

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

### **Decision notice**

**Date:** 30 October 2023

**Public Authority:** Chief Constable of Cheshire Constabulary  
**Address:** Police Headquarters  
Clemonds Hey  
Winsford  
Cheshire  
CW7 2UA

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

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1. The complainant has requested various items of information relating to the use of facial recognition software, from Cheshire Constabulary. In its response to the request, Cheshire Constabulary said that some parts of a report assessing the performance of two software systems were exempt from disclosure under section 43 (Commercial interests) of FOIA.
2. The Commissioner's decision is that Cheshire Constabulary was entitled to rely on section 43 to withhold the redacted information.
3. The Commissioner does not require any steps as a result of this decision.

#### **Request and response**

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4. On 20 February 2023, the complainant wrote to Cheshire Constabulary and requested information in the following terms (the Commissioner has redacted the names of the suppliers):

"I'm seeking the following documents referenced in a Data Protection Impact Assessment produced by Cheshire Constabulary in relation to its use of facial recognition technology:

1. An updated Data Protection Impact Assessment (DPIA) regarding Cheshire Constabulary's use of Retrospective Facial Recognition Technology. The previous DPIA, mentioned above and dated 07/09/2021, indicates this was due to be completed by 01/02/2023.
  2. Any documents that outline the results (or interim results) of a benchmarking exercise (also known as Operation Identifying) conducted by Cheshire Constabulary to assess the performance of [supplier A facial recognition software] compared to [supplier B facial recognition software].
  3. Any ethics forms completed by Cheshire Constabulary since September 2021 in relation to work involving Predictive Analytics, Machine Learning, Artificial Intelligence.
  4. Any documents that outline the results of STAR bias testing conducted by the National Physical Laboratory on behalf of Cheshire Constabulary since September 2021.
  5. Any press and media strategies or risk management strategies prepared by Cheshire Constabulary since September 2021 in relation to its use of facial recognition technology."
5. On 21 March 2023, and as provided for by section 17(2) of FOIA, Cheshire Constabulary told the complainant that it needed further time to complete its public interest test considerations in respect of sections 31 (Law enforcement) and 43.
  6. Cheshire Constabulary responded to the request on 22 May 2023, addressing each part of the request individually. For point (2), it disclosed a copy of a Facial Recognition Benchmarking report, with redactions made under section 43 of FOIA.
  7. On 22 May 2023, the complainant requested an internal review of Cheshire Constabulary's decision not to disclose the full report.
  8. Cheshire Constabulary provided the internal review on 8 August 2023. It maintained its position that the redacted information was exempt under section 43 of FOIA.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 8 August 2023 to complain about the way his request for information had been handled. He disagreed with the application of section 43, saying that Cheshire Constabulary had not demonstrated a causal relationship between disclosure and prejudice, or given proper consideration to the public interest in disclosure. He also believed that Cheshire Constabulary had

declined to engage substantively with the specific points he raised in his request for an internal review.

10. The analysis below considers whether Cheshire Constabulary was entitled to rely on section 43 to withhold information from the Facial Recognition Benchmarking report. The Commissioner has viewed the withheld information when reaching his decision.
11. The Commissioner has considered the conduct of the internal review in the 'Other matters' section, at the end of this decision notice.

## Reasons for decision

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### Section 43 – Commercial interests

12. Cheshire Constabulary has applied section 43 of FOIA to withhold parts of a report it commissioned on the performance of two pieces of facial recognition software. The redacted information comprises statistical comparison data and observations on the results.
13. Section 43(2) of FOIA states that information is exempt if its disclosure under FOIA would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
14. The Commissioner's guidance on section 43<sup>1</sup> states that performance information about a contractor is commercial information. However, in order to engage section 43(2), a public authority must be able to show how and why the disclosure of that commercial information has the potential to prejudice someone's commercial interests. The prejudice can be to the commercial interests of any person (an individual, a company, the public authority itself or any other legal entity).
15. In order for section 43(2), to be engaged, three criteria must be met:
  - the harm which the public authority envisages must relate to someone's commercial interests.
  - the public authority must be able to demonstrate a causal relationship between disclosure and prejudice to someone's

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<sup>1</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

commercial interests. Furthermore, the resultant prejudice must be real, actual or of substance.

- the level of likelihood of prejudice being relied upon by the public authority must be met (ie it must be shown that disclosure would, or would be likely to, result in prejudice occurring).
16. Cheshire Constabulary said that it commissioned the benchmarking report to test and evaluate the performance of two facial recognition software tools. It applied section 43 to withhold specific statistical comparison data and observations on the results. The methodology for the testing was disclosed to the complainant in full, as was the terminology used.
17. It said that disclosing the withheld information would reveal commercially sensitive information:
- “The information exempt is the side-by-side comparison of two commercially available products, this is performance information...The Facial Recognition Benchmarking exercise was conducted by Cheshire Constabulary for its own purposes. If the statistical information was disclosed to the world at large it would mean that the world at large had side-by-side figures of two commercially available products. The commercial organisations would not expect this data to be disclosed to the world at large”.
18. The complainant had argued that one of the software tools was not a commercially available product, but Cheshire Constabulary explained to the Commissioner that his understanding was incorrect. It gave the Commissioner a specific example of how disclosure of the redacted information could disadvantage the software providers. The Commissioner cannot reproduce its arguments here without disclosing commercially sensitive information.
19. Cheshire Constabulary said that disclosure of the withheld information ‘would be likely’ to prejudice the commercial interests of the software suppliers. It said the benchmarking exercise was designed to establish the best software option for its own particular needs, at a specific point in time, and it was not designed to identify whether one was objectively a better product. Cheshire Constabulary recognised that the two software systems are not like-for-like solutions and its analysis was not meant to be an independent, scientific comparison of whether one system was better:
- “The prejudice envisaged by the disclosure of the disputed information is real, of substance, and would be capable of harming the commercial interests of [the software suppliers]...There is a clear link between

disclosing the disputed information and the prejudice occurring. By its very nature testing will highlight what the report writer/s perceives as both merits and weaknesses of the software programmes. Disclosing this information under FOI where the software suppliers have no right of reply would harm their commercial interests as the weaknesses of one system compared to another system would be disclosed. At this point the commercial interests of the perceived 'loser' of the testing is harmed as their software is seen as 'inferior'."

20. It said that supplier A had provided written objections to the disclosure of the withheld information. It provided evidence to the Commissioner that it had properly consulted with supplier A to obtain, in some detail, its views on disclosure and that it was correctly representing them.

21. In his internal review request, the complainant had cited an evaluation report published by another police force assessing particular facial recognition software, saying that this set a precedent for disclosure of information of this type. Addressing this point, supplier A said:

"The stated published report is a scientifically reported set of results of real world Live Facial Recognition deployments by [name of police force], backed and put together by the National Physical Laboratory (NPL), an independent and highly reputable body that has a track record of releasing scientific reports and evaluations...The test carried out by Cheshire Constabulary and the independent evaluations carried out by the NPL cannot be considered in any way similar."

22. It added that disclosing the statistical information and accompanying analysis would be likely to prejudice its commercial interests because potential customers may consider it in isolation, without bearing in mind that the two systems being compared are not like-for-like solutions.

23. As regards the impact on its commercial interests, Cheshire Constabulary said:

"If Cheshire Constabulary were seen to disclose commercially sensitive information such as the results and evaluation of benchmarking/testing exercises, it would result in companies losing confidence in Cheshire Constabulary as a trusted organisation to conduct business with.

Cheshire Constabulary's reputation for being a commercial partner to such companies would also be harmed. This in turn would limit the number of companies who would want to engage in business partnerships with Cheshire Constabulary, therefore limiting the number of options available to Cheshire Constabulary in procurement. When tender options are reduced, this would lead to Cheshire

Constabulary having a poorer range of services to choose from, potentially at higher costs as the supplier would know Cheshire Constabulary have limited options.

Cheshire Constabulary is publicly funded. Should this lead to a situation where we were having to overspend to procure services, the additional funds would have to be taken from other areas of Cheshire Constabulary's budget. This impacts Cheshire Constabulary's commercial interests as a whole."

24. With regard to the three criteria set out in paragraph 15, a commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent.
25. The Commissioner is satisfied that the harm Cheshire Constabulary envisages relates to the commercial interests of the software suppliers; the information relates to commercially produced software products which the suppliers market to a range of potential customers.
26. The Commissioner also accepts that Cheshire Constabulary's arguments regarding its ability to competitively tender and obtain best value for money, relate to its own commercial interests.
27. Secondly, the Commissioner is satisfied that Cheshire Constabulary has shown that a causal link exists between disclosure of the withheld information and prejudice (or harm) to the software suppliers' commercial interests. He considers it likely that the withheld information would be of interest to potential customers wanting to gauge the relative strengths/weaknesses of the software, when the report was not designed to be used for that purpose and may lead to erroneous conclusions being drawn. He also finds it credible that concerns about the potential disclosure of commercially sensitive information could deter other suppliers from working with Cheshire Constabulary, thereby limiting its tendering options.
28. Thirdly, the Commissioner accepts Cheshire Constabulary's position that the envisioned prejudice to the software suppliers 'would be likely' to occur (ie it is more than a remote, hypothetical possibility).
29. However, the arguments Cheshire Constabulary presented do not persuade him that the level of harm to its own commercial interests meets the higher threshold of 'would' prejudice. Public sector contracts can be highly lucrative sources of income for private sector suppliers and the Commissioner considers that, for many, the financial benefits will outweigh any concerns regarding increased transparency under

FOIA. As such, he has applied the lower level of 'would be likely' to prejudice, when considering the public interest test, below.

30. Nevertheless, as the three criteria set out in paragraph 15 are met, the Commissioner is satisfied that the exemption provided by section 43(2) is engaged.

### **Public interest test**

31. Section 43 is subject to the public interest test, as set out in section 2 of FOIA. This means that although section 43 is engaged, the requested information must be disclosed unless the public interest in maintaining the exemption is stronger than the public interest in disclosure.

### **Public interest arguments in favour of disclosure**

32. The complainant said:

"Police use of facial recognition is highly controversial and concerns about the technology include uncertainty about its performance and its potential for bias. Disclosure of the requested information would increase openness and transparency at Cheshire Constabulary, provide accountability for the spending of public money, and enhance the standard of public debate about an issue of significant public concern and importance."

33. Cheshire Constabulary acknowledged the general public interest in transparency regarding the use of facial recognition technology in the prevention and detection of crime.

### **Public interest in maintaining the exemption**

34. Cheshire Constabulary argued that the public interest in transparency in this area was satisfied by the publication on its website of information detailing its use of facial recognition technology<sup>2</sup>.
35. It said that it is in the public interest to maintain an open and fair marketplace, where Cheshire Constabulary can procure services with the best possible terms and conditions. Any undermining of its ability to negotiate competitively, and with a wide selection of potential suppliers, would prevent it obtaining best value for money.

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<sup>2</sup> <https://www.cheshire.police.uk/police-forces/cheshire-constabulary/areas/cheshire/about-us/about-us/facial-recognition-technology/>

36. It said that if it was forced to overspend to procure services, the additional funds would have to be taken from other areas of its budget. This would impact on operational policing, which is clearly not in the public interest.

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

37. When balancing the opposing public interests in a case, the Commissioner will decide whether it serves the public interest better to disclose the withheld information, or to withhold it, because of the interests protected by the relevant exemption. If the public interest in maintaining the exemption does not outweigh the public interest in disclosure, the information must be disclosed.
38. The Commissioner accepts that there is a presumption running through FOIA that openness is, in itself, to be regarded as something which is in the public interest. He also recognises the need for transparency and accountability on the part of public authorities, as regards their spending of public money.
39. More specific to this case, the Commissioner recognises that the use of facial recognition technology for law enforcement carries advantages and risks. As regulator for data protection legislation, in 2019 the Commissioner published an Opinion for government on the use of live facial recognition technology by law enforcement in public places<sup>3</sup>.
40. He therefore acknowledges the complainant's position that there is a public interest in disclosing information about the operation of particular facial recognition software systems. However, set against this, he notes Cheshire Constabulary's submissions that the assessment was only designed to identify which system best suited its own particular needs; it did not contain objective conclusions on strengths or weaknesses, capable of being extrapolated or expanded on.
41. On that point, the Commissioner considers that the Facial Recognition Technology In Law Enforcement Equitability Study, published by the National Physical Laboratory in March 2023, does go some way towards satisfying the public interest in transparency in this area.
42. The Commissioner has also had regard to the public interest in ensuring that disclosure under FOIA does not adversely impact the commercial interests of suppliers that do business with public authorities, without

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<sup>3</sup> <https://ico.org.uk/media/about-the-ico/documents/2616184/live-frt-law-enforcement-opinion-20191031.pdf>

good reason. There is a public interest in ensuring that the commercial interests of suppliers are not damaged or undermined by the disclosure of information which is not in the public domain and which could adversely impact their future business. Having accepted in this case that the disclosures would be likely to be damaging to the software suppliers' commercial interests, the Commissioner can see no arguments for disclosure capable of justifying that potential for damage.

43. The Commissioner also recognises the necessity of Cheshire Constabulary protecting its own commercial interests - there is a public interest in public authorities not being disadvantaged by their FOIA obligations, when in commercial negotiations with the private sector. The interests of the suppliers it does business with should be protected, so that the best possible value for money can be obtained through open competition. To that end, there is a public interest in Cheshire Constabulary being regarded as a trusted party and potential suppliers having confidence in sharing confidential commercial information with it.
44. Having had regard to all the above, on balance, the Commissioner considers that the public interest in protecting Cheshire Constabulary's commercial interests, and those of the software suppliers, outweighs the limited benefit that would flow from disclosure in this case. His decision is therefore that Cheshire Constabulary was entitled to rely on section 43 of FOIA to withhold the redacted information.

## **Other matters**

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### **Section 45 - Internal review**

45. There is no obligation under FOIA for a public authority to provide an internal review process. However, it is good practice to do so, and where an authority chooses to offer one, the code of practice established under section 45 of FOIA sets out, in general terms, the procedure that should be followed. The code states that internal reviews should provide a fair and thorough review of procedures and decisions taken and pay particular attention to concerns raised by the applicant.
46. The complainant raised a number of points of concern in his internal review request. In its response, Cheshire Constabulary said:

"I do not propose addressing each point individually as I am satisfied that we have applied the exemption correctly..."
47. The complainant then complained to the Commissioner that when conducting the internal review, Cheshire Constabulary failed to properly engage with the points he made in his internal review request.

48. The Commissioner wrote to Cheshire Constabulary on 1 August 2023, explaining that the complaint had been accepted for investigation and that a case officer would be in touch in due course. However, prior to the case officer contacting Cheshire Constabulary, on 8 August 2023, it pre-emptively forwarded information explaining its handling of the request. Included in its submissions was correspondence from one of the suppliers, commenting on each specific point (in some cases, in some detail) made by the complainant in the internal review request.
49. Therefore, although the internal review outcome letter sent to the complainant did not respond, point by point, to the specific concerns he had raised, the Commissioner is satisfied that those concerns were taken into consideration when the internal review was conducted.
50. The Commissioner therefore finds no failure to conform with the section 45 code of practice in this regard.
51. However, the code states that, where offered, internal reviews should be conducted promptly. The approach of the Commissioner is that they should be completed within a maximum of 40 working days. In this case, Cheshire Constabulary took 55 working days to conduct the internal review.
52. Cheshire Constabulary has explained that this was due to the complexity of the request and the practical difficulties of consulting a range of parties for their views. Nevertheless, the Commissioner would remind Cheshire Constabulary of the importance of completing internal reviews in a timely manner.

## Right of appeal

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53. 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](mailto:grc@justice.gov.uk)

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

54. 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.
55. 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**  
**SK9 5AF**