

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 April 2022

Public Authority: Hampshire Constabulary

Address: Chief Constable of Hampshire Constabulary
Mottisfont Court
Tower Street
Winchester
SO23 8ZD

Decision (including any steps ordered)

1. The complainant has requested information from Hampshire Constabulary regarding specified misconduct proceedings. Hampshire Constabulary provided him with some of the requested information, however it stated that it was withholding the remainder under section 31(1) (a) (b) and (g) of FOIA by virtue of sections 31(2) (a) (b) and (c), also sections 32 and 40 FOIA.
2. The Commissioner's decision is that Hampshire Constabulary has correctly applied section 31 of FOIA to the withheld information. As this applies to all of the withheld information, the Commissioner has not considered Hampshire Constabulary's application of the exemptions at sections 32 and 40.
3. Therefore the Commissioner requires no steps to be taken.

Request and response

4. The complainant submitted a request for information to Hampshire Constabulary on 18 January 2021 which was worded as follows:-

"Please disclose an electronic copy of:
- the written outcome,
- the decision on sanction, and
- the transcript or, if there is no transcript, the audio recording of the disciplinary proceedings reported here: <https://www.bbc.co.uk/news/uk-england-hampshire-55586420>"
5. Hampshire Constabulary responded to the complainant's request on 19 February 2021, sending a link to a short summary of the written outcome and the decision on the sanction, and refused to disclose the transcript/audio recording of the disciplinary proceedings, citing section 31(1)(g) by virtue of section 31(2)(a) and (b) of the FOIA as a basis for non-disclosure.
6. The complainant sought an internal review of Hampshire Constabulary's decision on 19 February 2021. This was on the grounds that it took longer than 20 working days to respond to his request, only partially responded to his request for the written outcome and sanction determination, and also its application of the section 31 exemption to the request for the transcript/audio recording.
7. Hampshire Constabulary sent its internal review response to the complainant on 15 March 2021. It upheld its application of the section 31 exemption and provided some further explanation as to why it had been cited. It also sent a link to some further information regarding the written outcome and sanction determination.
8. The complainant contacted the Commissioner, who wrote to Hampshire Constabulary on 14 September 2021. Hampshire Constabulary issued a revised response to the complainant on 29 September 2021 stating that it was now applying sections 31, 32 and 40 of FOIA to the complainant's request.

Scope of the case

9. The complainant contacted the Commissioner on 15 March 2021 to complain about the way his request for information had been handled.
10. The Commissioner has considered Hampshire Constabulary's application of the specified exemptions.

Reasons for decision

Section 31 – law enforcement

11. Section 31 provides a prejudice-based exemption which protects a variety of law enforcement interests. Consideration of this exemption is a two-stage process. Firstly, in order for the exemption to be engaged it must be at least likely that disclosure would prejudice one of the law enforcement interests protected by section 31 of FOIA. Secondly, the exemption is subject to a public interest balancing test. The effect of this is that the information should be disclosed if the public interest favours this, even though the exemption is engaged.
12. Hampshire Constabulary has applied sections 31(1) (a) (b) and (g) together with sections 31(2) (a) (b) and (c) to withhold part of the requested information (“the withheld information”).
13. The relevant parts of section 31 of the 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—

 - (a) the prevention and detection of crime
 - (b) the apprehension or prosecution of offenders... and
 - (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 –

 - (a) the purpose of ascertaining whether any person has failed to comply with the law
 - (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper
 - (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or arise...”
14. The Commissioner will therefore consider whether Hampshire Constabulary exercises a relevant function for the purposes specified in the subsection (g) above.
15. The Commissioner will then go on to consider the nature and likelihood of prejudice to the functions as set out in sections 31(1)(a) and (b) and the functions as set out in section 31(1)(g) by virtue of sections

31(2)(a) (b) and (c) if the withheld information were to be disclosed and whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Hampshire Constabulary's functions under subsection 31(1)(g) for the purposes of Sections 31(2) (a) (b) and (c)

16. For the exemption to be engaged, the Commissioner requires the function identified by the public authority in relation to section 31(1)(g) to be a function which is specifically entrusted to that public authority to fulfil.
17. Hampshire Constabulary has stated that it has the power to conduct misconduct hearings under Schedule 2 of the Police (Conduct) Regulations 2012. The Commissioner is satisfied that this is a relevant function which falls under sections 31(1)(g) for the purposes of 31(2) (a) (b) and (c) of FOIA and is one which is specifically entrusted to Hampshire Constabulary, as a police force, to fulfil.

Is the exemption engaged?

18. In order to be engaged, the following criteria must be met:
 - first, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption (in this case, to the prevention or detection of crime, the apprehension or prosecution of offenders and the functions for the purposes of ascertaining whether any person has failed to comply with the law, whether any person is responsible for any conduct which is improper and whether circumstances exist or arise which would justify regulatory action in pursuance of any enactment);
 - secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and,
 - thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
19. In relation to the lower threshold (would be likely), the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility. Rather, there must be a real and significant risk. The Commissioner considers that the higher threshold places a stronger

evidential burden on a public authority to discharge. The chances of the prejudice occurring should be more probable than not.

20. Consideration of the exemption at section 31 is a two-stage process. Even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
21. The Commissioner has considered whether Hampshire Constabulary has demonstrated a causal link between disclosure of the withheld information and the prejudice that section 31 and the relevant subsections are designed to protect against. In the Commissioner's view, disclosure must at least be capable of harming the purpose or function in some way, i.e. having a damaging or detrimental effect on it.

The complainant's position

22. The complainant does not consider that section 31 is applicable as he states that any prejudice which was going to be caused to the specified law enforcement functions would have been caused by the fact that the proceedings were held in public, and journalists were present who could have transcribed everything which took place. His reasoning is that at the time Hampshire Constabulary was content for that to happen, and had not raised any objections to the proceedings being conducted in public.

Hampshire Constabulary's view

23. With regard to the potential harm from disclosure in this case, Hampshire Constabulary stated that disclosure would be likely to prejudice the voluntary provision of information to investigations and misconduct proceedings. Hampshire Constabulary stated that it was relying upon paragraphs 102-103 of the Commissioner's guidance on s.31¹, and on its standalone guidance on the voluntary supply of information.
24. Hampshire Constabulary stated that individuals provide information to misconduct investigations for the purpose of those proceedings (which may be both criminal and disciplinary in nature).
25. Hampshire Constabulary stated that disclosure would tend to discourage voluntary provision of information if individuals were aware that, not

¹ [law-enforcement-foi-section-31.pdf \(ico.org.uk\)](https://ico.org.uk/law-enforcement-foi-section-31.pdf)

only might their evidence be used for the purpose of that specific investigation, but it might also be disclosed to the world at large. According to Hampshire Constabulary, that prejudice could arise at three separate points in the process:

- The initial provision of evidence (noting that it is only at this stage that s.31(1)(a) and (b) would be engaged);
- The witness' willingness to attend misconduct proceedings;
- The witness' ability and willingness to be completely candid and forthcoming when giving evidence.

Hampshire Constabulary acknowledges that misconduct hearings (and criminal proceedings) are held in public, subject to any judicial decision on privacy, however giving evidence in public cannot be equated to disclosure under FOIA to the world at large. It should be noted also that there are no powers of compulsion in respect of witnesses in either criminal investigations (though there are in proceedings), or in misconduct investigations or proceedings, therefore these rely to a large extent upon the voluntary provision of information.

26. Hampshire Constabulary considers that it would also tend to discourage officers from accepting factual evidence provided by witnesses, particularly vulnerable witnesses, if they knew that witnesses who were required to attend risked their evidence being published to the world at large. Though witness attendance is a matter for the panel chair, it is inevitably influenced by the submissions of the officer concerned. The weight given to the evidence of a witness who has been required but does not attend is likely to be extremely limited, if any. Anything which raises the prospects of witnesses either not attending, or not giving evidence which comes 'up to proof' (i.e. reflects the content of their witness statements) is likely to increase the attractiveness to officers of requiring key witnesses to attend, which prejudices both the outcome of misconduct hearings and also their efficient management and running. Hampshire Constabulary considers that these factors amount to real, actual and/or substantial prejudice to the interests engaged.
27. Hampshire Constabulary has further informed the Commissioner that the complainant's request is in the context of a case which attracted a relatively significant degree of media interest. The release of the recording would therefore be likely to attract some attention, and to result in those two impacts set out above. On that basis, Hampshire Constabulary considers that there is a causal relationship between the potential disclosure of the information sought and the prejudice identified above. It considers that such prejudice would be likely to arise, in the sense that it may very well occur from such disclosures. That is particularly the case

where the request was made at the point that the proceedings had concluded extremely recently. Even if that is not the case based on a single disclosure, it would reach that threshold as a result of cumulative prejudice arising from multiple disclosures of this type of information: anything which contributes to such cumulative prejudice occurring should be regarded as meeting the appropriate threshold of likelihood.

Likelihood of prejudice

28. In a case such as this, it is not enough for the information to relate to the interests protected by section 31(1)(a) (b) and (g), its disclosure must also at least be likely to prejudice those interests. The onus is on the public authority to explain how that prejudice would arise and why it would occur. In this case Hampshire Constabulary has used the phrase "would be likely" indicating that it is relying on the lower threshold of prejudice in this case.
29. The Commissioner considers that the prejudice test is not a weak test, and a public authority must be able to point to prejudice which is 'real, actual or of substance'.
30. The information withheld by virtue of this exemption comprises an audio recording/transcript of disciplinary proceedings which were held in public and reported widely in the media.
31. In relation to the actual prejudice which Hampshire Constabulary alleged would be likely to occur if the withheld information were to be disclosed, the Commissioner has considered the arguments it put forward.
32. From the above arguments, the Commissioner is satisfied that Hampshire Constabulary has demonstrated a real and significant likelihood of prejudice resulting to the law enforcement functions as outlined in sections 31(1)(a) (b) and (g). The Commissioner is satisfied that the potential prejudice that Hampshire Constabulary has stated would be likely to occur if the withheld information were to be disclosed is real, actual and of substance, and that there is a causal link between disclosure of the withheld information and the prejudice against which the exemption is designed to protect.
33. The Commissioner is satisfied that it is plausible that disclosure of the withheld information would be likely to cause prejudice to Hampshire Constabulary's ability to carry out its functions under sections 31(1) (a) (b) and (g) for the purposes as set out in section 31(2) (a) (b) and (c) FOIA for the reasons outlined above. Therefore the Commissioner is satisfied that the exemption is engaged in relation to the withheld information.

Public interest test

34. Section 31 is a qualified exemption. The Commissioner must now consider whether, in all the circumstances of the case, the public interest in maintaining the exemption at sections 31(1)(a) and (b) of the FOIA outweighs the public interest in disclosing the information requested by the complainant.

Public interest considerations favouring disclosure

35. Hampshire Constabulary acknowledges and recognises the value in public transparency and accountability in police activities in order to maintain confidence and trust with the public.
36. It also accepts that the public interest in transparency and accountability is strengthened by the fact that police misconduct is a topic of particular public interest.

Public interest considerations in favour of maintaining the exemption

37. In terms of factors against disclosure, Hampshire Constabulary considers that there is an obvious and weighty public interest in an effective and efficient police misconduct regime and states that, if disclosure would cause real, actual or substantial prejudice to the effective and efficient operation of that system, the public interest in such disclosure would need to be extremely compelling to outweigh it.

Commissioner's conclusion

38. In carrying out the statutory balancing exercise in this case, the Commissioner considers that 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 police's ability to accomplish its core function of law enforcement.
39. In that respect, the Commissioner recognises that there is a very strong public interest in protecting the law enforcement capabilities of a police force and she considers that appropriate weight must be afforded to the public interest inherent in the exemption - that is, the public interest in avoiding prejudice to the prevention or detection of crime, the apprehension or prosecution of offenders and the other functions as set out in section 31(1)(g) by virtue of section 31(2)(a)(b) and (c).

40. The Commissioner also recognises the need to ensure transparency and accountability on the part of the police. However, he finds that there is a stronger public interest in ensuring the continued strength and effectiveness of both misconduct hearings and of the policing system as a whole. He recognises that, if disclosure of the withheld information is likely to cause prejudice to the policing system by inducing a potential reluctance to voluntarily provide information, upon which the effective running of the policing system relies, this would not be in the public interest.
41. The Commissioner recognises that the hearing at the time attracted significant media interest and was widely reported. He considers that the need to ensure transparency and accountability, and the understandable public interest which the case attracted, have been partly met by the disclosure of the findings and outcome. This does not appear to be a case where there is any plausible suspicion of lack of probity.
42. In the circumstances of this case, the Commissioner considers that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. It follows that Hampshire Constabulary was entitled to rely on sections 31(1)(a) (b) and (g) by virtue of sections 31(2)(a) (b) and (c) FOIA to refuse to disclose the withheld information.

Right of appeal

43. 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

44. 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.
45. 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

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