

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

### **Decision notice**

**Date:** 16 December 2021

**Public Authority:** Chief Constable of Cambridgeshire Constabulary  
**Address:** Constabulary Headquarters  
Hinchingsbrooke Park  
Huntingdon  
Cambridgeshire  
PE29 6NP

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

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1. The complainant requested from Cambridgeshire Constabulary ("the Constabulary") information about an outcome of a particular hearing regarding officer misconduct. The Constabulary supplied a link to its website for some of the information, it advised that there is no transcript of the hearing, and it also withheld some information by virtue of section 40(2) (personal information) of the FOIA.
2. The Commissioner's decision is that the Constabulary was entitled to rely on section 40(2) of the FOIA to withhold some of the information requested. However, the Commissioner has recorded a procedural breach of section 17 of the FOIA, as the Constabulary failed to issue the complainant with a refusal notice within the statutory time limits.
3. The Commissioner does not require the Constabulary to take any steps as a result of this decision.

## Background

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4. Bedfordshire, Cambridgeshire, and Hertfordshire Constabulary all work as a collaborated unit. The complainant described his concerns regarding the handling of his information request as being with Cambridgeshire Police, although it was Bedfordshire Police that liaised with the complainant. However, within this decision notice and for ease of reference, the public authority will be referred to as the Constabulary.

## Request and response

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5. On 2 December 2020, the complainant wrote to the Constabulary and requested information in the following terms:

*"Hi, please can you provide a PDF of the outcome of this hearing*

*<https://www.cambs.police.uk/assets/PDFs/About/Misconduct/AboutUs-Misconduct-PC2683.pdf> and also of the transcript (if no transcript is available then the audio recording)"*

6. On 4 December 2020 the Constabulary responded. It stated that *"the outcome and rationale should be published on the force website sometime today."* It also stated that it *"cannot release the transcript or the hearing audio recordings to you."*
7. On the same day, the complainant questioned whether or not the response *"we can't"* is a valid refusal under the FOIA. The Constabulary responded and said that *"there is no transcript for the hearing – so in that regard 'we cannot' give you a copy of it, as it doesn't exist."* It also directed the complainant to the force website should he request a copy of the hearing audio under the FOIA.
8. The complainant responded and said that his email of 2 December 2020 was a request for information under the FOIA. The Constabulary then informed the complainant that his email was forwarded to the FOI unit.
9. On 4 January 2021 the complainant informed the Constabulary that its response to his FOI request was overdue.
10. On 5 January 2021 the Constabulary said that it had chased the FOI unit for a response to this request, and it provided the complainant with an email address to use for future reference and for any further updates.

11. On 6 January 2021 the Constabulary provided its response to this request and determined that Cambridgeshire Constabulary do not hold the information requested. With regards to the audio copy, it refused this under section 40 (personal data) of the FOIA.
12. On the same day the complainant asked for an internal review.
13. On 3 February 2021 the Constabulary provided its internal review response. It supplied the complainant with a link to the outcome of the hearing available on the Cambridgeshire Constabulary website. It stated that there is no transcript of the hearing, therefore it was unable to provide this. The Constabulary also stated that whilst the hearing was held in public, the audio recording is now the personal information of the individuals involved and is exempt under section 40 of the FOIA.

### **Scope of the case**

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14. The complainant contacted the Commissioner on 5 February 2021 to complain about the way his request for information had been handled. Specifically, with regard to the Constabulary's application of section 40(2) of the FOIA to his request for information - the audio recording.
15. The following analysis focuses on whether the exemption at section 40(2) of the FOIA was cited correctly to this part of the request.

### **Reasons for decision**

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#### **Section 40 – Personal information**

16. The Constabulary explained to the Commissioner that the information was for a specified purpose, and said that following the hearing, there is no further expectation that the information should be disclosed. It said that the information is for the court service, a different purpose which the Constabulary believes "*is not the same as say a high profile case, misconduct cases have different rules.*"
17. The Commissioner is aware that information disclosed in court may briefly enter the public domain in theory, but its availability in practice is likely to be short-lived unless it passes into other more permanently available sources (e.g. online newspaper reports). Theoretically, any disclosure under the FOIA is disclosure into the public domain, in this case, the Constabulary considers the information requested is personal information of the individuals involved and applied section 40 of the FOIA.

18. 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.
19. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</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 UK General Data Protection Regulation ("GDPR").
20. 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.
21. 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?***

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

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

23. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
24. 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.
25. 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.
26. The withheld information in this case is an audio recording of a hearing. This includes details of an individual's career and information about other individuals. The Constabulary confirmed its position that all of the withheld information is personal data.

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA

27. In the circumstances of this case, having considered the withheld information and the arguments presented by both parties, the Commissioner is satisfied that the information relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
28. 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.
29. The most relevant DP principle in this case is principle (a).

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

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"*.

30. 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.
31. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

32. Article 6(1) of the UK 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.
33. 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>2</sup>

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<sup>2</sup>Article 6(1) goes on to state that:-

34. In considering the application of Article 6(1)(f) of the UK 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.
35. 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*

36. 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.
37. The Constabulary confirmed that it identified legitimate interests in disclosure in this case, it said that there is a need for the Constabulary to be open and transparent in its approach to dealing with misconduct.

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*"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".*

38. The complainant stated within his arguments to the Commissioner, that the hearing in question was held in public, as part of the open justice principle. He said that "*the transcript contains no information which was not placed into the public domain at the time of the hearing.*" He also referred the Commissioner to a quote within the Supreme Court judgment in *Khuja v Times Newspapers* [2017] UKSC 49, Lord Sumption JSC confirmed at [34(3)] that "*there is no reasonable expectation of privacy in relation to proceedings in open court.*" The complainant disputes the Constabulary's reasons for why section 40(2) of the FOIA can be engaged and said "*if the data subject had no reasonable expectation of privacy.*"
39. The complainant highlighted to the Commissioner, further factors which he considered relevant to support his argument against the Constabulary. These were quotes from other court judgements and which related to "*the principle of open justice*". He also referred to "*The Police (Conduct) Regulations 2020, reg 39*" relating to police misconduct hearings.
40. The complainant also gave an example to the Commissioner of an individual i.e. a journalist that takes notes in a court room during a hearing, but does not publish it, then a couple of years later, the journalist decides to publish what was shared in the court room. The complainant argued that information disclosed to the public at an open hearing, is not exempt information. He reiterated his view that there is no reasonable expectation of privacy regarding proceedings in open court.
41. The Commissioner notes the complainant's comments regarding the hearing held in public as part of the open justice principle. However, the Commissioner's guidance<sup>3</sup> states, if information has entered the public domain before the date of the request, it does not remain there indefinitely. Even if the information was previously revealed in open court, this does not make the information still available at the date of the request. As such, neither the individual(s) concerned, would reasonably expect this information to be released again. With regard to proceedings in open court, there is a reasonable expectation of privacy.
42. It is clear that the complainant strongly disagrees with the Constabulary's reliance of section 40(2) of the FOIA to his request, and he disputes its rationale that the withheld information is personal data.

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<sup>3</sup> <https://ico.org.uk/media/for-organisations/documents/1204/information-in-the-public-domain-foi-eir-guidance.pdf>



43. The complainant had not stated a legitimate interest within his correspondence. Therefore, the Commissioner could consider that the legitimate interest is only that of the complainant's own interest, and, as such there is very limited legitimate interest in disclosure of the information. However, the Commissioner surmises that the complainant's legitimate interest is in the transparency of police misconduct proceedings.
44. The Constabulary explained to the Commissioner why this information is that individual's personal data. It stated that the information is a recording of a hearing which talks in great length about a person's career. The information also includes details of other individuals and therefore, the Constabulary deemed it all to be personal information.
45. The Constabulary's position is that all of the withheld information is personal data as this is from a hearing. It said that the information (the audio recording) consists of information about both the individual's public life (i.e. their work as a employee) and their private life.
46. With regard to reasonable expectations which the individual has about what will happen to their personal data, the Constabulary said that the individuals involved would not expect their information to be disclosed via the FOIA and that they would expect their personal information to be withheld. The Constabulary considers disclosure of the information into the public domain could cause harm and distress to a number of people.

*Is disclosure necessary?*

47. "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.
48. The Constabulary set out why it concluded that disclosure is not necessary in this case. It said, it believes the harm in releasing this personal data into the public domain outweighs the benefit of being open and transparent in this instance. The Constabulary stated that it had published online the result of the hearing in question with some information included on the case, and that a link to the result of this hearing had already been supplied to the complainant. Therefore, the Constabulary is of the view that this demonstrated that it is "*trying to be as open and transparent as we can.*"



49. The Constabulary was asked by the Commissioner during the investigation of this case, whether some of the information (personal data) within the audio recording could be redacted. The Constabulary said that this would be a difficult task as it was "*a long hearing, too much to redact*" and to make redactions, it would not make the remaining information meaningful.
50. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified than to disclose the information requested.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

51. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
52. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
53. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
54. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

55. The Constabulary set out its conclusions as to the balance between the rights and freedoms of the data subject(s) in this case and the legitimate interest of the public in accessing this information. The Constabulary considered that it had balanced the rights of the individual against the rights of the complainant, by releasing what it had and nothing further. It said that it believes the release of further information would cause distress to the individuals concerned.
56. The Constabulary confirmed to the Commissioner that information to most of what was requested, it does not hold i.e. pdf document and transcript. However, the audio recording was withheld as the Constabulary considered it to be personal information.
57. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner, therefore, considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
58. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

### **The Commissioner's view**

59. The Commissioner's decision is that the Constabulary was entitled to withhold the information under section 40(2), by way of section 40(3A)(a) of the FOIA. Therefore, the Constabulary was not obliged to disclose this information.

### **Procedural matters**

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60. The complainant expressed his dissatisfaction with the handling of his request for information by the Constabulary. He specifically raised to the Commissioner the following points:
  - *"Failing to accept a valid request for information (by telling me I need to write to a specific person in order for it to be an FOIA request)*
  - *Refusing a valid request for information without providing a refusal notice ("we can't")*
  - *Failing to explain the application of section 40, and how it would be unfair to disclose 'personal data' which was already disclosed to the public at an open hearing."*

61. Section 17(1) of the FOIA states that where a public authority intends to refuse a request for information on the grounds that it is subject to an exemption in Part II of the FOIA, it must issue the requester with a refusal notice explaining the exemptions relied upon and why they apply (if not apparent), no later than 20 working days after the date on which the request was received.
62. The Commissioner notes that the Constabulary replied to the complainant's request for information on 4 December 2020. However, this was not a refusal notice and it did not specify an exemption. The response only informed the complainant of when the outcome and rationale should be published on its website, and that the Constabulary could not release to him the remaining information to his request.
63. The Commissioner also notes that on 6 January 2021 the Constabulary provided a refusal notice and cited the exemption.
64. In this case, the Constabulary failed to issue the requester with a valid refusal notice within 20 working days. The request for information was submitted on 2 December 2020 and the Constabulary provided its refusal notice on 6 January 2021. The Commissioner therefore finds that the Constabulary breached section 17 of the FOIA.

## Right of appeal

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65. 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](mailto:grc@justice.gov.uk).

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

66. 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.
67. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**