

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 July 2019

Public Authority: Police and Crime Commissioner for West Mercia
Address: Office of the Police and Crime Commissioner
West Mercia Police
Hindlip Hall
Worcester
WR3 8SP

Decision (including any steps ordered)

1. The complainant has requested information from the Office of the Police and Crime Commissioner for West Mercia (the "OPCC") about the ending of an alliance agreement between West Mercia and Warwickshire police forces. The OPCC refused to disclose the requested information citing sections 43(2) (commercial interests) and 42(1) (legal professional privilege) of the FOIA.
2. The Commissioner's decision is that the OPCC was entitled to rely on section 42(1) to withhold the requested information. No steps are required.

Background

3. On 29 June 2009 Warwickshire Police Authority and West Mercia Police Authority accepted the professional recommendations of their respective Chief Constables to deliver all policing services across both force areas.
4. The resulting strategic alliance was formed to:

"... enable both forces to meet the challenge of reducing policing budgets and provide greater operational and organisational resilience"¹.

5. In 2012, Police Authorities were subsequently replaced by Police and Crime Commissioners, this request being submitted to a Police and Crime Commissioner.
6. An independent review² of the strategic alliance was commissioned in November 2014 by both parties. This review concluded:

"Our conclusion is that the Strategic Alliance forged by Warwickshire and West Mercia is a beacon of collaboration that others can learn from, notably the integration of operational policing across force boundaries and the harmonisation of finance, HR and estate services".

7. According to Warwickshire Police's website:

"Warwickshire Police currently works in an alliance with West Mercia Police, with services delivered jointly across each policing area. While each force retains its own chief officer group and budgetary and operational control of local policing, all other services are delivered jointly. The alliance is not a merger, however. Each force retains its own identity and separate financial accounts are also maintained.

The agreement to form the alliance was made in June 2011 by the two force Chief Constables and their respective Police Authorities. The decision to work in an alliance has been supported by successive Police and Crime Commissioners in Warwickshire and West Mercia and was also given national acclaim.

One of the prime catalysts for the alliance was the necessity for the two forces to reduce their costs by £35 million as part of the government's comprehensive spending review. However, it was also recognised that the benefits for both forces were far broader than financial, including delivery of greater operational and organisational resilience, protecting frontline policing resources and

¹ <https://www.warwickshire-pcc.gov.uk/wp-content/uploads/2017/07/Warwickshire-and-West-Mercia-Force-and-Police-Authority-Collaboration-Agreements-2.pdf?x33396>

² https://www.warwickshire-pcc.gov.uk/wp-content/uploads/2017/07/police_force_collaboration.pdf?x33396

ensuring our processes were lean and more effective to deliver the best possible services.

In October 2018, the Chief Constable and PCC of West Mercia announced that they were terminating the alliance agreement with effect from October 9, 2019. Since the announcement was made by West Mercia, detailed planning has been undertaken to determine Warwickshire's future beyond the alliance.

While the decision to end the alliance was not one that Warwickshire agreed with, the termination brings the opportunity to rebuild Warwickshire Police from the bottom upwards and build new partnerships with other forces and organisations. Both the PCC and Chief Constable are confident that the resulting structures will be more effective and more responsive to local needs in its post-alliance future.

The alliance will continue in operation until October 2019 and the focus of the PCC and Warwickshire Police in the meantime is on securing an orderly transition to the future arrangements”.

8. Further background information about this request can be found online. For example, the following articles about the scrapping of the alliance were published on 9 October 2018^{3,4}.
9. The Commissioner has viewed the withheld information.

Request and response

10. On 20 December 2018 the complainant wrote to the OPCC and requested information in the following terms:

“I have been looking at your statements and those of The Warwickshire Force in respect of your announcement that you wish to exit the current arrangements of alliance. It seems to me from the fact that you signed a new alliance undertaking in April 2018 and both forces have publicly made claims about the benefits the the [sic] alliance has produced, something serious must have happened to cause your change of direction.

³ <https://www.bbc.co.uk/news/uk-england-coventry-warwickshire-45800073>

⁴ <https://www.shropshirestar.com/news/crime/2018/10/09/police-forces-to-end-alliance/>

You make a clear statement in your video published in October that you wish to see a renegotiation over the alliance because it currently does not work to the benefit of the people of West Mercia. May I ask for a copy of the analysis obviously undertaken by West Mercia Police and your Office as to the failings and what you wish to see changed together with the risk analysis which I'm sure you have completed before making such a major step.

The implications of what seems to be happening are very serious not just for citizens resident in The West Mercia Police Area but also to all who travel through and also nationally given the focus of attention on what has been happening.

I am happy for the requested analysis to be sent by email, or if you prefer, I can travel to your offices to collect if you are concerned about digital safety".

11. The OPCC responded on 24 January 2019. It refused to provide the requested information and cited the following exemption as its basis for doing so: section 43(2) (commercial interests) of the FOIA.
12. Following an internal review, the OPCC wrote to the complainant on 19 February 2019. It revised its position, maintaining reliance on section 43(2) and adding section 42(1) (legal professional privilege) of the FOIA.

Scope of the case

13. The complainant contacted the Commissioner on 4 March 2019 to complain about the way his request for information had been handled. His grounds of complaint were as follows:

"I asked for information held by the OPCC West Mercia which led him to give notice for cancellation of a joint working agreement with Warwickshire Constabulary just two months after signing an agreement for a two year continuation of such agreement in August 2018.

I am a resident in Warwickshire and have been unable to discover any statistical or strategic information which has led to the notice of cancellation.

The Commissioner for West Mercia has similar [sic] failed to produce any detailed analysis, nor has the Chief Constable for West Mercia. Given that the notice of cancellation was issued by West Mercia the onus must be on him to inform the public, of both West Mercia and Warwickshire and of the wider public in general (all

users of the police services either living in the constituent areas, of [sic] passing through) of the reasons for such notification of cancellation.

Further, it is unreasonable for the public(s), for whom said offices were created as elected offices, to consider the actions of This Commissioner, without disclosure of the facts leading to cancellation of notification, performance of services within the joint working against the calculated benefits of separation and full calculation of assessed costs before giving notice, during the work out of such notification and estimated performance and costs following.

The monies involved in policing are public monies. The costs and benefits are public. There is no issue of commerciality indicated. Therefore, to claim that whilst there is a public interest; the far greater public interest rests with ensuring the communities of West Mercia get the best possible policing service, now and in the future.

Disclosing the information requested regarding the alliance termination would compromise West Mercia's ability to achieve this...

It is submitted that this narrow view of responsibility only to the public of West Mercia is both wrong in fact and in law as the force is a nationally and locally funded body with a duty to all in the UK and it is being used as a cloak to hide decision making the very reason elected Commissioner were [sic] appointed".

14. The Commissioner will consider the citing of exemptions below.

Reasons for decision

Section 42 – legal professional privilege

15. Section 42(1) provides that information in respect of which a claim to legal professional privilege (LPP) could be maintained in legal proceedings is exempt from disclosure. It is a class based exemption which means that any information falling within the category described, is exempt from disclosure. As section 42 is a qualified exemption it is subject to the public interest.
16. LPP is a common law concept that protects the confidentiality of communications between a lawyer and client. In *Bellamy v the Information Commissioner and the Secretary of State for Trade and*

Industry (EA/2005/0023, 4 April 2006) the Information Tribunal described it as:

"... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and third parties if such communication or exchanges come into being for the purpose of preparing for litigation".

17. Therefore, the purpose of LPP is to protect an individual's ability to speak freely and frankly with their legal advisor in order to obtain appropriate legal advice. It recognises that individuals need to lay all the facts before their adviser so that the weaknesses and strengths of their position can be properly assessed. Therefore, LPP evolved to make sure communications between a lawyer and his or her client remain confidential.
18. There are two types of LPP, litigation privilege and advice privilege.
19. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. For information to be covered by litigation privilege, it must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It covers communications between lawyers and third parties, as long as they are made for the purposes of the litigation. Litigation privilege applies to a wide variety of information, including advice, correspondence, notes, evidence or reports.
20. Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the dominant purpose of seeking or giving legal advice.
21. The legal adviser must have given advice in a legal context, for example legal rights, liabilities, obligations or remedies. Advice from a lawyer about financial matters or on an operational or strategic issue is unlikely to be privileged, unless it also covers legal concerns, such as advice on legal remedies to a problem.
22. The withheld information is a single document which consists of detailed legal advice. It concerns the dissolution of the partnership between West Mercia and Warwickshire police forces. The OPCC has advised the Commissioner:

"The primary purpose of the communications ... was to outline ... legal advice on the strategic options available, and material legal

considerations for the PCC's consideration of the potential dissolution of the strategic policing alliance. The materials were deliberately marked at the time as being subject to legal privilege, because they were, and that continues to be the case".

23. The OPCC has further advised that:

"It is our contention that the information requested is subject to both legal advice privilege, and litigation privilege. These privileges have not been waived or lost at any time".

24. The OPCC has stated that the information is exempt from disclosure by way of being both legal advice privilege and litigation privilege. It has stated the following:

"Legal Advice Privilege

The information requested entirely consists of communications from myself, in my professional capacity, to the Police and Crime Commissioner (PCC). I am the PCC's primary legal advisor...

The primary purpose of the communications from myself to the PCC was to outline my legal advice on the strategic options available, and material legal considerations for the PCC's consideration of the potential dissolution of the strategic policing alliance. The materials were deliberately marked at the time as being subject to legal privilege, because they were, and that continues to be the case.

Litigation Privilege

As previously established, the information requested is contained entirely within formal legal advice communications from myself, in my professional capacity, as legal advisor to the PCC.

The communications provided professional advice to the PCC on the potential legal implications of the various strategic options available, including the termination of the current alliance arrangement between West Mercia Police and Warwickshire Police.

Litigation is not only possible, but is fully expected in this matter ... The parties are already preparing for mediation due to ongoing disputes regarding the termination...

The terms of the alliance agreement stipulate that, as the party terminating the arrangement, West Mercia is liable for the reasonable costs of both parties of implementing changes arising from the termination. This is a key point, as both parties are naturally seeking to interpret the definition of 'reasonable' costs in

different and conflicting ways, in order to best protect their own financial interests.

There is therefore a clear and justified expectation that formal court action will follow or be part of the formal disaggregation of the two police forces in October, in order to resolve final legal and financial liabilities for both parties.

The disclosure and publication of these communications would severely compromise the PCC's ability to effectively, robustly, and fairly contest the anticipated litigation".

25. The Commissioner is satisfied that the sole purpose of the withheld information in this case is to serve as legal advice created to assist in anticipated future litigation. The information was created by a legal professional solely for the purpose of preparation in the event of an appeal following any dissolution of the strategic policing alliance.
26. The Commissioner is also satisfied that the correspondence is 'confidential' and the OPCC has not made it available to the public or any third party without restriction. The Commissioner has viewed this information and she has found that it is as the OPCC has described.
27. The OPCC has explained:

"The request asks for disclosure of "the analysis obviously undertaken by West Mercia Police and your Office as to the failings and what you wish to see changed together with the risk analysis". The very premise of the request clearly establishes that public disclosure would undermine West Mercia's position, relating to both future litigation and collaborative negotiations. In both scenarios, disclosure would be significantly detrimental to the commercial interests of the Police and Crime Commissioner, and the communities of West Mercia.

The information is subject to clear, justified and retained legal advice privilege and litigation privilege".

28. Having considered the content of the withheld information, the Commissioner accepts that the requested information is subject to litigation privilege. It is from a professional legal adviser for the purpose of seeking and providing legal advice prior to contemplated legal action. On this basis, the Commissioner finds that section 42(1) of the FOIA is engaged.

Public interest test

29. The exemption provided in section 42(1) is a qualified exemption. This means that where the exemption is engaged a public interest test must be carried out to determine whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
30. Both the OPCC and the complainant have submitted arguments which the Commissioner has taken into consideration.

Public interest arguments in favour of disclosure

31. Some weight must always be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.

32. The complainant has argued:

"... the very reason for both The Freedom of Information Act and the creation of The Office of Police Commissioner by Act of Parliament, was to ensure that actions of both the Police Chief Constable and The Police Commissioner are open to scrutiny by the public, in particular by the public of the areas which immediacy and directness [sic] are affected by the bodies referred to".

33. The OPCC has argued:

"... With the regard to the disclosure of documents linked to the termination ... I accept that the public may have some interest in the content of these materials. However, this does not in itself constitute a public interest, in terms of whether disclosure would be in the best interests of the public".

34. However, it has countered this by adding:

"The reasons for the termination of the current strategic alliance have been clearly articulated a number of times ... including references to financial or commercial interests. Please view webcasts of the more recent meetings of West Mercia Police and Crime Panel, or the resulting media coverage, for specific examples".

Public interest arguments in favour of maintaining the exemption

35. The OPCC has argued:

"Whilst disclosure would enable a greater degree of transparency, the far greater public interest rests with ensuring the communities of West Mercia get the best possible policing service, now and in the future. Disclosing the information requested regarding the alliance termination would compromise West Mercia's ability to achieve this".

36. It has also advised the Commissioner:

"There is ... a clear and justified expectation that formal court action will follow or be part of the formal disaggregation of the two police forces in October, in order to resolve final legal and financial liabilities for both parties.

The disclosure and publication of these communications would severely compromise the PCC's ability to effectively, robustly, and fairly contest the anticipated litigation".

Balance of the public interest arguments

37. The Commissioner considers that the public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP, safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which is in turn, fundamental to the administration of justice.
38. Therefore, the Commissioner considers that the public interest in maintaining this exemption is a particularly strong one in terms of not undermining the principle of LPP. To equal or outweigh that public interest, the Commissioner would expect there to be stronger opposing factors.
39. The Commissioner has considered the arguments put forward by both parties and her prior findings and those of the Information Tribunal in relation to LPP.
40. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible. Those involved in dealings with the public authorities may feel they have better understood the process if they know how the public authority reached its decisions and its legal justification for a course of action.
41. The Commissioner has attached appropriate weight to the view that there is a significant public interest in not undermining the ability of a public authority to freely seek and receive frank legal advice. She considers that freely seeking and obtaining frank legal advice is crucial to a public authority's ability to make informed and legally supported decisions. She recognises that there is a need for confidentiality

between lawyers and their clients so that advice can be given freely, without fear of intrusion.

42. Having considered the legal advice, she notes that it is both recent and current. She considers that this is a particularly strong argument in favour of maintaining the exemption.
43. Having regard to the circumstances of this case, the Commissioner's view is that the public interest in disclosure does not equal or outweigh the strong public interest in maintaining the OPCC's right to consult with its lawyers in confidence.
44. The Commissioner has ultimately concluded that the arguments for disclosure are not greater than the arguments for maintaining the exemption, and that the exemption provided by section 42(1) for litigation privilege has been correctly applied.
45. As section 42(1) is properly engaged the Commissioner has not found it necessary to consider the application of section 43(2).

Right of appeal

46. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

47. 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.
48. 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

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