

**Freedom of Information Act 2000 (FOIA)
Decision notice**

Date: 17 June 2022

Public Authority: The Office of the Sussex Police & Crime
Commissioner

Address: Sackville House
Brooks Close
Lewes BN7 2FZ

Decision (including any steps ordered)

1. The complainant has requested copies of the application forms for successfully appointed applicants to the position of Legally Qualified Chair ("LQC") for Police Conduct Panels for the past ten years.
2. The Commissioner's decision is that the Office of the Sussex Police & Crime Commissioner (OSPCC) is entitled to rely on section 40(2) to withhold the requested information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 29 June 2021, the complainant wrote to the OSPCC and requested information in the following terms:

"I am aware that the actual decision to appoint a chair is posted online but I cannot find posted online any of the actual applications made by persons who were subsequently appointed as a chair and could you please provide copies of those applications for the past 10 year period."
5. The OSPCC responded on 12 July 2021. It confirmed the information was held but refused to provide it citing section 40(2) as its basis for doing so.

6. Following an internal review the OSPCC wrote to the complainant on 2 August 2021 and maintained its position.

Scope of the case

7. The complainant contacted the Commissioner on 30 August 2021 to complain about the way his request for information had been handled and stated:

"The complaint is that the information request I made by e mail on the 29 June 2021 of the Sussex Police & Crime Commissioner (copied below) was inappropriately dealt with under the FOI Act and despite it being crystal clear that what I had requested - which was nothing more than copies of the actual completed applications for the post of Legally Qualified Chair (LQC) of applicants who were subsequently appointed as an LQC - the responses I received appeared to amount to deliberate attempts to misinterpret the information request in order to avoid complying with it (it having in any event been incorrectly dealt with under the FOI Act instead of the DPA).

Please provide me with a copy of the response you receive from The Office of the Sussex Police & Crime Commissioner so as to give me the opportunity to comment upon it before you make a final decision."

8. The Commissioner considers the scope of this case is to determine if the OSPCC was correct to cite section 40(2) in response to the request. In doing so he is mindful of a previous decision notice issued on 4 May 2022¹ relating to an identical request to the OPCC for Cambridgeshire and Peterborough from the same complainant.
9. The complainant's concerns relating to the request being dealt with under FOIA are considered under 'Other matters'.

¹<https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4020345/ic-129110-r4l8.pdf>

Reasons for decision

Section 40(2) – Third party personal data

10. Section 40(2) 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.
11. In this case the relevant condition is contained in section 40(3A)(a)². 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'), asset out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
12. 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 FOIA cannot apply.
13. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

“any information relating to an identified or identifiable living individual”.
15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.
17. 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.

² As amended by Schedule 19 Paragraph 58(3) DPA

18. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to specific individuals who were candidates for the posts of LQCs. He is satisfied that the information withheld both relates to and identifies those individuals. The withheld information contains addresses, telephone numbers and email addresses. Additionally, the withheld information contains special category data relating to age, gender, sexual orientation, and disability. There are also free text fields where other special category data is recorded. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
19. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
20. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

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

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

22. 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 UK GDPR

23. 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.
24. 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 child³".

³ Article 6(1) goes on to state that:-

25. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under 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.
26. 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

27. 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.
28. 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.
29. The OPCC has not identified any legitimate interest in the release of the withheld information. It considers the candidates had an expectation that their information would be confidential to the application process

"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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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".

30. However, the Commissioner acknowledges that the complainant likely has a private legitimate interest and they consider there is also a wider legitimate public interest in ensuring those appointed as LQCs have the appropriate qualifications and merits to fulfil those duties. Nevertheless, the Commissioner is not persuaded that this is sufficient to outweigh the rights and freedoms of the individuals concerned.

Is disclosure necessary?

31. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
32. The Commissioner considers that the complainant's identified legitimate interests have been met by publication of the blank application form online as referred to in the previous decision notice. This application form contained all the questions asked of the applicants in relation to that part of the recruitment process. The Commissioner considers this is sufficient to address the legitimate interests of transparency and openness by the OPCC in relation to the complainant's request to see the questions applicants were asked.
33. The Commissioner accepts that information on application forms completed by the candidates included personal information and views they would not have any expectation of being disclosed and that were part of an application process.
34. The Commissioner notes the legitimate interest in knowing if such information were disclosed on the application forms, however, as is the case with this type of job application form the Commissioner is satisfied that such information would be disclosed as part of the recruitment process checks undertaken by the OPCC.
35. As the Commissioner has decided in this case that further disclosure is not necessary to meet the legitimate interest in disclosure, he has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing. It therefore does not meet the requirements of principle (a).
36. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
37. The Commissioner has therefore decided that the OPCC was entitled to withhold the information under section 40(2), by way of section 40(3A)(a) of FOIA.

Other matters

38. The complainant considers that the OPCC has incorrectly dealt with his request under the FOIA and stated:

“it having in any event been incorrectly dealt with under the FOI Act instead of the DPA.”

39. Section 84 of FOIA defines which information is covered under FOIA. In practice this means any recorded information held, either in hard copy or in an electronic form. In some cases, requests may be dealt with in the normal course of business provided however, it is highly unlikely that information relating to third party personal data will ever be disclosed as 'normal course of business' as this is likely to be a breach of the DPA.
40. If the information request relates to the requestors own personal data, then it will be dealt with under the DPA 2018.
41. The Commissioner has issued guidance⁴ relating to recognising a request under FOIA. The request does not have to make any direct reference to the Act. Any written communications to a public authority, including those sent electronically, could be a request for information. Therefore it was reasonable for the OPCC to treat this as a request under FOIA.
42. When submitting their complaint, the complainant stated that they wanted a copy of the OPCC's response to be sent to them prior to a decision notice being issued.
43. In this particular case and bearing in mind the previous decision notice issued along with the Commissioner's well-established position in such cases, it was not necessary to seek any further submissions from the OPCC.
44. In any event, the ICO does not provide copies of a public authority's response during the course of an investigation.

⁴ <https://ico.org.uk/media/for-organisations/documents/1164/recognising-a-request-made-under-the-foia.pdf>

Right of appeal

45. 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

46. 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.
47. 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

Susan Duffy
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