

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 13 July 2022

**Public Authority:** Chief Constable of South Yorkshire Police

**Address:** Police Headquarters  
Carbrook House  
Carbrook Hall Road  
Sheffield  
South Yorkshire  
S9 2EH

#### **Decision (including any steps ordered)**

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1. The complainant has requested information about the conduct and disciplinary record of a deceased police officer. South Yorkshire Police ('SYP') said that the requested information was exempt from disclosure under sections 31(1)(g) (Law enforcement) and 38(1)(a) (Health and safety) of FOIA.
2. The Commissioner's decision is that SYP was entitled to rely on section 31(1)(g) to refuse the request.
3. The Commissioner requires no steps as a result of this decision.

#### **Background**

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4. The withheld information relates to Operation Linden, the collective name for a series of investigations by the Independent Office for Police Conduct ('IOPC') into SYP's handling of reports of non-recent child sexual abuse and exploitation in Rotherham. The withheld information was supplied by SYP to the IOPC in connection with one of those investigations.

5. At the time of the request, Operation Linden was ongoing.
6. The IOPC published its findings regarding Operation Linden on 22 June 2022<sup>1</sup>.

## Request and response

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7. On 24 March 2021, the complainant wrote to SYP and requested information in the following terms:

“According to the BBC 'At the time of his death, [police officer’s name redacted] was under investigation for his alleged role in the Rotherham abuse scandal.’

REQUEST.

Disclose:

  1. The police disciplinary record of [name redacted]. This includes but is not limited to punishments or censure or other disciplinary matters.
  2. All complaints made against [name redacted]. This includes but is not limited to child abuse and sexual matters.
  3. All IPCC/IOPC and police reports relating to misconduct, wrongdoing, etc. by [name redacted].”
8. SYP initially responded on 12 April 2021. It would neither confirm nor deny whether it held the requested information, citing section 38(2) (Health and safety) of FOIA. The Commissioner determined that it was not entitled to rely on section 38(2) and directed SYP to issue a fresh response<sup>2</sup>.
9. On 12 May 2022, SYP wrote to the complainant. It confirmed that it held information which was relevant to the request but said it was exempt from disclosure under sections 31(1)(g) (Law enforcement) and 38(1)(a) (Health and safety) of FOIA.

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<sup>1</sup> <https://policeconduct.gov.uk/operation-linden>

<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4019741/ic-109664-t8v6.pdf>

## Scope of the case

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10. The complainant contacted the Commissioner on 13 May 2022 to complain about the way his request for information had been handled. He disagreed with SYP's decision to refuse his request, saying:

"Section 31 FOIA is not engaged. [named officer] died in 2015. Release would not prejudice the IOPC. The IOPC has had over 7 years to finish its work as regards [named officer]/child abuse. The IOPC has a poor reputation for issuing reports in a timely manner. I disagree that section 38 is engaged. [named officer] has been dead for 7 years. Distress/grief following death is not a danger to health, see ICO guidance".

11. In view of the previous interaction between the two parties regarding the request, the Commissioner exercised his discretion and accepted the complaint for investigation without requiring the complainant to request an internal review of SYP's decision.
12. The analysis below considers SYP's application of section 31(1)(g) (Law enforcement) to refuse the request.
13. The Commissioner has viewed the withheld information.

## Reasons for decision

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14. Section 31 of FOIA provides a prejudice-based exemption which protects a variety of law enforcement interests. SYP said that section 31(1)(g) was engaged, by virtue of section 31(2)(b).

15. The relevant parts of section 31 of FOIA provide that:

"(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice— ...

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

(2) The purposes referred to in subsection (1)(g) to (i) are – ...

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper".

16. Section 31 is a prejudice-based exemption and is subject to the public interest test. This means that not only does the information have to

prejudice one of the purposes listed, but it can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure.

17. To engage the exemption at 31(1)(g), a public authority must:
  - identify the public authority that has been entrusted with a function to fulfil one of the purposes listed in subsection (2);
  - confirm that the function has been specifically designed to fulfil that purpose; and
  - explain how the disclosure would prejudice that function.
18. The exemption is not only available to the public authority that has a relevant function. It can be claimed by any public authority provided that it can specify who does have the relevant function and why disclosure would, or would be likely to, prejudice it.
19. SYP told the complainant and the Commissioner that at the time of the request, the IOPC was investigating alleged police misconduct in respect of SYP's response to non-recent allegations of child sexual abuse in Rotherham (Operation Linden). The officer identified in the request was implicated in the investigation and SYP had provided the withheld information to the IOPC for consideration in its investigation. At the time of the request (and of SYP's fresh response to it, in May 2022) the IOPC investigation was ongoing and it had not yet published its overarching report.
20. The IOPC is responsible for overseeing the system for handling complaints made against police forces in England and Wales. It derives its powers of investigation from the Police Reform Act 2002 and the Policing and Crime Act 2017. The IOPC's website states that its powers include:

“... the power to launch investigations without a police referral and the power to present cases at misconduct hearings. There were also changes to the process for deciding whether an officer should face a misconduct hearing – giving the IOPC the final decision, without the need to direct forces to undertake misconduct hearings.”
21. The Commissioner is satisfied that the IOPC's powers of investigation into police misconduct are a relevant function under section 31(1)(g) for the purposes of 31(2)(b) of FOIA, and they are specifically entrusted to the IOPC to fulfil. He is also satisfied that the information in question was passed to the IOPC by SYP for the purpose of ascertaining whether any person is responsible for any conduct which is improper.

22. The Commissioner has then considered whether the third bullet point, regarding how disclosure would prejudice that function, is met.
23. The prejudice test involves three steps:
  - the actual harm which SYP alleges would, or would be likely to occur if the withheld information was disclosed, has to relate to the applicable interests within the exemption (in this case, ascertaining whether any person is responsible for any conduct which is improper);
  - SYP must be able to demonstrate that some causal relationship exists between the disclosure of the withheld information and the prejudice which the exemption is designed to protect against. Furthermore, the alleged resultant prejudice must be real, actual or of substance; and
  - it is necessary to establish whether the level of likelihood of prejudice being relied upon by SYP is met – ie 'would be likely' to result in prejudice or 'would' result in prejudice.
24. The first point for the Commissioner to consider is whether the arguments provided by SYP relate to the relevant applicable interests, namely, ascertaining whether any person is responsible for any conduct which is improper. SYP's position is that the IOPC's investigation into alleged police misconduct (which was 'live' at the time of the request), would be likely to be prejudiced if the withheld information was disclosed in response to this FOIA request.
25. The Commissioner is satisfied that the harm which SYP envisaged does relate to the applicable interests with which section 31(1)(g) (by reference to 31(2)(b)) is concerned, and so the first limb of the three part test outlined above is met.
26. The Commissioner next considered whether SYP has demonstrated that a causal relationship exists between disclosing the withheld information and the prejudice that section 31(1)(g) (by virtue of 31(2)(b)) is designed to protect against. In his view, disclosure must at least be capable of harming the function in some way (ie have a damaging or detrimental effect on it).
27. In its refusal notice, SYP informed the complainant that it had passed the withheld information to the IOPC for consideration in its misconduct investigation:

"The requested information therefore forms part of the IOPC's ongoing investigations and the IOPC have stated their intention to publish their findings in a certain timeframe and order. It is important that the IOPC are able to publish the results of their long running,

high profile, investigation in the timeframe they have identified and, importantly, in the order they have identified.

If South Yorkshire Police were to publish information [sic] requested, it would be likely to prejudice the IOPC's ongoing investigation. South Yorkshire Police would be publishing information that forms part of their investigations before the results and/or outcome of such investigations have been published and, potentially, before any complainants have been updated [sic]. Should any new information come to light requiring the IOPC to conduct further investigations, these would be prejudiced as information forming part of their investigation is already in the public domain.

The IOPC must be able to publish the findings of their investigations and outcomes relating to any complaints in the timeframe and in the order that they have identified."

28. SYP told the Commissioner that it had asked the IOPC for its view on the request, and the IOPC had requested that the information be withheld, so as to protect its (then) ongoing investigation.
29. With regard to the likelihood of prejudice in this case, SYP has confirmed that it is relying on the lower level of 'would be likely to' prejudice.
30. At the time of the request, the withheld information was being considered by the IOPC as part of its investigation into allegations of police misconduct at SYP. The investigation considered, amongst other things, whether there was any evidence of officers committing criminal offences, misconduct or instances of poor practice. The investigation eventually found that eight officers had cases to answer for misconduct, and 6 for gross misconduct. In one case, a referral was made to the Crown Prosecution Service regarding a potential criminal offence.
31. Against this background, the Commissioner has no difficulty in accepting that the withheld information comprised sensitive evidence and its disclosure before the investigation had concluded would have been likely to prejudice the investigation. Disclosing the withheld information would have placed in the public domain potential lines of enquiry about some of the matters while they were still under investigation by the IOPC. It is information which would be of significant value to anyone who believed they might be implicated in the allegations against the named officer. More generally, the information could be used by interested parties to try to interfere with, or undermine, the investigation, in order to sway it towards a particular outcome.
32. Although SYP's arguments concentrated on protecting the ongoing and live elements of the IOPC's (then) current investigation, the Commissioner considers that section 31 may also be relevant to the protection of its future investigations. This is because it is essential that

suspects, witnesses and victims feel able to engage with IOPC investigations without fear that the information they provide will be made public prematurely (or at all, if it is inappropriate to do so). The Commissioner believes that disclosing information which comprises evidence about someone under investigation, while the investigation is still underway, would have been likely to erode that confidence. It could create a perception that, when providing sensitive information to the IOPC, confidentiality could not be guaranteed, which could make it more difficult for the IOPC to gather evidence and intelligence in future investigations.

33. On the evidence considered above, the Commissioner is satisfied that there is a causal relationship between the disclosure of the withheld information and likely prejudice to the functions at section 31(2)(b). He also considers that the prejudice envisaged is real, actual and of substance. Section 31(1)(g) of FOIA is therefore engaged.

### **Public interest test**

34. Section 31 is subject to the public interest test, as set out in section 2 of FOIA. This means that although section 31 is engaged, the information may only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

### **Arguments in favour of disclosing the withheld information**

35. SYP acknowledged that the public interest in transparency surrounding police misconduct and disciplinary procedures would be served by disclosing the information. This would increase public confidence in SYP.
36. The complainant argued:

“The [public interest test] must be considered in light of the subject - sexual abuse of children and alleged involvement of police...The public being aware of past abuse can help prevent future abuse.”

### **Arguments in favour of maintaining the exemption**

37. SYP said:

“Factors in favour of non-disclosure is [sic] that disclosure would be likely to prejudice the IOPC’s eight year long investigation into non-recent child sexual abuse in Rotherham.

Given the high profile nature due to media reporting on CSA [child sexual abuse] in Rotherham, there is significant public interest in the IOPC’s investigations and the findings of their investigations.



Further, the IOPC are the organisation engaging and liaising with the complainants and survivors of CSA, not South Yorkshire Police. We do not know what engagement the IOPC have had with the complainants regarding the outcomes of individual cases and whether they have given them an indication of the timeframes for publication of details regarding their complaints.”

### **Balance of the public interest**

38. Following the comments of the Upper Tribunal in *Montague v Information Commissioner and Department for International Trade* [2022] UKUT 104 (AAC)<sup>3</sup>, the public interest balance must be assessed on how matters stood at the time of a public authority’s decision on the request.
39. When balancing the opposing public interests in a case, the Commissioner must decide whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption.
40. The Commissioner considers that, for public authorities, openness is, in itself, to be regarded as something which is in the public interest.
41. The Commissioner also recognises the importance of the public having confidence in public authorities that are tasked with upholding the law. Public confidence will be increased by the police having an effective and transparent disciplinary system. There is a related public interest in maintaining public confidence in, and the reputation of, the police service, in upholding high standards in policing, in deterring misconduct and protecting the public. There is also a public interest in there being accountability in law enforcement more generally.
42. However, appropriate weight must be afforded to the public interest inherent in the exemption - that is, the public interest in avoiding likely prejudice to law enforcement matters. Clearly, it is not in the public interest to disclose information that may compromise the IOPC’s ability to accomplish its core investigatory function, when doing so means that it may fail to bring proper scrutiny to a very serious matter.
43. The Commissioner considers the likely prejudice to the IOPC’s misconduct investigation, which was ongoing at the time of the request,

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[https://assets.publishing.service.gov.uk/media/6273a6ec8fa8f57a41d53ee9/UA\\_20\\_000324\\_000325\\_GIA.pdf](https://assets.publishing.service.gov.uk/media/6273a6ec8fa8f57a41d53ee9/UA_20_000324_000325_GIA.pdf)



to be a significant argument in favour of maintaining the exemption. There is a public interest in such investigations being conducted fairly, thoroughly and efficiently which would be undermined by the evidence under consideration being accessible under FOIA while the investigation remained underway. Investigating bodies require a safe space to conduct enquiries and to deliberate on findings, and it is not in the public interest that this be undermined or impeded by external interference.

44. This investigation was part of a wider set of investigations that have taken several years, and, in view of the seriousness of the subject matter, further legal proceedings might follow as a result of their findings. The withheld information could form a key piece of the evidence in any such proceedings. There is a very real public interest in ensuring the investigation, and any further proceedings, are not in any way undermined by the premature disclosure of information.
45. The Commissioner considers these to be arguments in favour of maintaining the exemption of considerable strength.
46. Added to this is the public interest in preventing the harm that is likely to be caused to future IOPC investigations if the requested information was released prematurely.
47. The complainant has argued that the subject matter demands the information be placed in the public domain, in order to help prevent against future CSA. However, he has not shown what benefit would flow from the disclosure of the information he requested while the IOPC investigation was still underway. In view of the significance of the IOPC's investigation, the Commissioner considers that full disclosure in this case would not better serve the interests of the public. Disclosure would be detrimental to the investigation and this would be contrary to the public interest.
48. Having given due consideration to all the arguments set out above, the Commissioner has decided that the public interest in maintaining the exemption outweighs the public interest in disclosure, and therefore that SYP was entitled to apply section 31(1)(g) (by way of subsection (2)(b)) of FOIA to refuse to disclose the withheld information.
49. In view of this decision, it has not been necessary for the Commissioner to consider SYP's claim that section 38 of FOIA also gave grounds for refusing the request.

## Right of appeal

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50. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

51. 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.

52. 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 .....**

**Samantha Bracegirdle**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
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