

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 April 2018

Public Authority: Office of the Police and Crime Commissioner for Lancashire

Address: County Hall
Preston
PR1 0LD

Decision (including any steps ordered)

1. The complainant requested information from the Office of the Police and Crime Commissioner for Lancashire ("the OPCC") about complaints it had received about the Chief Constable of Lancashire Police. The OPCC disclosed some information about the number of complaints received and the category of each complaint, but refused to provide details of individual allegations, citing the exemption under section 40(2) (personal information) of the FOIA as its basis for doing so.
2. The Commissioner's decision is that the OPCC was entitled to withhold the information under section 40(2) of the FOIA. She also found that the OPCC had complied with section 1(1)(b) of the FOIA in that it had correctly disclosed the information it held with regard to complaint numbers.

Request and response

3. On 27 November 2017, the complainant wrote to the OPCC and requested information in the following terms:

"I would like you to provide me with the number of complaints that have been brought against the Chief Constable of staff within this office.

I am seeking this for the past 2 years 2016 & 2017

Please can you break this down as follows:

- 1. Month of complaint*
 - 2. Who the Complaint was against (Chief Constable or staff)*
 - 3. Nature of the complaint and or category and allegation.*
 - 4. Whether the complaint was categorised as a Local Resolution or Local Investigation*
 - 5. Whether the complaint was upheld by the PCC or not upheld*
 - 6. If not upheld, was it appealed and if so what number were upheld by the appeal body."*
4. The OPCC responded on 22 December 2017. It clarified that it was only responsible for dealing with complaints about the Chief Constable, and so it did not hold any information in relation to complaints about his staff.
 5. It said that the information requested at 3) was exempt from disclosure by virtue of section 40(2) of the FOIA. However, it explained how complaints are recorded and disclosed the number of complaints received, broken down by month. It also provided figures for the information requested at 4), 5) and 6), although it did not break the figures down by month.
 6. The complainant requested an internal review on 22 December 2017. He challenged the decision to withhold the information requested at part 5) of the request, suggesting that a broad description of each complaint (eg *"'Perverting the course of justice' or 'Misconduct in a public office'"*) could be provided without revealing anyone's identity. He also expressed concerns that the figure for complaints received was inaccurate.
 7. Following an internal review, the OPCC wrote to the complainant on 29 January 2018. It revised its position slightly, disclosing the broad categories under which each of the complaints fell. It again refused to disclose the precise nature of each allegation, on the grounds that the information was exempt from disclosure under section 40(2) of the FOIA. It assured the complainant that the figures previously disclosed were accurate.

Scope of the case

8. The complainant contacted the Commissioner on 15 January 2018 to complain about the way his request for information had been handled. He disagreed with the application of section 40(2) to withhold

information and considered that the complaint figures disclosed to him in the initial response may be incorrect. Although he complained to the Commissioner prior to receiving the outcome of the internal review, he maintained his complaint once it had been received.

9. The Commissioner has therefore considered the OPCC's application of section 40(2) to withhold information in relation to part 3) of the request in this decision notice. She has also considered the accuracy of the complaint figures provided in the initial response.

Reasons for decision

Section 40 – personal information

10. 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 therefore operates to protect the rights of individuals in respect of their personal data.
11. 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.
12. The OPCC has cited section 40(2) to withhold outline information about the nature of the complaints, requested at part 3) of the request.

Is the requested information personal data?

13. The OPCC argued that the information was the personal data of the individuals who had submitted the complaints. The Commissioner was not convinced by this argument, in that she was not satisfied that, in the majority of cases, an individual was capable of being identified from the withheld information. In the few instances where she considered it would or may be possible to identify an individual from the description of their complaint, it would be a relatively simple matter to either redact or summarise the complaint in such a way that the information was anonymised, and this would not constitute the creation of new information.
14. The Commissioner has instead looked to the wording of the request, which is for information on the nature of the complaints received about the Chief Constable of Lancashire Police, and has considered whether the requested information constitutes his personal data.

15. 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 ("the 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.
16. 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.
17. Mindful that the request specifically refers to the Chief Constable of Lancashire Police and cannot be answered without reference to him, the Commissioner considers that he would be identifiable from the withheld information, and that it would be about him. As such, the Commissioner considers that the withheld information constitutes the personal data of the Chief Constable, within the meaning of section 1 of the DPA.

Is the requested information sensitive personal data?

18. Sensitive personal data is personal information which falls into one of the categories set out in section 2 of the DPA. Section 2(g) of the DPA is of relevance in this case:

"(g) the commission or alleged commission by him of any offence..."

19. The Commissioner notes that some of the complaints contain allegations of criminality. She therefore considers that information about those complaints comprises sensitive personal data, as defined in section 2(g) of the DPA.

Would disclosure contravene any of the data protection principles?

20. The OPCC 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 remains relevant when the Chief Constable is the primary data subject under consideration.

21. 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."

23. In the case of a FOIA request, personal data is processed when it is disclosed in response to the request. This means that the information may only be disclosed if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions and, in the case of the sensitive personal data, one of the Schedule 3 conditions. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

Would disclosure be fair?

24. 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.

25. 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 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 data subject); and
- the balance between the rights and freedoms of the data subject and the legitimate interests of the public.

Reasonable expectations

26. In the Commissioner's view, a key issue to consider in assessing fairness is whether the data subject has a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as a data subject's general expectation of privacy, whether the information relates to them in a private or professional capacity and the circumstances in which the personal data were obtained.

27. The Commissioner has published guidance on requests for personal data about public authority employees¹. In that guidance, she recognises that it is reasonable to expect that a public authority would disclose more information relating to senior employees than junior ones.

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https://ico.org.uk/media/fororganisations/documents/1187/section_40_reqs_for_personal_data_about_employees.pdf

28. However, it is always necessary to consider the nature of the information and the responsibilities of the employees in question, and the Commissioner has returned to this point in paragraphs 35-40, below.

Consequences of disclosure

29. As to the consequences of disclosure upon the data subject, the question here is whether disclosure would be likely to result in damage and distress to them. On this point, the Commissioner accepts that some minor distress may be caused to the data subject through disclosure. The Commissioner also recognises that disclosure of the nature of individual complaints may undermine public confidence in the Chief Constable and the wider force, in that some members of the public may assume there to be some truth to them irrespective of the fact that the complaints were not subsequently upheld.
30. The above points are considered further in paragraphs 35-40, below.

The legitimate public interest

31. Assessing fairness also involves balancing the individual's rights and freedoms against the legitimate interest in disclosure to the public.
32. Even though disclosure may cause distress to the individual concerned, and they may have a reasonable expectation that the information will not be disclosed, this does not mean that disclosure would necessarily be unfair. In this case, the Commissioner must consider the legitimate public interest in disclosure and balance this against the rights of the Chief Constable.
33. 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.
34. The Commissioner accepts that legitimate interests include the general public interest in transparency and accountability. Public confidence in the integrity of the police service will be enhanced by the extent to which it permits scrutiny of the complaints made about its most senior officers. On that point, the Commissioner notes that the OPCC has already (at internal review) provided information as to the broad category each complaint fell into (where this information was held).
35. In reaching a decision in this case, the Commissioner is mindful of the nature of the information and the role of the data subject. She has also taken into account her guidance with regard to balancing rights and

freedoms with legitimate interests when dealing with a request for personal data about public authority employees which states:

"Under the DPA, the exercise of balancing the rights and freedoms of the employees against the legitimate interest in disclosure is different to the public interest test that is required for the qualified exemptions listed in section 2(3) FOIA. In the public interest test, there is an assumption in favour of disclosure because the public authority must disclose the information unless the public interest in maintaining the exemption outweighs the public interest in disclosure. In the case of section 40(2) the interaction with the DPA means the assumption is reversed; a justification is needed for disclosure".

36. The Commissioner recognises that information about an individual acting in an official or work capacity will generally attract less protection than information about their private life. She also acknowledges that the more senior a person is, the less likely it is that disclosing information about their public duties will be unwarranted or unfair.
37. However, she has been guided by the First-tier Tribunal decision EA/2016/0217², which considered an almost identical request for information.
38. In a unanimous decision, the Tribunal found that information about the nature of complaints made about a Chief Constable should not be disclosed, stating that the public interest in transparency and accountability was already adequately served by the very complaints mechanism which facilitated scrutiny by Police and Crime Commissioners.
39. Furthermore, the Tribunal found:

"...that disclosure [of information about the nature of complaints received about him by the Police and Crime Commissioner] would be an unwarranted interference in the Chief Constable's rights...Those rights arising from both his personal interest in not being held up for public criticism on allegations that were found not to be sustainable, as well as his interest in the role of Chief Constable not being undermined during his time in office".

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2031/Police%20&%20Crime%20Commissioner%20for%20Lincolnshire%20v%20IC%20&%20Victoria%20Young%20EA.2016.0217%20\(23.05.17\).PDF](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2031/Police%20&%20Crime%20Commissioner%20for%20Lincolnshire%20v%20IC%20&%20Victoria%20Young%20EA.2016.0217%20(23.05.17).PDF)

40. The Commissioner notes that in this case (as in the case considered by the Tribunal), the complaints ranged from criminal allegations to criticisms of the Chief Constable's execution of his duties, and that none of the complaints received by the OPCC were upheld.
41. In the circumstances of this case, and with due regard to all the above, the Commissioner is satisfied that the legitimate interests of the public are not sufficient to justify any negative impact to the rights, freedoms and interests of the data subject. She therefore considers that disclosure of information relating to complaints about the Chief Constable in his public life would not be fair and that the OPCC was entitled to rely on section 40(2) of the FOIA to withhold the information.

Accuracy of information

42. The complainant had made the request through the public *Whatdotheyknow* website, and he was subsequently contacted by a third party who alleged that the figures the OPCC disclosed did not appear to include complaints that he had submitted. The third party implied that his complaints alone exceeded the number quoted in the OPCC's response. The complainant thought that this threw some doubt on the accuracy of the figures he was provided with.
43. The OPCC explained to the Commissioner that it was satisfied that the figures were correct. It said that the third party appeared to have misunderstood its procedure for recording complaints and allegations. Put simply, a single complaint may contain multiple allegations, and while a complainant might conceptualise each one as being a separate complaint, the OPCC records allegations under the wider complaint they pertain to. Thus, the figures it disclosed (25 complaints, composed of 46 allegations) took account of complaints which had multiple parts.
44. The Commissioner is satisfied that the explanation the OPCC provided is cogent and well evidenced. The complainant apparently has no other grounds for doubting the accuracy of the information. The Commissioner is therefore satisfied that, on the balance of probabilities, the response complied with the OPCC's obligation under section 1(1)(b) of the FOIA, to communicate the information it holds in respect of complaint numbers.

Right of appeal

45. 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

46. 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.
47. 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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