

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 14 September 2021

**Public Authority:** Chief Constable of Bedfordshire Police  
**Address:** Bedfordshire Police Headquarters  
Woburn Road  
Kempston  
Bedford  
MK43 9AX

#### **Decision (including any steps ordered)**

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1. The complainant requested information about injury awards for police officers. Bedfordshire Police provided some information within the scope of the request, but refused to provide the number of police officers granted an injury award for specified years (part 2 of the request), citing section 40(2) of FOIA, the exemption for personal information. The complainant's complaint focused only on the section 40(2) refusal. During the course of the Commissioner's investigation, Bedfordshire Police partly revised its position in that it said it did not hold information for the years 2018/19 or 2019/20, but maintained that section 40(2) applied to the information it held for 2017/18.
2. The Commissioner's decision is that Bedfordshire Police has correctly relied on section 40(2) in the circumstances of this case. She also finds on the balance of probabilities, that Bedfordshire Police does not hold the requested information for the years 2018/19 or 2019/20 for the reasons set out in this notice.
3. No steps are required as a result of this notice.

## Request and response

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4. On 17 September 2020 the complainant wrote to Bedfordshire Police via the *WhatDoTheyKnow.com* website<sup>1</sup> and requested information in the following terms:

*"I am interested in information relating to injury awards pursuant to the Police (Injury Benefit) Regulations 2006 SI 2006/932.*

*1. How many individuals currently receive injury awards from your force?*

*2. For each of the three years 2017/18, 2018/19 and 2019/2020 please provide the number of police officers granted an injury award.*

*3. For each of the three years 2017/18, 2018/19 and 2019/2020 please provide the amount paid to all those in receipt of injury awards.*

*4. For each of the three years 2017/18, 2018/19 and 2019/2020 please provide the number of reviews carried out of injury awards.*

*5. For each of the three years 2017/18, 2018/19 and 2019/2020 please provide the number of reviews that resulted in the level of pension:*

*i. remaining unchanged;*

*ii. increasing; and*

*iii. reducing.*

*6. For each of the three years 2017/18, 2018/19 and 2020 please provide the number of individuals contacted regarding a review who did not answer the questionnaire sent to them in connection with their review.*

*7. Please provide a copy of the questionnaire sent to those in receipt of injury awards regarding their review.*

*8. Please provide the number of officers in receipt of an injury award (include those who were awarded injury benefit by another force) who currently work for your force, if any."*

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<sup>1</sup> [https://www.whatdotheyknow.com/request/reviews\\_of\\_injury\\_awards\\_2](https://www.whatdotheyknow.com/request/reviews_of_injury_awards_2)

5. Bedfordshire Police responded on 16 October 2020. It provided the information for parts 1 and 3 of the request. For part 2 it cited section 40(2) of FOIA, the exemption for personal information. For the remainder of the request, it advised the complainant as follows:

*"For questions 4, 5, 6, 7 & 8 from discussions with our consultants, reviews of injury awards were suspended some time ago. New guidance on injury award reviews were to be issued by the government but as yet have not been received."*

6. The complainant requested an internal review on 18 October 2020 in relation to part 2 of his request only, where section 40(2) had been cited. He contended that a "motivated intruder" would not be able to identify any individual police officer should the number of police officers over the specified years be disclosed.
7. Following its internal review Bedfordshire Police wrote to the complainant on 13 November 2020. It maintained its original position.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 20 November 2020 to complain about the way his request for information had been handled.
9. He stated that, of the 24 police forces who had responded at the time of his complaint, only one other force cited section 40(2) for part 2 of his request. Whilst this is noted, the Commissioner will consider each complaint on its own merits.
10. During the course of the Commissioner's investigation, Bedfordshire Police provided her with the withheld number for the period 2017/18. It partly revised its position and said that due to the way the information is now held, it did not hold the information for 2018/19 or 2019/20.
11. At the Commissioner's request, Bedfordshire Police informed the complainant of its part-revised position on 20 July 2020. That same day, the Commissioner contacted the complainant to seek his view on the updated position.
12. On 29 July 2021, the complainant wrote to the Commissioner. He said he was "puzzled" by Bedfordshire Police's revised response, advising:

*"My puzzlement stems from the fact that the information provided in response to Request 3 [ie part 3] depends upon the existence of information for each of the three years specified in Request 2 [ie part 2]."*

*Additionally, Bedfordshire Police has provided no reasoning to support its position. It may be that the information is held on its behalf by someone else (pension scheme administrator). Organisations are legally obliged to keep detailed records of their pension schemes, and it is concerning that Bedfordshire Police is stating that it holds no information. Information regarding pensions required to be held is included in the following guidance to pension scheme administrators:*

*'Information pension scheme administrators must give to members'<sup>2</sup>.*

13. On 20 July 2021 and 2 August 2021, the Commissioner wrote to Bedfordshire Police to investigate its part-revised position, specifically that it had said it did not hold the requested information for the years 2018/19 and 2019/20.
14. Bedfordshire Police responded on 17 August 2021. It addressed the Commissioner's search-related questions and explained more about the system change. The Commissioner found it necessary to make further enquiries to clarify her understanding.
15. In this case, the Commissioner has considered whether Bedfordshire Police was entitled to rely on section 40(2) to withhold some of the information requested in part 2 of the complainant's request (specifically for the year 2017/18).
16. She has also considered whether, on the balance of probabilities, Bedfordshire Police holds the information requested for 2018/19 and/or 2019/20.
17. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of FOIA. FOIA is concerned with transparency of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held by public authorities. FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.

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<sup>2</sup> <https://www.gov.uk/guidance/pension-administrators-annual-and-lifetime-allowance-statements>

## Reasons for decision

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18. The Commissioner will first examine Bedfordshire Police's reliance on section 40(2) for the year 2017/18. She has been provided with the withheld number which is very low.

### Section 40 – personal information

19. Section 40(2) of 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.
20. In this case the relevant condition is contained in section 40(3A)(a)<sup>3</sup>. 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').
21. 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.
22. 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?***

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

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

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

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<sup>3</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

26. 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.
27. In this case, disclosure of the actual number of police officers granted an injury award during 2017/18 would not necessarily result in any individual police officer being able to be identified. However, the Commissioner is mindful that in this case the number is very low and that its disclosure could potentially reveal the identity of the data subject(s) and the fact that they have received an injury award.
28. Bedfordshire Police has explained that injury awards are made confidentially and knowledge of such awards is restricted to those who "need to know".
29. A test used by both the Commissioner and the First-tier Tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of re-identification of an individual from information which, on the face of it, appears truly anonymised.
30. The ICO's Code of Practice on Anonymisation<sup>4</sup> notes that:

*"The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA".*
31. In summary, the motivated intruder test is that if the risk of identification is "reasonably likely" the information should be regarded as personal data.
32. The Commissioner considers that a motivated intruder could potentially identify a Bedfordshire Police Officer (or officers) through piecing together the number of officers (if disclosed), together with other information known to them about an individual or individuals.
33. There are two main ways for re-identification to come about:

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<sup>4</sup> <https://ico.org.uk/media/fororganisations/documents/1061/anonymisation-code.pdf>

- An intruder takes personal data it already has and searches an anonymised dataset for a match.
  - An intruder takes a record from an anonymised dataset and seeks a match in publicly available information.
34. Generally the latter risk scenario is of greater concern for data custodians because of the confidentiality pledges that are often given to those appearing in an anonymised dataset. However, both risk scenarios are relevant and can carry with them different probabilities of re-identification. In either case though, it can be difficult, even impossible, to assess risk with certainty.
35. Despite all the uncertainty, re-identification risk can certainly be mitigated by ensuring that only the anonymised data necessary for a particular purpose is released. The fact that data has been anonymised does not mean that data minimisation techniques are not still relevant.
36. In this case, the Commissioner has taken into account other arguments provided by Bedfordshire Police which she is not able to reproduce here. Based on the information she has been provided, she is mindful that disclosure of the withheld figure would be likely to result in the individual(s) concerned being identifiable by other Bedfordshire Police employees who are likely to have a more in-depth knowledge of their own work force and any injuries to staff.
37. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information both relates to and could identify the data subject(s) concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
38. The fact that information constitutes the personal data of an identifiable living individual or individuals 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.
39. The most relevant DP principle in this case is principle (a).

**Would disclosure contravene principle (a)?**

40. 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".*



41. 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.
42. 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.

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

43. 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.
44. 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"<sup>5</sup>.*

45. 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;

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<sup>5</sup> 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".*



- 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.
46. 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*

47. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
48. The complainant has not submitted any legitimate interest arguments *per se* and has instead argued that disclosure of the 'number' of injury awards to police officers during 2017/18 does not constitute personal data; the Commissioner does not agree for the reasons set out above.
49. Bedfordshire Police did not provide any legitimate interests despite having been given the opportunity to do so by the Commissioner.
50. The Commissioner can see that there are legitimate interests in the disclosure of the number of police officers receiving injury awards – this would aid openness, transparency and provide context to how many times injury awards were granted during the year 2017/18.

*Is disclosure necessary?*

51. '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.
52. Neither the complainant nor Bedfordshire Police made any submissions as to why disclosure of the number of injury awards is 'necessary'. The Commissioner cannot identify any reason why it is necessary for the

*number* of police office injury awards for 2017/18 to be disclosed in this case. By way of comparison, she considers that disclosure of the amount of money associated with such awards would potentially be of greater public interest, but she also notes that in this case, the expenditure has been disclosed for all 3 year periods stipulated by the complainant.

53. As the Commissioner has decided in this case that disclosure 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).

### *Conclusion*

54. The Commissioner has therefore decided that Bedfordshire Police was entitled to withhold the information requested for the year 2017/18 under section 40(2), by way of section 40(3A)(a).
55. The Commissioner will next consider whether, on the balance of probabilities, Bedfordshire Police holds the number of injury awards granted to its police officers for 2018/19 and/or 2019/20.

### **Section 1 – general right of access**

56. Section 1(1) of 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."*

57. The Commissioner is mindful that when she receives a complaint alleging that a public authority has stated incorrectly that it does not hold the requested information, it is seldom possible to prove with absolute certainty whether the requested information is held. In such cases, the Commissioner will apply the normal civil standard of proof in determining the case and will decide on the 'balance of probabilities' whether information is held.
58. The Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the public authority to check whether the information is held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. 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 proof of the balance of probabilities.

59. Therefore, the Commissioner has sought to determine whether, on the balance of probabilities, Bedfordshire Police holds any recorded information for the numbers of police officers granted an injury award for the years 2018/19 and/or 2019/20. Accordingly, she asked Bedfordshire Police to explain what enquiries it had made in order to reach the view that it did not hold this information.

60. By way of an overview, Bedfordshire Police told the Commissioner:

*"Having spoken to the relevant departments I can confirm that since the change in system for the 2018/2019 year we don't hold the date for which officers are granted an injury award within the pay system. I have also been informed that this is no longer recorded as it caused problems due to in some circumstances the date the injury award is granted and the effective date of the award are different, therefore we wouldn't be able to provide it for such circumstances due to the way the system is configured."*

61. The Commissioner found it necessary to clarify Bedfordshire Police's response to her search questions. Having done so, she understands that since 2018/19 the requested information is now held by an external pensions provider ('EPP') which records injury award information relating to police officers for around half (but not all) the UK police forces. Whilst EPP's system records the overall amount of injury award expenditure by year, it does not break this down by date or number of officers by year.

62. Bedfordshire Police clarified it had been able to identify the number of police officers in receipt of an injury award for 2017/18 because it held that information on its old system before EPP were involved. It also explained that it had been able to provide the overall number of individuals in receipt of an injury award at the time of the request (as per part 1 of the request) because no breakdown by year had been requested by the complainant.

63. Bedfordshire Police explained that it was aware that one of the police forces who had responded to the complainant's request keeps its own records of dates and numbers of police officers in addition to the information held by EPP, and so had been able to respond to his request in full. However, Bedfordshire Police said it does not hold or maintain any such records itself.

64. Bedfordshire Police said it had searched with its Human Resources and Finance departments whom it said it considered to be "*the relevant departments*", as well as with EPP. It explained that searches included

all electronic data that each department felt relevant to the request where they believed this information could be held. The search term 'injury award' was used on Bedfordshire Police's networked resources as well as for EPP.

65. Bedfordshire Police confirmed that any recorded information held relevant to the request would be held electronically. It said that no information had been held that had been deleted or destroyed. It also advised that there are no business purposes or statutory requirements upon Bedfordshire Police to hold and retain the requested information.

### *Conclusion*

66. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it must hold, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in the paragraphs above, the Commissioner is required to make a finding on the balance of probabilities.
67. She accepts that the introduction of EPP and a different system, together with at least one other police force maintaining its own injury award records in addition to those held by EPP, has made this case less clear. However, she has sought and secured explanations from Bedfordshire Police to address these points and to satisfy herself as to what information is held.
68. Based on the explanation provided by Bedfordshire Police, the Commissioner is satisfied, on the balance of probabilities, that no recorded information is held for the number of police officers in receipt of an injury award for the years 2018/19 or 2019/20.

## Right of appeal

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69. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

70. 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.

71. 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 .....**

**Carolyn Howes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**