the resultant investigations and inquiries, this will clearly undermine the police's ability to prevent or detect crime, apprehend offenders and ensure fair trials, and this would have a detrimental effect on law enforcement. The Commissioner is satisfied that the resultant prejudice which Leicestershire Police considers would occur can be correctly categorised as real and of substance.
33. As regards the third criterion, the likelihood of prejudice arising, the Commissioner has been guided on the interpretation of the phrase "*would, or would be likely to*" by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; i.e. either prejudice "*would*" occur or prejudice "*would be likely to*" occur.
34. With regard to "*would be likely to*" prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that "*...the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk*" (Tribunal at paragraph 15).
35. With regard to the alternative limb of "*would prejudice*", the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that "*...clearly this second limb of*

the test places a stronger evidential burden on the public authority to discharge" (Tribunal at paragraph 36).

36. Leicestershire Police argued that the prejudice it envisaged "would" occur. Having regard to the Tribunal's comments in paragraph 35, and the arguments Leicestershire Police supplied in support of its position, the Commissioner is not satisfied that Leicestershire Police has demonstrated that the prejudice it has envisaged "would" occur.
37. In such cases, the approach of the Commissioner is to consider instead whether a case has been made for the lower threshold that prejudice "would be likely to" occur. The Commissioner will accept that an outcome "would be likely to" occur where there is a real and significant likelihood of this, rather than that outcome being a remote possibility. Having considered the information it supplied, the Commissioner is satisfied that Leicestershire Police did demonstrate that the prejudice it envisaged "would be likely to" occur.
38. The Commissioner is therefore satisfied that the exemptions at sections 31(1)(a), (b) and (c) of the FOIA are engaged.

Public interest test

39. Section 31 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemptions contained at sections 31(1)(a), (b) and (c) outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

40. Leicestershire Police stated that disclosure would support its commitment to openness and transparency by giving the public information relating to a high profile issue, about which there has been significant public debate.
41. It said that the information requested may also allow the public an insight into the scale of the alleged offending complained about.

Public interest arguments in favour of maintaining the exemption

42. Leicestershire Police repeated its arguments as to the impact that disclosure would have on complainants, and on the need to maintain the public's confidence in its ability to deal with complaints confidentially and sensitively. It said that it was not in the public interest for criminal investigations or public inquiries to be undermined by alleged victims being deterred from cooperating.

Balance of the public interest

43. The Commissioner considers that it is important that the general public have confidence in the police service, which is responsible for enforcing the law. Confidence will be increased by allowing scrutiny of their performance. Accordingly, there is a general public interest in disclosing information that promotes accountability and transparency in order to maintain that confidence and trust.
44. However, balanced against this, she also recognises that there is a very strong public interest in protecting the law enforcement capabilities of public authorities. The Commissioner considers that appropriate weight must be afforded to the public interest inherent in the exemption - that is, the public interest in avoiding prejudice to the prevention or detection of crime, apprehension or prosecution of offenders and administration of justice.
45. The Commissioner considers that the central subject matter of this case (historic allegations of sexual abuse) is a highly sensitive issue. She acknowledges that there is real public concern about the apparent failure of the criminal justice system to respond appropriately to allegations of abuse at the time they were originally made, particularly where the allegations related to high profile figures. She particularly notes the independent report referred to in paragraph 5, above, which stated that sufficient evidence existed in 1991 for charges to be brought. There is therefore a clear public interest in public authorities being open and transparent about the scale of alleged offending which might have taken place in the period since 1991.
46. However, in the circumstances of this case, the Commissioner has given greater weight to the arguments surrounding the public interest in preserving the ability of Leicestershire Police to protect the welfare of alleged victims of crime, and by doing so, its ability, and the ability of other bodies, to conduct investigations and inquiries, including into allegations of abuse committed over a number of years.
47. There is a clear public interest in protecting society from the impact of crime, and this includes ensuring that those who report crimes, particularly sensitive ones such as sexual abuse, are not subject to unfair or unwarranted intrusion or speculation.
48. In that respect, she notes that many of the complainants are highly vulnerable and that public speculation about their motives for coming forward may well have an adverse impact on them to the extent that they would disengage from the IICSA's ongoing inquiry into Lord Janner. She is satisfied that it would not be in the public interest to disclose information which might prejudice or jeopardise the work of that inquiry,

which will publish a report and make recommendations for the future as part of its outcomes.

49. She is also accepts that the public perception that witnesses may be subject to this type of public scrutiny may, in future, deter some victims from coming forward and cooperating with Leicestershire Police, particularly where sensitive offences are alleged. This would be likely to have an impact on the flow and quality of information Leicestershire Police relies on to conduct investigations. There is strong public interest in ensuring that the overall effectiveness of investigations being undertaken by police forces is not undermined or compromised. It would clearly not be in the public interest if the disclosure of information resulted in a reduction in the ability of police forces to successfully apprehend or prosecute offenders.
50. Having taken all of the above into consideration, the Commissioner has concluded that, in this case, the public interest in maintaining the exemptions at sections 31(1)(a), (b) and (c) of the FOIA outweighs the public interest in disclosing the withheld information.

Right of appeal

51. 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

52. 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.
53. 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

Samantha Bracegirdle
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