

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 November 2023

Public Authority: Independent Office for Police Conduct
Address: 90 High Holborn
London
WC1V 6BH

Decision (including any steps ordered)

1. The complainant has requested information pertaining to Independent Office for Police Conduct's (IOPC) investigation into the actions of a named former Police Officer and their handling of a report of indecent exposure. IOPC withheld the requested information citing section 40(2) of FOIA (Personal information).
2. The Commissioner's decision is that IOPC were correct to rely on section 40(2) of FOIA to withhold the requested information. He does not require any further steps to be taken.

Request and response

3. On 6 June 2023, the complainant wrote to IOPC and requested information in the following terms:

“Please can you provide an electronic copy of the transcript of PC [name redacted] interview under caution with your team, which was held on 18 November 2021.”
4. IOPC responded on 30 June 2023 and refused to provide the requested information citing section 40 of FOIA as its basis for doing so.

5. Following an internal review on 12 September 2023, IOPC maintained its original position.

Scope of the case

6. The complainant contacted the Commissioner on 31 August 2023 to complain about the way their request for information had been handled.
7. The Commissioner considers that the scope of his investigation is to determine whether IOPC were correct to withhold the requested information under section 40(2) of FOIA.

Reasons for decision

Section 40-personal information

8. Section 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.
9. In this case the relevant condition is contained in section 40(3A) (3B) (a). 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 UK General Data Protection Regulation ('UK GDPR')).
10. 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.
11. 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?

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

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

13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

14. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as 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.
15. 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 focus.
16. In this case, the requested information relates to a transcript of a misconduct interview with a former Police Officer during investigations into their conduct in handling of a report of indecent exposure and the actions they took whilst working as a Police Officer. The interview transcript relates to the former officer in question, and they are identifiable from this information. It contains their direct answers to questions asked by the investigators and demonstrates the actions taken whilst they were serving in the Police force.
17. IOPC believe that the transcript in its entirety is personal data. It argues that the information contains details of the former Police Officer's career background and working patterns which has a biographical significance to the data subject. It says that the transcript contains the data subject's recollection of events and refers to other officers and members of the public who have provided witness statements and therefore contains their personal data. In addition, it argues that the transcript contains the personal data of those individuals present at the interview and refers to criminal activities and allegations against a third party.
18. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the transcript relates to the data subject as well as other named parties as described by IOPC. He is satisfied that this information both relates to and identifies those concerned. The information therefore falls within the definition of 'personal data' in section 3(2) of DPA.

Would disclosure contravene principle (a)?

19. 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."

20. In the case of a 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.
21. 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.

22. In addition, if the requested data is criminal offence data, for disclosure to be lawful and compliant with principle (a), it also requires that the disclosure meets the requirements of Article 10 of the UK GDPR.

Is the information criminal offence data?

23. 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:
- the alleged commission of offences by the data subject; or
 - proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings, including sentencing.
24. IOPC argues that the transcript contains some criminal offence data as it refers to allegations and criminal activities of a third party. During the Commissioner's investigations IOPC explained that the interview was gathered as part of an independent investigation under the Police Reform Act 2002. IOPC added that paragraph 23(2) of Schedule 3 provides that IOPC shall, amongst other things consider whether an investigation report indicates that a criminal offence may have been committed by **any** person under investigation and if the report does so indicate, consider whether it is appropriate to refer the matter to the Director of Public Prosecutions.
25. IOPC argues that information gathered in the context of an independent investigation for the purposes of deciding whether or not the former Police Officer has committed a criminal offence can be categorised as criminal offence data. Relying on the Commissioner's decision in [Decision notice IC-97389-V7M5](#) IOPC stated that it is arguable that the interview transcript in its entirety constitutes criminal offence data as it is evidence that was gathered in the context of an IOPC investigation and the decision as to whether a criminal offence has been committed is one that must be made. It maintains this position even though no criminal offence was ultimately identified, and the officer was found to have a case to answer for gross misconduct.
26. 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.
27. IOPC states that the sensitive nature of the data and the risk that disclosure would cause unwarranted damage or distress to the individuals involved requires the imposition of the additional conditions as set out in section 10(5) of the DPA. It says that it does not consider

the conditions contained in Part 3 paragraph 29 (consent' from the data subject) and paragraph 32 (data made manifestly public by the data subject) to apply and therefore disclosure under FOIA would be unlawful.

28. Having considered the withheld information the Commissioner agrees that there is criminal offence data contained in the requested information. The Commissioner recognises that the withheld information includes personal data relating to the alleged commission of offences by the data subject and a third party. Having had sight of the withheld information, the Commissioner has concluded that, a greater part of the transcript is focused on the investigations, actions or conduct of the former Police Officer in relation to those alleged offences committed by the third party. He agrees that the independent investigation carried out by IOPC was to gather evidence and consider whether a criminal offence has been committed by either the data subject or any person under investigation. However, he does not consider that the entire transcript constitutes criminal offence data.
29. The Commissioner is aware of reporting surrounding the subject matter in the public domain, such as newspaper articles and on social media sites, which confirms a subsequent trial and conviction of a third party and also that the former Police Officer's alleged conduct was proven at a gross misconduct hearing.
30. The Commissioner has not seen any evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to a FOIA request or that they have deliberately made this data public.
31. As none of these conditions required for processing criminal offence data are satisfied, there is no legal basis for its disclosure. Processing this criminal offence data would therefore breach principle (a) and hence this information is exempt under section 40(2) of FOIA.

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

32. Article 6(1) of 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 Articles applies.
33. The Commissioner considers that the lawful basis most applicable is article 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.”¹

34. 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.

35. The Commissioner considers that the test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interest

36. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.

37. Further, 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

38. In this case, the personal data relates to the named former Police Officer’s conduct in handling of a report of indecent exposure and the actions they took whilst working as a Police Officer. It provides their

¹ 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) provides that: -

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the 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”.

direct answers to questions asked by the investigators and provides their recollection of events, making references to other officers and their rankings as well as members of the public who provided witness statements. The transcript also contains information about those individuals who were present at the interview.

39. IOPC has stated that it recognises a legitimate interest in the public being assured that police officers are held to the highest standards of behaviour and the importance of principles of transparency and accountability in police misconduct investigations and proceedings. It states that the information in question was considered as evidence within misconduct proceedings and was directly referred to within those proceedings. It recognises that the proceedings and actions of the data subject link to a very high-profile matter involving criminal activities of a third party and therefore it is understandable, the public interest in the connected matters. It admits that disclosure of the transcript would provide transparency regarding the thoroughness of the investigation into the former officer's conduct and may go some way to provide insight into the reasons for their actions.
40. IOPC acknowledges that there is legitimate interest in a member of the public seeking to obtain the information to satisfy their curiosity about how the former officer accounted for themselves in interview and to seek reassurance that the conclusions by the misconduct panel were reasonable and fair.
41. The Commissioner acknowledges the need for transparency in IOPC investigations into police conduct especially in situations where they are linked to high-profile cases. He recognises that there is public interest in cases, such as this, where the public would like to know what evidence was gathered by IOPC and how that impacted on the final decisions reached by the misconduct panel. The Commissioner would agree that there may be a legitimate interest in the public being assured that IOPC investigations are thorough and that the right outcome from the police misconduct hearing was reached.

Is disclosure necessary?

42. '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.
43. IOPC argues that because the actions of the officer links to the very high-profile case of a third party's criminal activities, there has been significant publications regarding this investigation and the outcomes for

the officer, including IOPC's publication of detailed information about the investigation and the evidence gathered.

44. It also states that the Metropolitan Police Service (MPS) published a very detailed outcome rationale and summary statement on its website following the conclusion of the misconduct proceedings aimed at satisfying the public's interest in the case. IOPC has informed the Commissioner that the Police Conduct Regulations 2020 allows for the misconduct panel's rationale to be published for a period not less than 28 days, however the MPS moved to a position earlier this year whereby the period of publication was extended to three months and therefore remained on the MPS website for longer.
45. IOPC contends that the disclosure of the interview transcript would add nothing more to the public's understanding or to the existing information available about the case. It does not consider that it would make the officer more accountable for their actions. It says that there is significant publication surrounding this case and the officer has undergone due process and the panel found that they would have been dismissed without notice had they still been a serving police officer. It says that the relevant evidence gathered from the interview was considered as part of the misconduct hearing proceedings and their conclusions adequately summarised within those publications.
46. IOPC state that the disclosure of the full transcript would be likely to reinvigorate publicity about a concluded matter that could impact negatively on the privacy of not just the former officer in question but also the privacy of other individuals who would not expect that reference to them would be released into the public domain. IOPC maintains that as disclosure under FOIA should be the least intrusive means possible to meet the legitimate interest, it does not consider that disclosing the withheld information would satisfy those legitimate aims.
47. The Commissioner notes the complainant's request for internal review where they stated that "...section 40 does not apply to misconduct proceedings which took place in public..." and cited the First Tier Tribunal's decision in *Kanter-Webber v IC & Chief Constable Cambridgeshire Constabulary* [2023] UKFTT 00441(GRC)/EA/2021/0376². This case relates to the audio recording of a Police Misconduct Panel hearing in which the tribunal concluded that the principle of open justice cannot be overridden by the data subject's reasonable expectation of privacy. In the tribunal's view, the data

² <https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i3232/Kanter-Webber%2c%20Gabriel%20%28EA-2021-0376%29%20Allowed.pdf>

subject cannot have reasonable expectation of privacy where personal data were made public during proceedings conducted in open court.

48. Contrary to the current case which relates to evidence that was considered at a Police Misconduct Panel hearing. The Commissioner finds that the information request is clearly distinct from an audio recording of misconduct proceedings hearing in open court. To reiterate, the complainant's request relates to IOPC's independent investigation interview with the former Police Officer and was conducted external to the misconduct hearing processes. Having said this, the Commissioner considers that whilst the hearing was a public hearing, this does not mean that evidence considered or pertaining to the hearing remains in the public domain. To disclose information under FOIA is a disclosure to the world at large and therefore irrespective of the hearing taking place publicly, does not warrant the disclosure of the evidence under FOIA.
49. In determining whether disclosure is necessary, the Commissioner has considered the requested information and whether the disclosure under FOIA is necessary to achieve the legitimate interests above, or whether there is another way to address them, that would interfere less with the privacy of individuals.
50. The Commissioner is satisfied that in this case there are no less intrusive means of achieving the legitimate aims identified than to disclose the information requested.

Balance between legitimate interests and the data subjects' interests or fundamental rights and freedoms

51. The balancing test involves considering whether the identified interests in disclosure outweigh 'the interests or fundamental rights and freedoms of the data subject which require the protection of personal data'.
52. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause.
 - whether the information is already in the public domain.
 - whether the information is already known to some individuals.
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
53. Whilst the Commissioner is aware that the subject matter of the interview focuses on the former Police Officer's conduct, he is also mindful that the transcript contains details of other individuals present

at the interview, details of members of the public as well as details of other officers and witnesses. The Commissioner has considered the potential harm and distress which disclosure of the interview transcript could cause. He has also considered whether it is within the reasonable expectation of these individuals that the interview transcript would be disclosed under FOIA.

54. IOPC have stated that whilst it acknowledges a reasonable expectation that relevant details of the former police officer's actions, wrongdoing and the outcome of the misconduct proceedings would be subject to some publicity, particularly as its linked to a high-profile case, it does not consider this would extend to the expectation of the full disclosure of the interview transcript. It argues that if this was apparent it would have impacted on how the former Police Officer would have conducted herself within the interview. It says, for example, that they would have been more self-conscious about their answers and how this would be perceived by the public. However, IOPC maintains that the necessary punitive measures were meted out and the outcome of the misconduct proceedings were published for the relevant period by the MPS. It says that it is reasonable to assume that an individual subject to those proceedings may consider that nothing new would be released once the requisite publication period is ended. IOPC maintains that it is not likely that the former Police Officer would reasonably expect that detailed evidence from a concluded investigation and misconduct proceedings would be disclosed at this time.
55. The Commissioner has considered information already in the public domain reporting on these matters including the Notice of the Outcome of Police Misconduct Hearing published by the MPS which contained a very detailed outcome rationale and summary statement. He has also considered information published on IOPC's website as well as information reported by the media surrounding the actions of the former Police Officer. The information contained in the transcript includes criminal offence data which cannot be disclosed due to its sensitivity. In the Commissioner's view, and due to the amount of detail already in the public domain, he does not consider that the disclosure of the remaining information would add any more to the public's understanding or to the information that already exists about this case.
56. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms He considers that there is no Article 6 basis for processing and the disclosure of the information would not be lawful.
57. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair and transparent.

The Commissioner's view.

58. The Commissioner's decision is that IOPC was entitled to withhold the information under section 40(2) of FOIA. IOPC was not obliged to disclose the information.

Other matters

59. The complainant informed the Commissioner that they were dissatisfied by the significant delay by IOPC in responding to their request for internal review. FOIA does not impose a statutory time within which internal reviews must be completed albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe. In the Commissioner's view it is reasonable to expect most reviews to be completed within 20 working days and reviews in exceptional cases to be completed within 40 working days.
60. In this case the complainant submitted their internal review on 30 June 2023. IOPC informed them of the outcome of the internal review on 12 September 2023. The Commissioner clearly considers this to be an unsatisfactory period of time.

Right of appeal

61. 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

62. 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.

63. 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

Esi Mensah
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