

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

### **Decision notice**

**Date:** 30 January 2024

**Public Authority:** Chief Constable of South Wales Police  
**Address:** Police Headquarters  
Cowbridge Road  
Bridgend  
CF31 3SU

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

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1. The complainant has requested the outcome notices for two misconduct hearings from South Wales Police. South Wales Police relied on section 40(2) of FOIA (third party personal information) to withhold the information.
2. The Commissioner's decision is that South Wales Police has correctly relied on section 40(2) of FOIA to withhold the information.
3. The Commissioner has also decided that South Wales Police breached section 10(1) by failing to confirm that the requested information was held, and breached section 17(1) by failing to issue a valid refusal notice within 20 working days.
4. The Commissioner does not require further steps to be taken.

#### **Background**

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5. South Wales Police has explained to the complainant the following in relation to the Inspector referred to in their request:

"At the time of the request the matter had not yet been heard and so the documentation could not be shared. This matter has now concluded; however, we are still not able to provide the requested documentation.

Following the hearing, the legally qualified chair of the panel, granted the officer anonymity and furthermore directed the appropriate authority not to publicise the findings and outcome document.

This was published on the South Wales Police website.”

6. South West Police also advised the complainant of the following regarding the Police Constable referred to in their request.

“The requested document was published on the South Wales Police website in accordance with the police (conduct) regulations 2020 [“the Regulations”] requirements. The direction of the regulations requires us to publish the document for 28 days. Following some national concern that this is too short period, we now publish for 3 months. The matter was decided in March 2022, so the publication was made at this time.”<sup>1</sup>

## **Request and response**

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7. On 17 August 2023, the complainant wrote to South Wales Police and requested information in the following terms:

“Please send me copies of the outcome notices of misconduct proceedings for Inspector [name redacted] and PC [name redacted]...”

8. South Wales Police responded on 4 October 2023. It refused to provide the requested information, citing section 40(2) of FOIA.
9. Following an internal review, South Wales Police wrote to the complainant on 22 November 2023. It maintained its original position.

## **Scope of the case**

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10. The complainant contacted the Commissioner on 28 November 2023 to complain about the way their request for information had been handled.
11. The Commissioner considers that the scope of his investigation is to establish whether South Wales Police is entitled to withhold the requested information under section 40(2) of the FOIA.

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<sup>1</sup> <https://www.legislation.gov.uk/ukxi/2020/4/made>

12. It must initially be borne in mind that, even though part of the requested information has previously been published under the Regulations, this was a distinct disclosure specifically provided for under that legislation. Once the required parameters had been met, then the information was removed from the public domain. The Commissioner is now considering whether or not that information should be disclosed under the provisions of FOIA, which is an entirely different legal gateway.

## **Reasons for decision**

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### **Section 40 - personal information**

13. Section 40(2) of the 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.
14. In this case the relevant condition is contained in section 40(3A)(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').
15. 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 the FOIA cannot apply.
16. 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?**

17. Section 3(2) of the DPA defines personal data as:  
"any information relating to an identified or identifiable living individual".
18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
19. 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.

20. 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.
21. Clearly the requested information relates to two named individuals and the outcome of their misconduct hearings. Accordingly, it is their personal data. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
22. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
23. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

24. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

25. 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.
26. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
27. Due to their differing circumstances, the Commissioner has considered the two officers separately.

### **Officer charged with assault**

#### **Is the information criminal offence data?**

28. Information relating to criminal convictions and offences is given special status in the UK GDPR.
29. 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.
30. The Commissioner has outlined his view in a similar request for information made by the same complainant in his Decision Notice IC-264178-D7D2<sup>2</sup>. In that case, the Commissioner upheld the public authority's position that the requested information was exempt from disclosure on the basis that it was criminal offence data of identifiable parties.
31. For the above reason, the Commissioner will not reproduce the content of that decision notice here but he has adopted the analysis and concluded South Wales Police was entitled to rely on section 40(2) for this part of the requested information, as it concerns criminal offence data.

### **Officer guilty of gross misconduct**

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

32. 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"<sup>3</sup>.

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<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4027983/ic-264178-d7d2.pdf>

<sup>3</sup> 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".

33. In considering the application of Article 6(1)(f) of the 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.
34. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.
35. The Commissioner has outlined his view in a similar request for information made by the same complainant in his Decision Notice IC-264178-D7D2 (see footnote 2). In that case, the Commissioner upheld the public authority's position that the requested information was exempt from disclosure on the basis that it was third party personal data and the data subject's fundamental rights and freedoms overrode the legitimate interests in disclosing the requested information.
36. Based on the same rationale, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms in this case. The Commissioner therefore considers that there is no Article 6 basis for processing and so disclosure of the information would not be lawful.
37. 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 or transparent.

## **Procedural Matters**

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38. Section 10(1) of FOIA obliges a public authority to comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.
39. Section 17(1) obliges a public authority to issue a refusal notice in regard to any exempt information within the same timescale.
40. South Wales Police failed to provide a valid response to this request until after 20 working days had passed. It therefore breached sections 10(1) and 17(1) of FOIA.

## Right of appeal

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41. 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)

42. 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.
43. 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 .....**

**Carolyn Howes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**