

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 January 2020

Public Authority: Chief Constable of Humberside Police
Address: Humberside Police HQ
Priory Road
Hull
HU5 5SF

Decision (including any steps ordered)

1. The complainant has requested copies of the disciplinary records of eight named police officers. The Chief Constable of Humberside Police ("the Police") confirmed that it held some information but refused to provide it, relying on section 40(2) of the FOIA (personal data) to do so.
2. The Commissioner's decision is that the Police have correctly applied section 40(2) to withhold the information.
3. The Commissioner does not require any further steps.

Request and response

4. On 12 April 2019, the complainant wrote to the Police in relation to other matters, but also requested:

"a copy of the disciplinary record of each of the officers involved in [Reference number]. This should show pre-December 2016 findings as well as post-2016 findings. These officers being:

[Officer A]

[Officer B]

[Officer C] (you may need extra space in relation to his disciplinary record)

[Officer D]

[Officer E]

[Officer F]

[Officer G]
[Officer H]"

5. The Police responded on 7 May 2019. They stated that, as the requested information would be the personal data of the officers involved, it would be their personal data and so exempt from disclosure under section 40(2) of the FOIA.
6. The complainant requested an internal review on 8 May 2019, on the grounds that there was information in the public domain relating to gross misconduct proceedings.
7. The Police finally provided the outcome of its internal review on 6 November 2019. It now refused to confirm or deny holding information within the scope of the request as it argued that even providing a confirmation (or a denial) that information was held would disclose personal data about the officers in breach of their rights under data protection legislation.

Scope of the case

8. The complainant first contacted the Commissioner on 8 August 2019 to complain about the way his request for information had been handled. At that point, the Police had yet to complete the outcome of their internal review and the Commissioner's intervention was necessary to expedite this process.
9. Once the internal review was completed, the complainant drew the Commissioner's attention to media reports of the outcome of a misconduct hearing in which Officer C was found guilty of gross misconduct. He argued that this meant that there was an overwhelming interest in the requested information being disclosed to him.
10. The Commissioner drew the article to the attention of the Police and suggested that there would be a reasonable public expectation that the Police would be likely to hold at least some information within the scope of the request. On that basis, she suggested, the Police could issue a confirmation that some information was held without infringing the rights of the data subjects.
11. Having reflected on the matter, the Police subsequently issued a fresh refusal notice on 13 January 2020. They now confirmed that they held some relevant information but still wished to withhold it, relying on section 40(2) in order to do so. It also refused to confirm which officers it did and did not hold information about.

12. The scope of the Commissioner's investigation has therefore been to determine whether the withheld information is personal data and, if it was, to determine whether its disclosure would breach any of the GDPR principles.
13. The Commissioner did not seek the withheld information in this case because she did not consider that it would add anything to her considerations. Nothing in this decision notice should be taken as indicating what information the Police might or might not hold within the scope of the request.

Reasons for decision

Section 40 personal information

14. Section 1(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.*
15. 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.
16. 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').
17. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.

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

18. 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.
19. The complainant has pointed to the fact that the Police already publishes anonymised information about the outcomes of misconduct hearings. He therefore argues that all the information he has requested is already in the public domain. He merely wants the (anonymised) information relating only to the eight named officers.

Is the information personal data?

20. Section 3(2) of the DPA defines personal data as:

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

21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
22. 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.
23. 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.
24. The complainant's request named eight officers. Therefore any information which the Police disclosed must, by virtue of being within the scope of the request, be linked to one of those eight officers. If a record was linked with an individual officer, it would demonstrate that the officer in question had been subject to some form of disciplinary proceedings. The information would therefore reveal something about the officers involved.
25. Given the relatively small number of people involved, the Commissioner considers that it would be difficult to redact any records that exist sufficiently to prevent a record being linked to an individual officer. As disclosure under the FOIA is disclosure to the world at large, she must also consider the possibility that some of the officers involved might be able to identify their own records and, by comparing notes, identify the remaining officers.
26. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that any information would

relate to the named officers. She is satisfied that any information would both relate to and, when read with the request, identify, the officers concerned. This information would therefore fall within the definition of 'personal data' in section 3(2) of the DPA.

Would disclosure contravene principle (a)?

27. 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.
28. The most relevant DP principle in this case is contained in Article 5(1)(a) of the GDPR which states that:

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

29. 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.

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

30. 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.
31. 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.

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:-

32. 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.
33. 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

34. 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 accountability and transparency for their own sakes, as well as case-specific interests.
35. 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.
36. The Commissioner accepts that there is a legitimate interest in knowing whether those responsible for upholding and enforcing the law are maintaining the highest professional standards.

Is disclosure necessary?

"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".

37. '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.
38. The Police pointed out to the Commissioner that, whilst the complainant's more recent correspondence had focused on misconduct hearings, the original request sought disciplinary records. The Police argued that an officer's disciplinary records would go beyond misconduct and would cover minor matters which would not, in isolation, constitute misconduct.
39. The Commissioner is conscious that disclosure under the FOIA is disclosure to the world at large. It is the equivalent of the Police publishing the information on its website. When considering the necessity test, she is not therefore considering whether providing the information *to the complainant* is necessary to achieve the legitimate interest, but whether it is necessary to *publish* the information.
40. As noted above, the Commissioner does recognise the legitimate interest in being assured that police officers are held to the highest standards of behaviour. However she considers that this can be achieved by the requested information being made available, where necessary, to line managers, the relevant Professional Standards Departments and, if necessary, the Independent Office for Police Conduct. Clearly this a less privacy-intrusive means of achieving the legitimate interest than publishing the information.
41. The fact that anonymised information on misconduct hearings is already in the public domain further weakens the necessity to publish the withheld information – which could be de-anonymised.
42. 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).
43. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in transparency, she does not need to go on to conduct the balancing test and has not done so.
44. The Commissioner therefore finds that section 40(2) of the FOIA is engaged in respect of the withheld information.

Other matters

45. Whilst there is no statutory time limit for conducting internal reviews, the Commissioner's guidance states that these should normally be carried out within 20 working days and should never take longer than 40 working days.
46. The Commissioner notes that, in this particular case, it took the Police six months and her own intervention, to complete its internal review. She considers such a delay to be unacceptable.

Right of appeal

47. 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

48. 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.
49. 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

Phillip Angell
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