

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 July 2019

Public Authority: Office of the Police and Crime Commissioner for West Yorkshire

Address: Ploughland House
62 George Street
Wakefield
WF1 1DL

Decision (including any steps ordered)

1. The complainant requested information relating to the Chief Constable of West Yorkshire Police's role as Service Director for the College of Policing's Strategic Command Course.
2. The Office of the Police and Crime Commissioner for West Yorkshire (OPCC) denied holding some information within the scope of the request. It disclosed some information but refused to provide the remainder, citing section 40 (personal information) of the FOIA as its basis for doing so.
3. The Commissioner investigated the OPCC's application of sections 40(1) and 40(2). She also considered whether, on the balance of probabilities, it held further information within the scope of the request.
4. The Commissioner's decision is that the OPCC correctly applied the provisions of section 40(1) to withhold the information withheld by virtue of that exemption. She also concluded that the OPCC correctly applied the provisions of section 40(2) to withhold the information withheld by virtue of that exemption.
5. She determined that, on the balance of probabilities, the OPCC did not hold the further information within the scope of the request.
6. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

7. On 21 December 2018, in a request called “[Chief Constable] *Dee Collins role as Course Service Director at College of Policing*” the complainant wrote to the OPCC and requested information in the following terms:

“Please supply all data held in connection with the above posting which should include but is not limited to:

1. All emails between the PCC's office, including the PCC and any of his staff, and the chief constable, or her staff officer or PA.

2. All emails between the PCC's office, including the PCC and any of his staff, and the chief executive of the College of Policing, or his personal assistant or [name redacted].

3. Any notes in the PCC's diary, day book or the like concerning the Memorandum of Understanding.

4. Any data that assists in the public's wider understanding over the change in the characterisation of the role as a 'flexible attachment' when it had previously been referred to repeatedly in the local press, and by the West Yorkshire Police (WYP) press office, as a 'secondment'.

5. Any data that assists in the public's understanding over the change in the timescales. It was reported in the local press, and by the WYP press office, that the secondment would begin in January, 2019. It actually began on 3rd December, 2018.

6. Any data that assists in the public's understanding of the rationale behind the PCC allowing the chief constable to take up this post. Albeit on a cost neutral basis”.

8. The request was made using ‘*whatdotheyknow*’.
9. The OPCC responded on 23 January 2019. It denied holding some of the requested information, namely in relation to parts (2), (3) and (5) of the request. It provided some information within the scope of parts (1), (4) and (6) of the request but refused to provide the remainder, citing the following exemptions as its basis for doing so:
- section 40(1) (personal information)
 - section 40(2) (personal information).
10. Following an internal review, the OPCC wrote to the complainant on 5 February 2019 maintaining its original position.

Scope of the case

11. The complainant contacted the Commissioner on 8 February 2019 to complain about the way his request for information had been handled. He told the Commissioner:

"The complaint is, effectively, set out in the internal review request the points within which have either received no response, or an unsatisfactory response".

12. In that internal review request, the complainant told the OPCC, amongst other things:

"... No data has been provided in respect of questions 3, 4, 5 and 6. There is no explanation as to whether information is held, or otherwise. It is almost certain that information of this class is held".

13. The Commissioner notes the discrepancy between the complainant's view and that of the OPCC with regard to those parts of the request.

14. The complainant also told the OPCC:

"Disclosure has been redacted that appears, in some cases, to be outwith the Act and more to do with concealing an embarrassing [sic] truth to this particular requester. The PCC is reminded that disclosure under the Act is applicant blind and to the wider world".

15. In that respect, the OPCC told him:

"...redactions were applied only to information which was outside of your request or which was personal information and exempt".

16. The Commissioner wrote to the complainant, setting out the scope of her investigation: whether the OPCC was entitled to rely on section 40(1) and/or section 40(2) as a basis for refusing to provide the withheld information and whether it was correct when it said that it did not hold the information requested at parts (2), (3) and (5) of the request.

17. As is her practice, the Commissioner asked the complainant to contact her, within a specified timeframe, if there were other matters that he considered should also be addressed.

18. In the absence of a response from the complainant, who the Commissioner knows to be conversant with the ICO complaints procedure, the Commissioner progressed her investigation on the basis set out in her correspondence.

19. During the course of her investigation, the OPCC provided the Commissioner with a copy of the withheld information. The OPCC also confirmed that the names of senior police officers and senior members of staff have been disclosed, but that the names of junior officers of staff and the direct email addresses and telephone numbers of all officers and staff had been redacted.
20. The analysis below considers the OPCC's application of section 40 to the withheld information. The Commissioner has also considered whether, on the balance of probabilities, the OPCC held further information within the scope of parts (2), (3) and (5) of the request at the time the request was made.
21. For the purposes of this decision notice, the Commissioner will refer to senior police officers and senior members of staff as 'senior officers'.

Reasons for decision

Section 40 personal information

Section 40(1)

22. Section 40(1) of the FOIA states:

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject".

23. During the course of her investigation, the OPCC told the Commissioner:

"... information held by the OPCC which identifies [the requester]'s email address and his name ... has been redacted under S40(1).

This information is personal information under the Data Protection Act 2018 because it can be used to identify [the requester] and also because it is linked to him ...".

24. Section 3(2) of the Data Protection Act 2018 (DPA) defines personal data as:

"any information relating to an identified or identifiable living individual".

25. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

26. The Commissioner is satisfied that the complainant could be identified from the information concerned and that this information is, therefore, his own personal data.
27. This information is therefore exempt under section 40(1) of the FOIA and the OPCC was entitled to withhold that information.
28. The Commissioner has next considered the OPCC's application of section 40(2) to the small amount of information withheld by virtue of that subsection of the exemption.

Section 40(2)

29. 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(3A)(3B) or 40(4A) is satisfied.
30. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
31. 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 of the FOIA cannot apply.
32. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

33. As noted above, section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

34. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

35. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
36. In this case the OPCC told the complainant that personal data relating to staff had been redacted from the information it provided to him:

"... in order to avoid a breach of the Data Protection Act 2018..."
37. Similarly, the OPCC told the Commissioner:

"Information which identifies the names, email addresses and direct telephone numbers of police officers and members of staff has been identified as personal information under S3(2) of the Data Protection Act 2018 because it relates to an identified living individual"
38. Having considered the withheld information, the Commissioner is satisfied that the information relates to police officers and members of staff. She is satisfied that this information both relates to, and identifies, those individuals. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
39. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
40. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

41. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject"

42. In the case of an 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 lawful, fair and transparent.
43. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
44. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

Is the information special category data?

45. Information relating to special category data is given special status in the GDPR.
46. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
47. Having viewed the withheld information, the Commissioner finds that a small amount of the withheld information does include special category data. She has reached this conclusion on the basis that there is a brief reference to data concerning the health and wellbeing of an identifiable individual.
48. The Commissioner observes that, while within the broad scope of the request, the special category data is not directly relevant to the request.
49. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
50. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
51. The Commissioner has seen no evidence or indication that the individual(s) concerned have specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
52. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.
53. The Commissioner has gone on to consider if there is an Article 6 condition to allow for the lawful processing of the remaining personal data that is not special category data.

Lawful processing: Article 6(1)(f) of the GDPR

54. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent

that at least one of the " lawful bases for processing listed in the Article applies.

55. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"*².

56. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

(i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

(ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;

(iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

57. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

58. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of

² Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

accountability and transparency for their own sakes, as well as case-specific interests.

59. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
60. Albeit without providing any evidence in support of his view, the complainant referred to "*the likely high level of public interest*" in the outcome of his request.
61. Acknowledging the legitimate interest in respect of the withheld email addresses and telephone numbers of specific individuals, the OPCC told the complainant:

"The legitimate interest in disclosure of this information relates to a general principle of accountability and transparency and an interest in senior public figures being accessible to members of the public".

62. The OPCC confirmed that view in its submission to the Commissioner.
63. The Commissioner acknowledges that the withheld information under consideration all relates to the data subjects' professional lives.
64. Given the subject matter of the request, and the need for accountability and transparency in relation to public authorities, she considers the interest is legitimate.

Is disclosure necessary?

65. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
66. In its submission to the Commissioner, the OPCC accepted that the disputed information relates to the data subjects' professional lives.
67. With respect to the information that was provided to the complainant, the OPCC told the Commissioner it had concluded that disclosure of the names of senior officers was necessary to meet the legitimate interest:

"... because this illustrates how a decision of significant public interest was made and by whom".

68. However, with respect to the withheld information, it did not consider that disclosure was necessary to fulfil the legitimate interest. In that respect, the OPCC confirmed that:

"... the names of junior officers or staff have been redacted and the direct email addresses and telephone numbers for all officers and staff have been redacted".

69. In support of that position, the OPCC advised that:

"... email and telephone contact information for the OPCC and West Yorkshire Police is available on the respective websites".

70. In considering whether disclosure of the information is necessary in this case, the Commissioner considers it important to recognise the different types of personal data which have been withheld:

- the names and contact details of junior officers and staff
- the contact details, in terms of direct email addresses and telephone numbers, of senior officers

Information relating to junior officers or staff

71. In respect of the names and contact details of junior officers and staff, the Commissioner does not consider disclosure is necessary in order to meet the legitimate interest identified above. She accepts that general contact details and email addresses for West Yorkshire Police and the OPCC are available on their respective websites.

72. Furthermore, she does not consider that disclosure of information that constitutes the personal data of junior officers or staff who were acting in an administrative capacity would bring any greater understanding of the posting that is the subject matter of this request.

73. Therefore, she does not consider that the disclosure of this information is necessary to meet the legitimate interest in question. As such, article 6(1)(f) is not met in respect of this information.

74. As the Commissioner has decided in this case that disclosure of such information is not necessary to meet the legitimate interest, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

Information relating to senior officers

75. In respect of the withheld information relating to senior officers, the Commissioner considers there to be a stronger case for arguing that

disclosure of such information is necessary in order to meet the legitimate interests identified.

76. However, the Commissioner recognises that the test is one of 'reasonable necessity' which involves considering alternative measures; disclosure would not be necessary if the legitimate aim could be achieved by something else.
77. The Commissioner has acknowledged above the legitimate interest in transparency and in senior public figures being accessible to the public. In that respect, she recognises that the information that the OPCC disclosed in this case included contact details for press enquires and the Chief Constable's Office, for the OPCC and for the College of Policing.
78. She considers that the provision of those means of contact achieve the legitimate aim. Disclosure under the FOIA of the withheld information relating to the senior officers would therefore not be the least intrusive means of achieving the legitimate aim.
79. As the Commissioner has decided in this case that disclosure of the withheld information is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

The Commissioner's view

80. The Commissioner has decided the OPCC was entitled to withhold the information under section 40(2), by way of section 40(3A)(a) of the FOIA.

Section 1 - general right of access

81. Section 1 of the FOIA states that:

"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."

82. The complainant told the OPCC:

"The number of emails disclosed in response to Q's 1 and 2 appear, to my trained eye, to be incomplete and do not satisfy the terms of the request..."

83. Similarly, he told the Commissioner:

"Disclosures received from two other public authorities, on broadly the same topic, reveal that the documents and information received from WYOPCC is incomplete".

84. In its submission to the Commissioner, the OPCC told her:

"All the documents retrieved were disclosed with a small number of redactions".

85. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First Tier Tribunal decisions, applies the civil standard of the balance of probabilities.

86. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

87. In this case, the Commissioner has sought to determine whether, on the balance of probabilities, the OPCC held further information within the scope of the request.

88. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. She will also consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded. In addition, she will consider any other information or explanation offered by the public authority which is relevant to her determination.

89. The complainant disputed that the OPCC did not hold information within the scope of parts (2), (3) and (5) of the request. He told the OPCC:

"It is almost certain that information of this class is held. It would be an extraordinarily lax way to run the office of a PCC if there were no such records".

90. During the course of her investigation, the Commissioner asked the OPCC to describe the searches it carried out for information falling within the scope of the request, and the search terms used. She also asked other questions, as is her usual practice, relating to how the OPCC established whether or not it held the requested information.

91. In its submission to the Commissioner, the OPCC provided her with details of the searches it had conducted for the requested information.

92. The OPCC told the Commissioner that, in order to determine whether or not information within the scope of the request was held:

"On receipt of the request a search of the shared network for the OPCC was undertaken using the search terms 'College of Policing', 'Strategic Command Course' and 'Course Service Director'. No relevant information was found".

93. It confirmed that all electronic information processed by the OPCC is saved on a shared network and that no hard copy files were held. The OPCC also explained which email accounts were searched for any relevant information and why those accounts were considered relevant.

94. The Commissioner acknowledges that the requested information may be of interest to the complainant. However, while appreciating the complainant's frustration that the OPCC did not hold the requested information, the Commissioner is mindful of the comments made by the Information Tribunal in the case of *Johnson / MoJ (EA2006/0085)*³ which explained that the FOIA:

"... does not extend to what information the public authority should be collecting nor how they should be using the technical tools at their disposal, but rather it is concerned with the disclosure of the information they do hold".

95. Having considered the OPCC's response, and on the basis of the evidence provided to her, the Commissioner is satisfied that, on the balance of probabilities, the OPCC did not hold further information within the scope of the request.
96. The Commissioner therefore considers that the OPCC complied with its obligations under section 1(1) of the FOIA.

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<http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i90/Johnson.pdf>

Right of appeal

97. 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

98. 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.

99. 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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Information Commissioner's Office
Wycliffe House
Water Lane
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SK9 5AF**