

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 August 2022

Public Authority: Chief Constable of Wiltshire
Address: Wiltshire Police Headquarters
London Road
Devizes
Wiltshire
SN10 2DN

Decision (including any steps ordered)

1. The complainant has requested, from Wiltshire Police, information about a particular hearing regarding officer misconduct. Wiltshire Police provided some information but withheld the remainder, citing sections 31(1)(g)(2)(b) (Law enforcement), 32(1) (Court records) 38(1) (Health and safety) and 40(2) (Personal information) of FOIA.
2. The Commissioner's decision is that section 40 is properly engaged. No steps are required.

Request and response

3. On 9 July 2021, the complainant wrote to Wiltshire Police and requested information in the following terms:

“Please provide me with an electronic copy of (i) the transcript, (ii) the panel's full written findings, and (iii) the panel's decision on sanction, in relation to the disciplinary hearing of [name redacted]. If there is no transcript, the audio recording will be acceptable as an alternative”.
4. On 6 August 2021, Wiltshire Police responded. It refused to provide the requested information, citing the following FOIA exemptions as its basis for doing so: sections 21(1) (Information accessible to the applicant by

other means), 31(1)(g)(2)(b) (Law enforcement), 38(1) (Health and safety) and 40(2) (Personal information).

5. On 6 August 2021, the complainant requested an internal review.
6. Wiltshire Police provided an internal review on 3 September 2021, in which it removed reliance on section 31 of FOIA.
7. During the Commissioner's investigation, Wiltshire Police revised its position, advising the complainant accordingly. It disclosed the panel's decision on the sanction. It removed reliance on section 21 of FOIA. It reinstated reliance on section 31(1)(g)(2)(b) of FOIA and added reliance on section 32(1)(c) (Court records). It maintained its position regarding sections 38(1)(a) and 40(2) of FOIA. It further advised that it would neither confirm nor deny (NCND) holding any transcript of the hearing, citing section 40(5) of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 3 September 2021 to complain about the way his request for information had been handled. His grounds were as follows:

"Section 21 is inapplicable, because the precise information I requested – the panel's written determinations – are not available at the URL provided, which is a press report about them

Sections 38 and 40 are inapplicable, because the information I requested has already been placed into the public domain. The police service's claim that this was a closed "window of opportunity" has no basis in law".

9. Following Wiltshire Police's change of position during the investigation, the Commissioner wrote to the complainant for his views.

10. The complainant responded saying:

"Section 31 does not apply because the information in question has already been placed into the public domain, voluntarily, by Wiltshire Police (albeit it is no longer accessible to the public at the present time). The hearing was public and attended by journalists; any of them could have been making a shorthand transcript, or otherwise noting down anything that transpired at the hearing, and the police were clearly content for everything that was said to be transcribed in this way. It is worth noting that the police would have been asked in advance whether or not they were comfortable for the hearing to take place in public – see the Police (Conduct)

Regulations 2020, reg 33(8)(f) – and this was their opportunity to raise concerns about prejudice to law enforcement. My comments about section 40, below, also apply to section 31.

Section 32 does not apply because police disciplinary tribunals do not “exercise the judicial power of the state”. This was decided by Lord Donaldson MR in *Leary v BBC* (Court of Appeal, 29 September 1989, unreported), and approved by Stuart-Smith LJ in *General Medical Council v BBC* [1998] 1 WLR 1573 (CA) at p 1581C. None of the cases cited by Wiltshire Police contradict that finding, nor, in any event, could High Court cases supersede a reported judgment of the Court of Appeal.

Section 40 does not apply because once something has been said in open court – which includes a statutory public hearing of any description, whether or not it is a court – nobody has any reasonable expectation of privacy in respect of it. ... As such, although the requested information includes personal data, the data subjects have no reasonable expectation of privacy whatsoever. The Police (Conduct) Regulations 2020, reg 39 require police misconduct hearings to take place in public, for reasons of transparency and protecting public confidence in the police. Everyone whose personal data appears in the recording was aware of this at the time – and, as the police themselves were at pains to stress, appearance at a hearing is voluntary, so it is not as if any of the data subjects were coerced into giving evidence – it is plain that section 40 cannot apply. Wiltshire Police’s argument that there is sufficient information about the proceedings in the public domain is simply untenable; there is virtually no information about the proceedings in the public domain, and in any event, it is clear from the legislation governing police misconduct hearings that the principle of open justice is deemed to apply”.

11. The Commissioner will consider the application of exemptions to the request below.

Reasons for decision

12. The withheld information in this case consists of an audio recording and the panel findings. The Commissioner has not found it necessary to listen to the recording, which he understands to be seven days’ worth of footage. He has viewed the panel findings.

Section 40 – Personal information

13. The Commissioner will first consider the information which Wiltshire Police has confirmed that it holds, namely the audio recording of the hearing and the panel's findings.
14. 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.
15. 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 UK General Data Protection Regulation ("GDPR").
16. 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.
17. 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?

18. Section 3(2) of the DPA defines personal data as: "any information relating to an identified or identifiable living individual".
19. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
20. 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.
21. 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.

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

22. Wiltshire Police has confirmed that the information: "would incorporate the personal data of very many different data subjects: the Panel, advocates, witnesses, and the officers concerned, at a minimum".
23. The withheld information in this case is an audio recording of a hearing and a panel's findings. Wiltshire Police confirmed its position that all of the withheld information is personal data. The recording necessarily includes the speech of every party recorded in the proceedings. Therefore, in the circumstances of this case and having considered the arguments presented, 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.
24. 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.
25. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

26. 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".
27. 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.
28. 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.
29. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

Is any of the information special category data?

30. Information relating to special category data is given special status in the GDPR.
31. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.

32. Having considered the wording of the request the Commissioner finds that the requested information does include special category data. He has reached this conclusion on the basis that the misconduct case relates to an officer's inappropriate sexual behaviour against a colleague so clearly relates to a natural person's sex life; the Commissioner considers that any information which could be used to identify the victim falls within this category.
33. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
34. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
35. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
36. It is further noted that the complainant was advised that:

"The victim was afforded anonymity: this victim would have a reasonable expectation that any details which identified her, or which could lead to her identification would not be reported and would not be released to the world at large. To clarify, the information requested contains what the victim experienced, what she told her friends, what she reported and to whom, which is highly sensitive and personal as well as what she said during the Gross Misconduct Hearing. To disclose this information would allow all that know her to peruse the documents. As there would be a direct link between the individual and the information, it is clear that this would constitute her personal information".
37. Whilst the complainant is of the view that "the data subjects have no reasonable expectation of privacy whatsoever", that the proceedings were public and everyone involved was aware of this at the time, the Commissioner does not agree. Disclosure of personal data for a misconduct hearing is not the same as disclosing it to the world at large after that hearing has concluded. Disclosure at the hearing was necessary to ensure that the hearing reached a proper verdict. Participants would have no expectation that information they shared for that necessary purpose would subsequently be disclosed to the general public under FOIA after that purpose had been served.

38. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.
39. The Commissioner will next consider any personal information which would not fall within the definition of special category data insofar as it relates to parties other than the victim.

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

40. 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.
41. 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.
42. 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;

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:-

"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.

43. 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

44. 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.
45. The complainant has not specified any particular legitimate interest in disclosure. However, his arguments above reflect that he considers the data subjects to have no reasonable expectation of privacy and that the hearings are held publicly for reasons of transparency and promoting confidence in the police.
46. Wiltshire Police argued:

"The common law power of police to disclose information to the public at large is where there is a pressing social need to do so for policing purposes. We do not consider that disclosure of the requested information ... would meet that test.

Accordingly, we do not consider that we would have a legitimate interest in disclosure".

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 complainant has not said why he believes disclosure is 'necessary' in this case. He has argued that once something has been heard in public then it cannot be afforded any further protection. In his view, anyone connected to the case can have no reasonable expectation of privacy as the case was heard in the 'open'. If this were the case, then arguably any such hearing, or any trial in any court, would have no privacy afforded to any party after it has concluded.
49. The Commissioner accepts that there is unlikely to be any other way of securing the information, other than under DPA subject access rights for those whose data is actually recorded on the tapes. Therefore, to allow those who did not attend the hearing to see what actually happened at the time, and to understand the findings, the Commissioner can see some legitimate interest in its disclosure.
50. However, the hearing concluded that the officer was guilty of gross misconduct and he was dismissed. The findings have been promulgated for any interested parties to note. The victim was granted anonymity so she could not be identified.
51. Wiltshire Police has argued:

"Our view is that disclosure of the information is not necessary ... because information has already been placed in the public domain about the subject matter and outcome of these proceedings. That is an alternative means of meeting the identified legitimate interest which is less intrusive than releasing the entirety of the panel's findings, audio recordings and transcripts (if held).

If the balancing exercise needs to be conducted, we accept that the hearing took place in public, therefore allowing the identities of those involved to be seen, and that the information in the public domain and alongside with this response already identifies the officer concerned and the panel and advocates involved. However, it is reasonable to state that this was a 'window in time' and should not dictate that the personal information of those involved should be released in the future to furnish an FOI request. Furthermore, it does not identify all of the witnesses involved or named.

We consider that witnesses, in particular, would have a reasonable expectation that while their evidence would be given in public and might be reported, it would not be released verbatim to the world at large as and when requested at any time in the future. Witnesses who were not called to give evidence, but whose statements were adduced as evidence, would have an enhanced expectation in that regard".

52. 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 on information in the public domain³ states that 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. There is some media coverage about the hearing still available online, confirming that the officer was dismissed, but this is limited in nature and only names the officer. As such, none of the individuals concerned would reasonably expect this information to be released again under FOIA. With regard to proceedings which are heard publicly, there is still a reasonable expectation of privacy.

53. As the findings have been made public the Commissioner cannot see any necessity to disclose all of the background to the case and the rationale which led to the panel's findings. The complainant has not provided any argument as to why such disclosure would be necessary.
54. The law provides that there must be a pressing social need for any interference with privacy rights and that the interference must be proportionate.
55. As the Commissioner has decided in this case that 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 and it is unlawful. It therefore does not meet the requirements of principle (a).

The Commissioner's view

56. The Commissioner has therefore decided that Wiltshire Police was entitled to withhold all of the information under section 40(2) of FOIA.
57. He has not found it necessary to consider the other exemptions cited.

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

Right of appeal

58. 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

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

59. 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.

60. 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
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