

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 July 2024

Public Authority: The Police, Fire and Crime Commissioner for Staffordshire

Address: Ground Floor
Block 9
Weston Road
Stafford
ST18 0Y

Decision (including any steps ordered)

1. The complainant has requested information in connection to a non-FOIA complaint that he made to the Police, Fire and Crime Commissioner for Staffordshire (the "PFCC"). The PFCC provided some information, said some was not held and withheld some citing section 31(1)(g) (by virtue of 31(2)(a) and (b)) (Law enforcement) of FOIA.
2. The Commissioner's decision is that the PFCC handled the request appropriately. However, by failing to respond to the request within the statutory time limit, the PFCC breached sections 1(1) and 10(1) of FOIA.
3. No steps are required.

Request and response

4. Following an earlier request (which is being considered alongside this case under reference IC-286740-L3J7), on 6 December 2023 the complainant made the following request:

"Based on the information now in my possession which includes the admissions that Senior OPCC Staff have been engaged in 'Scoping' the evidence relating to the former CC [Chief Constable] [name

redacted] complaints since the 14th October 2020 to the current date, and that complaints against a Chief Constable require detailed records to be maintained please provide the following,

- 1] The names and or positions held of the Staff within the OPCC engaged in the 'Scoping' process? And over what period of time have they been engaged in that task? (Days, months and year of involvement)
- 2] Any internal or external notes, records, emails or other documents, however generated or stored, which have been created by the OPCC Staff engaged in the 'Scoping' process, including [name redacted] and the current PCC [name redacted] regarding the complaints against former CC [name redacted]. (Correspondence issued by me is not required)
- 3] Any reports, or enquiries made by the OPCC Staff, into the complaints including any reports, or information from other bodies or persons, in response to questions presented by the OPCC Staff including any comments, or responses made by the former CC [name redacted] in response to the allegations.

When a complaint, is made against a Police Officer, particularly one involving criminal allegations, a notice must be served upon that officer to inform him/her of the complaint.

- 4] Please provide a copy of that document displaying the date issued and any response made by the officer.

CC [name redacted] was permitted to retire and or resign premature to the completion of his contract, and prior to any investigations being conducted by the PCC into the allegations made against him.

- 5] Who made that decision; why was he permitted to retire or resign whilst subject of criminal and misconduct allegations, and what was the rationale for accepting his retirement or resignation?"
5. The PFCC responded on 1 February 2024. In respect of part (1), it advised that the position was 'Independent Review Manager. For parts (2) – (4) it advised that this information was exempt from disclosure by virtue of section 30 (1)(a) of FOIA. For part (5) it advised:

"... the FOI Act 2000 only extends to requests for recorded information. It does not require public authorities to create

information to answer questions generally; only if the information is already held in recorded form.

The Act does not extend to requests for information regarding the application or implementation of policies, or the merits or demerits of any proposal or action”.

6. The PFCC did not offer an internal review, advising the complainant to go straight to the Commissioner with any complaint. The Commissioner’s views regarding this approach are in “Other matters” at the end of this notice.

Scope of the case

7. The complainant contacted the Commissioner on 4 February 2024, to complain about both this request and the earlier one referred to above. The Commissioner has read his grounds but it should be noted that he can only deal with requests for recorded information within his remit of overseeing FOIA. Several issues that the complainant has raised are not matters falling within the Commissioner’s jurisdiction, so they cannot be considered or commented on in this notice.
8. In respect of this request, the complaint refers to an inadequate response to part (1) – the PFCC only disclosed a job title without referring to the remainder. He queried the citing of section 30 for parts (2)–(4). He also included part (5) within his grounds of complaint for section 30(1), which was not the position taken by the PFCC as it had determined that this part of the request was not valid. He also referred to timeliness.
9. During the Commissioner’s investigation, the PFCC revised its position. It said that, instead of section 30, it now wished to rely on 31(1)(g) by virtue of 31(2)(a) and (b) in respect of parts (2) and (3) of the request. In respect of parts (4) and (5), it said that no information was held. It also provided the Commissioner with an explanation regarding its response to part (1) of the request.
10. For expediency, the Commissioner did not require the PFCC to update the complainant regarding this change as he did not consider it would be likely to affect any of his views or arguments. The Commissioner will therefore consider this revised position.
11. The Commissioner’s duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of FOIA. FOIA is concerned with transparency of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held

by public authorities. FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.

Reasons for decision

Part (1) of the request

12. The complainant considers that the PFCC's response to this part of his request is inadequate as it referred only to a job title.
13. The Commissioner notes that this part of the request sought only "names **and or** positions".
14. The Commissioner discussed this point with the PFCC and was advised that only one member of staff had been involved with the "scoping process" throughout and that the position stated was their role.
15. Accordingly, the Commissioner finds that the PFCC has adequately complied with this part of the request in full.

Parts (2) – (3) of the request

Section 31 – Law enforcement

16. Section 31(1)(g), by virtue of 31(2)(a) and (b), has been cited in respect of parts (2) – (4) of the request.
17. Section 31 provides a prejudice based exemption which protects a variety of law enforcement interests. That means that, in order to engage the exemption, there must be a likelihood that disclosure would cause prejudice to the interest that the exemption protects.
18. The PFCC considers section 31(1)(g) of FOIA is the relevant section in this case. That section states:

"31 – (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 –

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)".

Functions for a specified purpose

19. The Commissioner has issued guidance on section 31 of the FOIA¹ in which he observes that the first five exemptions listed under section 31(2) all include the term “ascertaining”. In that respect, his guidance states:

“In this context, “ascertaining” means that the public authority with the function must have the power to determine the matter in hand with some certainty. They must not only be responsible for the investigation, but they must also have the authority to make a formal decision on compliance with the law or code of practice. This decision could include the power to take direct action, such as revoking licences or imposing fines, or taking a formal decision to prosecute an offender”.

20. In this case, the PFCC is citing 31(1)(g) by virtue of 31(2)(a) and (b) - the purpose of ascertaining whether any person has failed to comply with the law and the purpose of ascertaining whether any person is responsible for any conduct which is improper respectively.

21. The PFCC explained to the Commissioner:

“Under the Police Reform Act, the Police, Fire and Crime Commissioner is the Appropriate Authority regarding any complaints against the Chief Constable of its respective force, in this instance Staffordshire.

In respect of any complaints where the OPFCC is the appropriate authority, it has the power to determine whether a complaint is recorded and if it is recorded, how it is dealt with. It also allows for in this particular case for a scoping exercise to be conducted, this allows for information readily available to be considered. This process can determine if any person has failed to comply with the law and/or is responsible for conduct that is improper”.

22. The Commissioner is satisfied that part of the PFCC’s functions include investigating complaints involving the chief officer that may be relevant

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-31-law-enforcement/sections-31-1-g-regulatory-powers/>

to sections 31(2)(a) and (b), provided the prejudice envisaged would, or would be likely to, arise.

23. Consideration of the section 31 exemption involves two stages. First, in order to be engaged, the following criteria must be met:
- 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 subsection;
 - 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 and of substance; and
 - it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met - whether disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
24. Secondly, the section 31 exemption is qualified by the public interest, which means that, once the exemption has been engaged on the basis of the prejudice test, the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

The prejudice test

25. 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 and of substance'. If the consequences of disclosure would be trivial or insignificant, there is no prejudice.
26. He also considers that the authority must be able to show how the disclosure of the specific information requested would, or would be likely to, lead to the prejudice. If the authority cannot show that the prejudice would or would be likely to occur, then the exemption is not engaged.
27. The withheld information in this case comprises information relating to a 'live' complaint. The PFCC considered that the exemption applied because the complaint remains ongoing and disclosure would prejudice its ability to comply with its statutory duties.

Applicable interests

28. The relevant applicable interests listed in this exemption are "ascertaining whether any person has failed to comply with the law" and

“ascertaining whether any person is responsible for any conduct which is improper” respectively.

The nature of the prejudice

29. Next, the Commissioner has considered whether there would be a causal relationship between disclosure and the prejudice which the exemption is designed to protect against. He has also looked at whether the resultant prejudice which is alleged is real, actual and of substance.

30. The PFCC explained to the Commissioner:

“If the process does not allow for information to be kept in confidence then it would deter from information being provided. This would be likely to prejudice the exercise of the OPFCC’s [Office of the Police, Fire and Crime Commissioner] function and would undermine its maintenance of the various legal requirements about confidentiality of information.

To ensure that a fair process is conducted the OPFCC must be confident that it can conduct processes/investigations without fear of that information being disclosed into the public domain or used adversely to make further complaints prior to the conclusion of any due process.

The matters the applicant has raised is [sic] still ongoing and as such it is a reasonable position to take that disclosing information about the nature and outcome would prejudice the case going forward. Releasing information without it being concluded would invite undue public scrutiny which would adversely impact on the outcome.

The value of investigations/scoping exercises, such as those which are conducted into alleged breaches of standards of professional behaviour, rely on discretion and full cooperation.

Any release of information relating to ongoing investigations could prejudice and undermine those investigations. In addition, the right to a fair outcome could be undermined”.

The likelihood of prejudice

31. The PFCC did not specify the level of likelihood being relied on and the arguments above refer to both levels. The Commissioner will therefore consider prejudice at the lower level of ‘would be likely’ to prejudice law enforcement.

Would disclosure be likely to prejudice law enforcement?

32. In considering whether the PFCC has a function for any of the purposes listed in subsection (2), the Commissioner has taken account of its argument that the basis for engaging the exemption is the prejudice to the PFCC's statutory function to investigate complaints. The Commissioner accepts that the ability of the PFCC to comply with its statutory duties is clearly an applicable interest falling within the scope of section 31(1)(g).
33. Having considered the withheld information, he is satisfied that it relates to the applicable interests.
34. With regard to the second criterion, the Commissioner accepts that there is a clear causal link between disclosure and the prejudicial outcome covered by the exemption. The Commissioner acknowledges that the withheld information relates to a complaint that was ongoing at the time of the request, and remains so.
35. He accepts that as, at the time of the request, the complaint matter was not concluded, therefore disclosure of the withheld information may impact on the course of the investigation and undermine the formal process. Furthermore, having considered the nature of the prejudice that could occur, the Commissioner is satisfied that this would clearly be real and of substance.
36. As the Commissioner accepts that the outcome of disclosure predicted by the PFCC would be likely to occur he finds that the exemption provided by section 31(1)(g) in conjunction with section 31(2)(a) and (b) is engaged.

The public interest test

37. Section 31 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

38. The PFCC has argued that it:

"...does recognise that there may be arguments in favour of disclosure such as ensuring that Chief Officers are held to account for their accounts. There is a general public interest in disclosure and openness concerning misconduct matters. There is a public interest in giving assurance to the public that effective

arrangements are in place for preventing and detecting improper conduct”.

39. The Commissioner accepts that there is a public interest in transparency, for example in disclosing information about complaints in order to preclude allegations that an investigation lacked thoroughness or was biased. However, until an investigation has been completed, it would be unwise to draw any premature conclusions about an alleged complaint such as in this case.

Public interest arguments in favour of maintaining the exemption

40. In support of non-disclosure, the PFCC said:

“Investigations/scoping exercises into any breach of standards of professional behaviour rely upon the willing participation and cooperation of people within that process. The effectiveness of the process is maintained by the understanding among those who participate in it that any information which they provide about the circumstances is kept in confidence, unless there is a lawful reason to do otherwise. It is vital that information is given freely and openly and, in an environment, where they can trust that their information will not be prematurely disclosed, or released simply upon request”.

41. It also argued:

“The Office of the Police, Fire and Crime Commissioner take all matters, where it is the appropriate authority very seriously and thoroughly investigates all instances reported to allow appropriate and proportionate punishment to be enforced or any parties to be identified and exonerated. Although the assurances that release of this information would provide are important, it is of paramount importance that the integrity of these investigations are not jeopardised. Release of any information that may interfere or prejudice a process of this kind would not be undertaken. Therefore, on balance it is our opinion that the factors supporting release of this information are outweighed by those opposing and this information will not be released”.

Balance of the public interest arguments

42. The Commissioner has considered the public interest arguments including the public interest in transparency.
43. In his view, there will always be a public interest in disclosing information which allows scrutiny of how public authorities, such as the

PFCC, operate and how well they serve the public in carrying out their statutory functions.

44. In that respect, the Commissioner has taken into account that that the public interest is satisfied in some way by the disclosure of information at the end of an investigation and that the complainant will be apprised of the outcome, albeit outside of FOIA, once the investigation has been completed.
45. The Commissioner also acknowledges that there is a public interest in protecting the safe space in which investigations, such as those into complaints about a Chief Constable, are conducted. He agrees that this would be undermined by disclosure.
46. The Commissioner considers that appropriate weight must be given to the public interest inherent in the exemption – that is the public interest in avoiding likely prejudice to the PFCC's ability to ascertain whether anyone has failed to comply with the law or whether anyone is responsible for improper conduct. The Commissioner considers that it is clear that there is a substantial public interest in avoiding that prejudice and that this is a strong public interest factor in favour of the exemption.
47. The Commissioner has also taken into account that, at this time, the complaint remains 'live' and the formal investigation process has not reached its conclusion. This, in the Commissioner's view, adds considerable weight to the public interest in maintaining the exemption in this case. Furthermore, at its conclusion, the complainant will be apprised of the findings.
48. In all the circumstances of the case, the Commissioner has concluded that the public interest in maintaining the exemption provided by section 31(1)(g) in conjunction with sections 31(2)(a) and (b) outweighs the public interest in disclosure. In reaching this view he has given particular weight to the public interest in protecting the safe space in which such investigations are conducted.
49. The PFCC was therefore not obliged to disclose the withheld information.

Parts (4) – (5) of the request

Section 1 – General right of access

50. This is being considered in respect of parts (4) and (5) of the request.
51. Section 1 of FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds that information and, if so, to have that information communicated to them.

52. In this case, the complainant suspects that the PFCC holds information from which it could answer these parts of the request. The PFCC's position is that it does not.
53. In cases where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner – following the lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.
54. The Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the public authority to check whether the information is held and any other reasons offered by the public authority to explain why the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.
55. Therefore, the Commissioner has sought to determine whether, on the balance of probabilities, the PFCC holds:
 - a copy of any notice which was served on the previous Chief Constable in respect of the complainant's non-FOIA complaint against him, and
 - any documentation which evidences why the Chief Constable was "permitted" to retire and/or resign premature to the completion of his contract.
56. Accordingly, the Commissioner asked the PFCC to explain what enquiries it had made in order to reach the view that it did not hold this information.
57. In responding to the Commissioner's enquiries, the PFCC explained that no notice had been served on the Chief Constable, which is why one wasn't held. It provided a confidential submission to support its position which the Commissioner has taken into account. He is unable to reproduce the rationale here as the complaint remains ongoing.
58. Regarding any document to evidence why the Chief Constable had been "permitted" to retire, the PFCC explained that the Chief Constable did not need "permission" to retire. He had apparently asked to retire and his resignation was accepted. This would have been dealt with by the force itself and the PFCC therefore does not hold any information. There

would be no requirement for the PFCC to hold information about such a retirement as it would not have any direct involvement; all personnel information would be held by Staffordshire Police.

The Commissioner's conclusion

59. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in the paragraphs, above, the Commissioner is required to make a finding on the balance of probabilities.
60. In a case such as this, the Commissioner's role is simply to decide whether or not, on the balance of probabilities, the public authority holds the requested information.
61. The Commissioner considers the above to be entirely plausible explanations from the PFCC. It was not necessary to serve a notice so there isn't one. And the PFCC holds no information regarding the Chief Constable being "permitted" to retire as no such permission was necessary and, in any event, it would not hold personnel information.
62. Based on the above, the Commissioner is satisfied that, on the balance of probabilities, this information is not held. He is therefore satisfied that the PFCC has complied with the requirements of section 1 of FOIA in respect of these parts of the request.

Section 1 – general right of access

Section 10 - time for compliance

63. Section 1(1) of FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.
64. Section 10(1) of FOIA provides that a public authority should comply with section 1(1) within 20 working days. Section 1(1)(a) initially requires a public authority in receipt of a request to confirm whether it holds the requested information.
65. The request was submitted on 6 December 2023, and the complainant did not receive a response until 1 February 2024. By failing to respond to the request within 20 working days of receipt, the PFCC breached sections 1(1) and 10(1) of FOIA.

Other matters

Internal review

66. In this case, the PFCC explained to the Commissioner:

“Please note that given the initial request was done by senior management who would normally do the IR [Internal Review], the applicants request for an internal review was directed to you in the circumstances”.

67. Whilst this isn't its usual practice, the Commissioner understands that this was done on the basis that this request was considered at a higher level within the PFCC, which would normally have been reserved for conducting internal reviews. As such, the PFCC thought it unnecessary to do a further review.

68. Whilst this is not best practice, the Commissioner understands and accepts the rationale for taking such an approach on this occasion.

Right of appeal

69. 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

70. 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.
71. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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