

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 August 2022

Public Authority: Chief Constable of Merseyside Police
Address: Police Headquarters
Canning Place
Liverpool
Merseyside
L1 8JX

Decision (including any steps ordered)

1. The complainant has requested, from Merseyside Police, Body Worn Video (BWV) footage taken by police attending an incident. Merseyside Police refused to provide the requested footage citing the exemptions at sections 40(2) (Personal information) and 30(1)(a) & (2)(a)(i)(iii) (Investigations and proceedings) of FOIA.
2. Merseyside Police advised the Commissioner that some footage was officially available online. However, it had not advised the complainant regarding this so the Commissioner considered its obligations under section 21 of FOIA and found a breach. The Commissioner's decision is that section 40 is properly engaged in respect of all of the remaining information.
3. The Commissioner requires Merseyside Police to take the following steps to ensure compliance with the legislation:
 - direct the complainant to any officially disclosed BWV footage.
4. Merseyside Police must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 6 July 2021, the complainant wrote to Merseyside Police and requested information in the following terms:

“Under the Freedom of Information Act 2000, please can you provide me with the following: All body worn video recorded by an officer on [date redacted] at [name redacted]'s home on [address redacted]. The incident is detailed here:

[newspaper article redacted]”.
6. On 29 July 2021, Merseyside Police responded. It refused to provide the requested information citing the following sections of FOIA: 40(2) and 30 (1)(a) & (2)(a)(i)(iii).
7. The complainant requested an internal review on 29 July 2021.
8. Merseyside Police provided an internal review on 27 August 2021. It maintained its position.
9. The Commissioner was offered the opportunity to view the footage as the data was too large to email to him. However, he did not consider it necessary to do so in order to reach a decision in this case.
10. The Commissioner has anonymised the request to limit the possibility of reidentification of the parties concerned.

Scope of the case

11. The complainant contacted the Commissioner on 17 September 2021, to complain about the way his request for information had been handled. He said:

“I believe that the public interest test has been wrongly argued. The use of body worn video is a relatively recent and little scrutinised police tool and this case represents a potential failing (officers switched off cameras mid incident) whose disclosure would provide such scrutiny”.
12. The Commissioner required further information from the complainant, which was provided on 7 October 2021.
13. The Commissioner will consider the application of exemptions to the request below.

Reasons for decision

Section 21(1) of FOIA – Information reasonably accessible

14. Section 21 of FOIA states: (1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

15. Although not cited by Merseyside Police, in its response to the Commissioner it advised that sections 30 and 40 of FOIA were only being cited in respect of any footage which was not released to the media.

16. As such, it was clear to the Commissioner that some information was officially available online; this remains the case.

17. The Commissioner's guidance regarding section 21¹ says, at paragraph 20, that:

“information, although generally available elsewhere, is only reasonably accessible to the applicant if the public authority:

- knows that the applicant has already found the information; or
- is able to provide the applicant with precise directions to the information so that it can be found without difficulty”.

18. From the correspondence that the Commissioner has viewed, it is clear that Merseyside Police has not directed the complainant to this footage or apprised him of its existence. Whilst it may be the case that he is already aware of it, this is not readily apparent. Whilst the complainant's request does include a link to a media article, which in itself includes some mobile phone footage, this is not an official release made by the force itself.

19. In failing to advise and direct the complainant to information that is reasonably accessible to him, the Commissioner finds that Merseyside Police has breached section 21 of FOIA.

20. Merseyside Police should now comply with the step at paragraph 3 above.

¹ <https://ico.org.uk/media/for-organisations/documents/1203/information-reasonably-accessible-to-the-applicant-by-other-means-sec21.pdf>

Section 40 – Personal information

21. This has been cited in respect of all of the remaining BWV footage. The Commissioner is advised that the footage is of several individuals including the victim, his partner, paramedics and police officers.
22. 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.
23. 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”), as set out in Article 5 of the UK General Data Protection Regulation (“GDPR”).
24. 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.
25. 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?

26. Section 3(2) of the DPA defines personal data as: “any information relating to an identified or identifiable living individual”.
27. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
28. 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.
29. 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

30. Merseyside Police has confirmed that the body worn footage shows several individuals, as can be evidenced from some being available online. This footage will identify individuals either visually or verbally.
31. Insofar as some of the footage also relates to the interior of the property, the Commissioner also accepts that this is the personal information of the residents as its disclosure would allow them to be identified from either information that is in the public domain or by those who know them.
32. Therefore, in the circumstances of this case and having considered the arguments presented, the Commissioner is satisfied that the entire footage relates to, and identifies, the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
33. 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.
34. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

35. 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".
36. In the case of a 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.
37. 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.
38. 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 criminal offence data?

39. Information relating to criminal convictions and offences is given special status in the GDPR.
40. Article 10 of the GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to:

- (a) The alleged commission of offences by the data subject; or
- (b) Proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.

41. Having considered the wording of the request, and noting that some of the footage was used in court to secure convictions, the Commissioner finds that the footage used in court does include criminal offence data.
42. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.
43. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under FOIA are the conditions at Part 3 paragraph 29 (consent from the data subject) or Part 3 paragraph 32 (data made manifestly public by the data subject).
44. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to their data being disclosed to the world in response to a FOIA request or that they have deliberately made this data public. Whilst it has been viewed in court, this was necessary for that specific purpose. Those concerned had no choice as to its use as it was required to ensure the administration of justice.
45. As none of the conditions required for processing criminal offence data are satisfied there is no legal basis for its disclosure. Processing this criminal offence data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.
46. The Commissioner will next consider the remaining personal information which was not relied on in court. This footage relates to the property and events which occurred after the incident.

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

47. 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.
48. 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”³.

49. 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.

50. 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

51. 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.

³ 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”.

52. The complainant has said that that officers switched off their BWV cameras mid-incident, so he has argued that disclosure of the footage would allow for public scrutiny into police use of BWV. The Commissioner agrees that the two officers turned their cameras off as this fact is in the public domain. However, having liaised with Merseyside Police on this point, the Commissioner notes that any footage which may relate to this action falls within that footage which was considered by the court. It therefore falls within the criminal offence data findings above and is exempt from disclosure.
53. The remaining footage which falls to be considered here does not contain any information which may serve to allow scrutiny of the use of BWV. However, the Commissioner notes that the incident itself was of some significance, so seeing how the force dealt with the aftermath may be of some general interest to the public, although this was not an argument presented by the complainant.
54. Merseyside Police advised:

"Where a senior investigating officer considers that there is benefit to an investigation to make a disclosure then that will be managed and usually made by staff at the Media Office, in consultation with a press release for information. In this particular case, I have identified no legitimate interests in disclosure in this case".

Is disclosure necessary?

55. '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.
56. Merseyside Police argued:

"There has been a trial process and in the normal manner the media, particularly the local media have reported on the actions and the disclosure of the body worn video would not assist the public in understanding what took place within the dwelling. As such I see no tangible benefit to the public in disclosure of the body worn video.

... Whilst the investigation has been completed, the public interest in understanding why an investigation reached a particular conclusion or in understanding that the investigation has been properly carried out, would not be aided by the disclosure, given the information that is already in the public domain".

57. The complainant has not said why he believes disclosure is 'necessary' in this case. However, 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 footage. Therefore, to allow scrutiny of any footage that does not fall to be exempt under the criminal offence category findings above, the Commissioner can see some limited legitimate interest in its disclosure.
58. However, it is noted that the criminal trials that followed have concluded and those who were found guilty have been sentenced accordingly. The outcome of the trials has been promulgated for any interested parties to note. The remaining withheld information relates to the aftermath, ie what happened after the incident, which was deemed to have not been of relevance to the court hearings. It is therefore difficult to envisage what purpose its disclosure would serve now if it was not of use to the trials and why disclosure would be necessary.
59. The other parties connected to the incident, whose personal data is contained in the remaining footage, would have no reasonable expectation that this unused footage would now be disclosed to the world at large under FOIA.
60. There is some media coverage about the incident still available online to serve the public interest. The Commissioner cannot see any necessity to disclose any of the remaining background to the case. The complainant has not provided any argument to support why such disclosure would be necessary.
61. The law provides that there must be a pressing social need for any interference with privacy rights and that the interference must be proportionate.
62. 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

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

Right of appeal

64. 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

65. 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.

66. 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
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SK9 5AF**