

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 May 2022

Public Authority: Independent Office for Police Conduct
Address: 90 High Holburn
LONDON
WC1V 6BH

Decision (including any steps ordered)

1. The complainant requested information about a police dog biting incident which occurred on 14 November 2020. The IOPC stated that it held the information and provided a redacted copy of the referral form to the complainant. The IOPC relied on section 40(2) of FOIA (personal data) for the redacted information and confirmed some information related to criminal offence data and could not be released.
2. The Commissioner's decision is that the IOPC have correctly applied section 40(2) of FOIA to withhold the redacted information.
3. The Commissioner does not require the IOPC to take any further steps as a result of this decision notice.

Request and response

4. On 25 February 2021, the complainant made the following request for information under FOIA:

“Regarding the police dog biting incident of 14th November 2020, West Midlands police dog [name redacted], please advise when was an incident report sent to the IOPC and who sent it, and please disclose a copy of the referral so the reported unfolding of the incident can be understood.”

5. The IOPC acknowledged the request on 25 February 2021 and confirmed they would respond to the request by 26 March 2021.
6. The IOPC responded to the FOI request on 26 March 2021. They provided some of the information requested and supplied a redacted copy of the referral form. They redacted information on the form as they considered it exempt under section 40(2) of FOIA. The IOPC confirmed the information related to the personal details of those involved in the incident. They also stated that some of the information was “special category” data under Article 9 of the UK GDPR relating to health. Additionally, some of the information was withheld as it related to criminal offence data under the UK Data Protection Act 2018.
7. On 9 April 2021, the complainant requested an internal review. They stated they wished to appeal the IOPC’s decision to redact the parts of the referral form containing the description of the event and the redaction of a line within part F of the form. The complainant pointed out that both redactions would contain descriptions of the injuries sustained by the person in question but would not lead to identification of the subject. The complainant also requested that the reference number of the referral be provided as this was not personal data.
8. The IOPC provided the complainant with their internal review response on 5 May 2021, in which it maintained its position.

Scope of the case

9. The complainant contacted the Commissioner on 18 September 2021 to complain about the way their request for information had been handled by the IOPC.
10. Due to our involvement the IOPC have subsequently released some more information to the complainant. They have provided the reference

number of the referral form, however, have further redacted section F of the form citing that the whole section relates to criminal offence data.

11. The Commissioner considers the scope of his investigation is to establish whether the IOPC is entitled to withhold the requested information under section 40(2) of FOIA.

Reasons for decision

Section 40 personal information

12. 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.
13. 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 ('UK GDPR').
14. 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.
15. 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?

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

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

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
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¹ As amended by Schedule 19 Paragraph 58(3) DPA

18. 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.
19. 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.
20. The information requested relates to an individual who was allegedly bitten by the police dog, and it is not about the complainant.
21. As part of his investigation, the Commissioner has requested sight of the withheld information and would confirm the information relates to a third party and contains their full name and date of birth as well as details relating to injuries.
22. The IOPC has provided the complainant with a redacted copy of the referral form and released some information confirming who made the referral and when it was made. They have withheld information that would identify the details of the person bitten. They have further redacted information which is health information and criminal offence data.
23. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information held would identify the person concerned. This information 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 UK 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 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.

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 or criminal offence data, in order for disclosure to be lawful and compliant with principle (a), it also required disclosure meets the requirements of Article 9 and Article 10 of the UK GDPR respectively.

Is the information special category data?

30. Information relating to special category data is given special status in the UK GDPR.
31. Article 9 of the UK 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, and viewed the withheld information, the Commissioner finds that the requested information does include special category data. He has reached this conclusion on the basis that the description describes injuries which relate to the person's health.
33. In this case it is likely the person involved would expect their health information to remain confidential and not be released to the world at large.
34. 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.
35. 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.
36. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world at large in response to a FOIA request or that they have deliberately made this data public.
37. 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 FOIA.

Is the information criminal offence data?

38. Information relating to criminal convictions and offences is given special status in the UK GDPR.
39. Article 10 of the UK 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.*
40. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include criminal offence data. He has reached this conclusion on the basis that reporting around this incident in the public domain i.e., newspaper articles and social media sites confirm there was a subsequent trial and a conviction for the data subject.
41. The IOPC have confirmed all details in Section F of the referral form relate to information connected to the criminal investigation and fall within criminal offence data. They have confirmed they consider the content would clearly identify the individual concerned. This information would allow individuals in the community to identify the person when considered alongside other details available to them in the public domain.
42. The IOPC have stated that the subject concerned has not released the details of the information or provided any consent for the information to be released. The IOPC state no conditions under Article 10 of the UK GDPR in respect of the processing of criminal data have been met.
43. 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.
44. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under the 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).
45. 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 a FOIA request or that they have deliberately made this data public.

46. 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.

Lawful processing: Article 6(1)(f) of the UK 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"²

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;

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) 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 subparagraph (displaying 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.
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 such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
52. Further, 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
53. In this case information is personal data and relates to the person bitten by the dog. The information includes age and date of birth as well as health data information which is special category data and cannot lawfully be disclosed. Whilst the case was widely reported in the media there is no indication that personal information of this nature was released into the public domain.
54. Furthermore, the data is stated by the IOPC to be related to criminal offence data which is given additional protection under the UK GDPR Article 10. There is no indication any conditions under Article 10 of the UK GDPR are met in order to release this data. Whilst some details of the subsequent court case were reported in the media, it does not follow that the full details should be released to the world at large.
55. The Commissioner also notes from the information request posted on the What do They Know ("WDTK") website by the complainant that the information relates to a person who was legally a child at the time of the incident.
56. The complainant set out their reasoning on the WDTK website to explain why the information was sought. They wished to clarify the actions and circumstances around the deployment of the police dog. They provided the following information to support their request:

“The BTP Police dogs Manual of Guidance p.29, Good Practice regarding police dog bites, states "bites by police dogs may expose the handler and the Chief Officer to litigation. It is vital that adequate processes are implemented to enable the defence of any such cases. It is imperative that handlers are able to articulate the processes involved when recording their rationale following a deployment where there has been a bite by their dog". Sadly, in this case, it appears the dog was off lead and out of sight of its handler when the biting incident first started and accordingly I would expect the incident to be recorded in detail at the local level and referred to the IOPC as a matter of routine.”

57. The Commissioner acknowledges the need for transparency around information that might reassure the public about their personal safety in relation to the practice around the deployment of police dogs.
58. The Commissioner would agree there may be a legitimate interest in sharing information about the deployment of the dog in this instance to understand if guidance available to police services was applied. It is clear the redacted information does not provide sufficient detail to meet this aim.

Is disclosure necessary?

59. ‘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.
60. It is clear there would appear to be no other means for the complainant to obtain the detail of the information they requested other than through release of the redacted information. However, this must be balanced against the subject’s rights to have their personal data protected. There must be particular consideration for the health information and criminal offence data.

Balance between legitimate interests and the data subject’s interests’ fundamental rights and freedoms

61. 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 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.

62. 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.
63. In the Commissioner's view, a key issue is whether the individual concerned has a reasonable expectation 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.
64. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
65. As the requested information relates to special category data and a criminal investigation, potentially involving a minor, the Commissioner considers it is likely that disclosure would cause harm and distress to that individual if the information was released to the world at large without their knowledge and consent.
66. Furthermore, the withheld information when considered alongside other information available in media reporting may cause negative consequences for the individual in their locality if they were identified.
67. The Commissioner has not seen any evidence to suggest that the individual involved would have a reasonable expectation that their personal data would be disclosed in response to an information request.
68. The Commissioner considers that disclosure of this information would be disproportionately intrusive to the data subject as it would reveal information about the data subject which is not otherwise in the public domain.
69. The law provides that there must be a pressing social need for any interference with privacy rights and that the interference must be proportionate.

Commissioner's conclusion

70. Whilst the Commissioner understands the complainant's wish to obtain this information and the wider public interest in accountability and openness in relation to police activity, he is mindful that disclosure under FOIA is disclosure to the world at large and not just to the requester.
71. Without any evidence to the contrary, the Commissioner accepts the IOPC's view that there is a duty of confidentiality to the person involved to ensure their identity remains confidential.
72. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms in this case. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
73. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that it is not necessary to go on to separately consider whether disclosure would be fair or transparent.
74. The Commissioner has therefore decided that the IOPC was entitled to withhold the information under section 40(2) of FOIA by way of section 40(3A)(a).

Right of appeal

75. 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

76. 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.

77. 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
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