

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 November 2022

Public Authority: Chief Constable of South Yorkshire Police
Address: South Yorkshire Police Headquarters
Carbrook House
Carbrook Hall Road
Sheffield
S9 2EH

Decision (including any steps ordered)

1. The complainant has requested, from South Yorkshire Police ("SYP"), information about Hillsborough claims. SYP initially withheld this information citing the exemptions at sections 36(2)(b)(i)(ii) & (c) (Prejudice to effective conduct of public affairs), 38(1) (Health and safety), 40(2) (Personal information), 41 (Information provided in confidence), 42(1) (Legal professional privilege), 43(2) (Commercial interests) and 44(1)(a) (Prohibitions on disclosure) of FOIA. During the Commissioner's investigation SYP revised its position. It disclosed some information, said some was not held and refused the remainder, citing sections 38(1) (Health and Safety) and 40(2) (Personal information) of FOIA; at a very late stage it reintroduced reliance on section 42(1) of FOIA. The complainant has agreed to a reduced scope.
2. The Commissioner has considered the reduced request and finds that none of the exemptions cited are engaged.
3. The Commissioner requires SYP to take the following steps to ensure compliance with the legislation:
 - Disclose the information described in part (3) of the request.
4. SYP 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. Following an earlier request, on 22 July 2021 the complainant made the following information request (numbering added for convenience):

“Further to the response from last year ... and the recent annual accounts which seem to show much lower costs than expected I would like to make a request for some specific information.

Please note, I am sending the request to SYPC [South Yorkshire Police and Crime Commissioner] and South Yorkshire Police as it maybe that only one of the bodies holds some of the specific information requested.

Clearly, if one body holds all the relevant information I would be happy for that body only to respond. That body is possibly more likely to be SYPC given the final question below but I am happy to receive two separate responses if that's how the information is held.

1. Please provide the number of claims received against SYP for misfeasance in public office under what I understand is called the 'Hillsborough Victims' Misfeasance Litigation' group action begun in 2015. (If there are separate civil claims relating to Hillsborough since 2015, I would be grateful if you would identify what these are for and how many have been received)
2. Please provide the number of claims so far settled, identifying when the first settlement was made and the most recent.
3. Please provide the total amount so far paid out in compensation.
4. Please provide the total amount paid to any outside solicitors and/or barristers working on behalf of SYP to defend or respond to the claims.
5. Please identify the solicitors and/or barristers concerned.
6. Finally, I would be grateful if you could provide any updated information of the type provided in the response in March, which set out expected legacy costs over the coming years. This may now reach a further year beyond 2023/24, if available”.

6. On 16 November 2021, (in compliance with Decision Notice IC-126387-R5D8¹), SYP responded. It refused to provide the requested information, citing the following exemptions of FOIA as its basis for doing so: sections 36(2)(b)(i)(ii) & (c), 38(1), 40(2), 41, 42(1), 43(2) and 44(1)(a).
7. The complainant requested an internal review on 18 November 2021.
8. SYP provided an internal review on 24 November 2021 in which it maintained its position.
9. During the Commissioner's investigation, it became apparent that, although SYP had handled the request itself, some of the requested information was in fact held by the Office of the Police and Crime Commissioner for South Yorkshire (the "OPCC"). As the complainant had already written to both parties but they had elected to provide one response, the Commissioner advised both to deal with the request appropriately (a separate decision will be issued in respect of the OPCC under reference IC-190790-W1B4).
10. On 19 August 2022, SYP revised its response and wrote to the complainant accordingly. It provided some information in respect of part (1) of the request, adding that it had: "... also received a number of civil claims for Pain and Suffering and Loss of Amenity, PSLA, and for negligence"; it withheld these numbers, citing sections 38 and 40 of FOIA. It partially responded to part (2), disclosing the oldest and most recent dates, relying on sections 38 and 40 of FOIA for the remainder (reflecting its position in respect of part (1) of the request). It refused to provide a response to part (3), citing sections 38 and 40. It provided a response to parts (4) and (5). It said that it did not hold the information requested at part (6) as this was held by the OPCC.

Scope of the case

11. The complainant originally contacted the Commissioner on 24 November 2021 to complain about the way his request for information had been handled. Following SYP's revised response, the Commissioner further liaised with the complainant. He advised that, were SYP to disclose the total sum for part (3) of his request (ie with no further breakdown), he would accept that as a satisfactory outcome, and the case could be

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/4018748/ico-126387-r5d8.pdf>

informally resolved. SYP declined to do so, maintaining reliance on the exemptions cited.

12. As no informal resolution was reached, the Commissioner will consider the citing of exemptions in respect of part (3) of the request.

Reasons for decision

Section 40 – personal information

13. 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.
14. 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 General Data Protection Regulation ('GDPR').
15. 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.
16. 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?

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

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

more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

20. 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.
21. In responding to other parts of the original request, SYP has already disclosed to the complainant that:

“Up until 15th July 2022 SYP had received 489 claims and of these 424 claims have been settled.

We have also received a number of civil claims for Pain and Suffering and Loss of Amenity, PSLA, and for negligence. However we are exempting this number under Sec 40(2) as personal data because the people involved could be identified due to the smaller number received”.

22. SYP has argued the following in respect of part (3) of the request:

“We believe that by releasing the main number of claims and those settled, together with the amount of compensation paid out so far would lead to calculations and assumptions to be made about the amount of money awarded to individuals”.

23. It explained that: “[t]he majority of the Hillsborough victims are well known, firstly all to each other and secondly many of them within the public domain, and as such any total amount given out would be able to be linked to these people and an estimation made about how much money they had been awarded in compensation”, relying on the ‘motivated intruder’ principal.
24. It is initially noted that the exact number of claims has not been divulged, ie the number of individual civil claims remains withheld, and the complainant has agreed that this is not now required. Whilst SYP has indicated that these figures are low, that is all that has been confirmed regarding them. As the claims will be for different reasons (pain and suffering and loss of amenity and negligence), then the amounts will clearly differ. Therefore, it would not be possible to infer from the figure even an average payment, as all the variables are not known.
25. It is also not clear to the Commissioner how anyone could be identified by disclosure of the total figure when compared to an incomplete total sum of money. Whilst some of the individuals concerned may be aware of what each other has received in compensation, the Commissioner is not convinced that this can be extrapolated further to identify any or all of the claimants.

26. It is also noted that the OPCC has previously provided similar information to the complainant. Whilst this does not set a precedent, the Commissioner would expect any associated harm in respect of reidentification to have been evidenced as a result of that disclosure.
27. In the circumstances of this case, having considered the withheld information and the arguments offered, the Commissioner is not satisfied that a living individual can be identified, directly or indirectly, by provision of the total amount so far paid out in compensation.
28. As it is not personal information, section 40 is not engaged.

Section 38 – Health and safety

29. Section 38(1)(a) of FOIA states that information is exempt if its disclosure would, or would be likely to endanger the physical or mental health of any individual.
30. In section 38 the word 'endanger' is used rather than the word 'prejudice' which is the term used in other similar exemptions in FOIA. However, in the Commissioner's view the term endanger equates to prejudice.
31. Consideration of this exemption involves two stages. Firstly, the exemption must be engaged as a result of endangerment to physical or mental health being at least likely to result. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

The endangerment test

32. In order to engage this exemption, SYP must demonstrate that there is a causal link between the endangerment and disclosure of the information.
33. SYP must also show that disclosure of the withheld information in this case would, or would be likely to, have a detrimental effect on the physical or mental health of any individual. The effect must be more than trivial or insignificant.
34. SYP explained to the complainant:

“We believe that the release of this figure would also have a detrimental impact on survivors.

The psychological impact on survivors of such traumatic events are well known and documented.

The settlement of compensation could allow the closure process for survivors to begin. Re-opening matters, by way of disclosure of information regarding the compensation payments to the world at large, after the individuals involved have begun to re-build their lives (some for over a year already) has the potential to endanger the mental health of the parties concerned.

Hillsborough was a hugely traumatic event, which we know by means of involvement with survivors is something which most are still recovering from, and may continue to recover from for many years to come, if not their entire lives. This means that the release of the data regarding payments would be likely to go beyond stress or worry and constitute an endangerment to the mental health of any individual”.

35. As mentioned above, the OPCC has previously provided some monetary information to the complainant. This has not set a precedent; however, the Commissioner would expect that, were there any realistic risk of endangerment to any individual’s physical or mental health, SYP would have been able to evidence this after that information had been placed into the public domain via FOIA. Whilst the OPCC is clearly a separate public authority, the Commissioner is aware that SYP has liaised closely with the OPCC over these requests and he would have expected any such evidence to have been shared. No actual evidence of any endangerment resulting from the previous disclosure has been presented to the Commissioner.
36. SYP has also drawn the Commissioner’s attention to a different decision notice where he found that section 38 was engaged in relation to compensation payments³. In that case, the details being sought relate to the actual survivors of Child Sexual Exploitation, and he does not consider that a direct parallel can be drawn between the information being sought. In any event, each request is considered in a case-by-case fashion.

The Commissioner’s conclusion

37. Having considered the withheld information, ie a monetary figure paid to an unknown number of people, the Commissioner does not accept that SYP has demonstrated that endangerment would occur through its disclosure. It therefore follows that he has concluded that section 38 is not engaged.

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4021003/ic-114836-d2x6.pdf>

Section 42 – Legal professional privilege

38. Section 42(1) states that:

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

39. This exemption is subject to the public interest test.

40. The purpose of legal professional privilege (LPP) is to protect an individual's ability to speak freely and frankly with their legal advisor in order to obtain appropriate legal advice. It recognises that individuals need to lay all the facts before their adviser so that the weaknesses and strengths of their position can be properly assessed. Therefore, LPP evolved to make sure communications between a lawyer and their client remain confidential.

41. In reintroducing reliance on this exemption, SYP explained to the Commissioner:

“The requested information is contained in documents that attract without prejudice privilege and litigation privilege in relation to court proceedings that were issued in 2015 and are currently ongoing.

Such information includes otherwise privileged communications between the Claimant's lawyers, the settling Defendants and their lawyers. The settlement of the Scheme and subsequent communications with the Claimant's Solicitors have been conducted on an expressly 'without prejudice' and confidential basis. The communications are subject to both 'without prejudice' privilege and litigation privilege. It has been agreed between the parties that the terms of settlement remain confidential”.

42. Had the requested information been for individual terms of settlement, then the Commissioner accepts that these will be held in individual claim files which would be likely to engage the LPP exemption. However this is not the case. The information under consideration here is a total figure which has not been broken down into individual claims.

43. The actual number of claims remains undisclosed so it is not possible to estimate with any accuracy the amounts of compensation which may have been awarded to individuals, ie the amounts of individual claims. The Commissioner is not convinced by the arguments provided that disclosure of an overall amount would realistically breach LPP.

44. The Commissioner does not consider SYP has presented a satisfactory case for section 42 being engaged regarding the actual information under consideration here.
45. Therefore, on the basis of its submission to him, the Commissioner has decided that SYP has incorrectly applied section 42(1) of FOIA to part (3) of the request. Because he has found that section 42(1) is not engaged, it has not been necessary to consider the public interest test.

Other matters

46. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.
47. There have been considerable delays in the handling of this request and engagement with the Commissioner. These delays will be recorded.

Right of appeal

48. 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

49. 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.

50. 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
Cheshire
SK9 5AF