

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 June 2022

Public Authority: College of Policing
Address: 58 Leamington Road
Ryton on Dunsmore
Coventry
CV8 3EN

Decision (including any steps ordered)

1. The complainant has requested from the College of Policing (CoP) a copy of the barred list for the Metropolitan Police Service (MPS). CoP refused the request on the grounds that the requested information was exempt by virtue of section 40(2) (Personal information) of FOIA.
2. The Commissioner's decision is that CoP was entitled to rely on section 40(2) to withhold the requested information.
3. The Commissioner requires no steps.

Background

4. Part 4A of the Police Act 1996 (as amended by Schedule 8 of the Policing and Crime Act 2017) places a duty on CoP to maintain a statutory list of persons barred from policing ('the barred list')¹. CoP is also under a duty to publish information about such persons, although it has the discretion to do this "in such manner as the College of Policing considers appropriate".

¹ <https://www.legislation.gov.uk/ukpga/2017/3/schedule/8>

5. Furthermore, all police forces are required by the Police (Conduct) Regulations 2020 to give public notification of misconduct hearings and to publish a report of the outcome (except where certain criteria apply). The Commissioner understands from previous investigations that MPS publishes such information on its website for 28 days before removing it².
6. The CoP website³ publishes the following information about the barred list:

“What the barred list contains

All officers, special constables and staff members who have been dismissed from policing after investigations under the Police (Conduct) Regulations 2012 or Police (Performance) Regulations 2012 as well as the equivalents for police staff.

Individuals will remain on the list indefinitely, unless they win an appeal against their dismissal or make a successful review application, where they would have to provide clear evidence as to why they were now suitable to re-join policing. Reviews cannot be requested for a minimum of three years for performance matters, and five years for conduct matters. Even a successful review does not guarantee a return to policing: the individual concerned would have to successfully apply for a post and pass vetting, just like anyone else would.

...

The College will make decisions on whether it is appropriate to publish the information on the barred list, taking into account national security, other ongoing investigations and any significant harm which may be caused to the individual or others. In the vast majority of cases, we expect that the information will be published.

...

² Para 6, <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/2620290/ic-67112-t2x3.pdf>

³ <https://www.college.police.uk/ethics/barred-list>

Public access to the barred list

Details of officers and special constables (but not police staff) who have been dismissed for conduct matters are published by the College of Policing, unless certain exemptions apply. The list is updated monthly, with names added by the end of the following month. For example, if someone is dismissed on 15 January, their name will be on the list by the end of February.

As agreed with the Information Commissioner's Office, the public list is searchable. As details of police hearings and outcomes are now largely published on force websites and reported in the media, the names of individuals who are dismissed from policing are generally already in the public domain.

In accordance with the legislation, the details held on the public list will include the name and force of the officer concerned, their rank and number, the date and reason for dismissal. Information will be held on the public list for five years from the date of publication.”

7. As stated above, the Commissioner has advised CoP on the privacy implications of maintaining the barred list. He is satisfied that the provision of a public database, searchable by individual names, balances CoP's duty to publish with its duty to process highly sensitive personal data in compliance with the provisions of the UK General Data Protection Regulation ('UK GDPR') and the Data Protection Act 2018 ('DPA').

Request and response

8. On 5 July 2021, the complainant wrote to CoP and requested information in the following terms (he reproduced a sample entry of the barred list, containing personal data, which the Commissioner has redacted):

“Provide the current barred list for the Met police service.

If possible, it should be in alphabetical order, by surname.

Please include the detail in the barred list -

First name [redacted]

Middle name -

Last name [redacted]

Police force [redacted]

Officer/special type Police Officer – [redacted]

Officer rank [redacted]

Date of dismissal [redacted]

Reason for dismissal [redacted]

Dismissal published [redacted]”.

9. CoP responded on 8 July 2021. It confirmed that it held the information specified in the request, but said it was exempt from disclosure under section 40(2) (Personal information) of FOIA.
10. The complainant requested an internal review on 8 July 2021, adding that “there was a legitimate interest”. In a further email sent the same day, he said “All the information is on your website.”
11. Following an internal review, CoP wrote to the complainant on 29 July 2021. It provided some information about the background to the barred list, and referred the complainant to the searchable database on its website. It outlined the factors it had considered when deciding whether or not to disclose the requested information. It maintained that its decision to refuse the request under section 40(2) of FOIA was correct.

Scope of the case

12. The complainant contacted the Commissioner on 29 July 2021 to complain about the way his request for information had been handled. He disagreed with the decision to refuse his request, saying the information was already in the public domain via the CoP website.
13. The complainant asked the Commissioner to issue a decision notice on his complaint, therefore the Commissioner has not pursued the question of whether his complaint might be informally resolved.
14. The analysis below considers whether CoP was entitled to rely on section 40(2) of FOIA to withhold the requested information.

Reasons for decision

Section 40 – Personal information

15. The Commissioner is familiar with the purpose and content of the barred list. The withheld information in this case is self evident from the fields reproduced in the complainant's request. The Commissioner has therefore been able to consider the disclosure of the information as a class, without it being necessary to view the specific information requested by the complainant.
16. As regards the complainant's claim that the requested information is already in the public domain via the CoP website, the Commissioner notes that CoP only provides access to records of an individual on the barred list in response to their name firstly being input into the database. The barred list as a whole is not published and it is not otherwise available for the public to view. The public has limited access to the content, based on the searcher being restricted to looking for information about a specific individual, rather than simply perusing all the content; the Commissioner considers this to be a proportionate way of accessing this type of information. The complainant is therefore requesting the disclosure of information which, though available, is not readily accessible.
17. The Commissioner understands from previous investigations that some of the requested information might be available online by way of media reports based on information which might previously have been disclosed by the MPS under the aforementioned Police (Conduct) Regulations 2020. However, such disclosures would not have been made under the remit of FOIA and they do not establish a precedent for disclosure under the Act.
18. 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.
19. In this case the relevant condition is contained in section 40(3A)(a)⁴. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the

⁴ As amended by Schedule 19 Paragraph 58(3) DPA.

processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').

20. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data then section 40 of FOIA cannot apply.
21. 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?

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

“any information relating to an identified or identifiable living individual”.

23. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
24. 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.
25. 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.
26. Clearly, the requested information in this case relates to named individuals and the fact they have been dismissed from the MPS in the circumstances outlined in paragraph 6, above. Accordingly, it is their personal data.

Would disclosure contravene principle (a)?

27. 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”.

28. 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.
29. 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.

30. In addition, if the requested data is criminal offence data, in order for disclosure to be lawful and compliant with principle (a), it must also meet the requirements of Article 10 of the UK GDPR.

Is the information criminal offence data?

31. Information relating to criminal convictions and offences is given special status in the UK GDPR.
32. 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.
33. Having had regard to the class of information that is held on the barred list (as evidenced by the field titles listed in the request) the Commissioner notes that the database only includes those individuals who have been dismissed on conduct or performance grounds. He therefore finds that the requested information will include criminal offence data. He has reached this conclusion on the basis that inclusion on the barred list involves the consideration of whether or not named police officers have committed criminal offences.
34. 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.
35. 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).
36. Whilst details regarding some of the data subjects might still in the public domain by way of the media, the Commissioner has seen no evidence or indication that they would have specifically consented to this data being disclosed to the world in response to an FOIA request or that they would have deliberately made this data public.
37. 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 in order to disclose it under FOIA would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

Is any of the information not criminal offence data?

38. As noted in paragraph 33, the barred list includes information on people who have been dismissed from policing on performance grounds. The Commissioner recognises that this might include grounds which fall short of constituting a criminal offence. The Commissioner has therefore considered whether the processing of such information in order to disclose it in response to the request would be lawful.

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

39. 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.

40. 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"⁵.

⁵ 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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) 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 sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

41. 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;
 - 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.
42. 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

43. 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.
44. The complainant has not offered any explanation as to what legitimate interest is being pursued in the request. The Commissioner surmises that it is the legitimate interest in the external scrutiny of the actions of the police in relation to officers who have been accused of wrongdoing.

Is disclosure necessary?

45. '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.
46. As set out above, the complainant has not made any submissions as to why disclosure of the withheld information is 'necessary'. In the absence of the complainant's input, the Commissioner does not consider that

disclosure of this personal data is reasonably necessary for the purposes of the legitimate interests he has identified above.

47. The Commissioner considers that the following measures already provide sufficient external scrutiny of the treatment of police officers who have been accused of wrongdoing:

- the publication of misconduct information in accordance with the Police (Conduct) Regulations 2020 on force websites;
- the public's ability to search the barred list on a name by name basis; and
- the general oversight provided by the Independent Office for Police Conduct, which can consider complaints about the police.

48. The complainant has not explained why disclosure of the barred list in its entirety would be desirable, when the above sources of information already exist. In the absence of such an explanation, the Commissioner has concluded that it would be a disproportionately intrusive measure.

49. Since disclosure under FOIA is not the least intrusive means of achieving the legitimate aim in question, it follows that it is not "necessary".

50. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interests 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 decision

51. The Commissioner has therefore decided that CoP was entitled to rely on section 40(2) of FOIA to refuse the request.

Right of appeal

52. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

53. 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.

54. 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
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