

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 20 September 2011

Public Authority: Chief Constable of Greater Manchester Police
Address: Chester House
Boyer St
Manchester
M16 0RE

Summary

The complainant asked Greater Manchester Police (the "public authority") to provide emails relating to police pension regulations. The public authority initially withheld the information using the exemption in section 22(1)(c) of the Freedom of Information Act (the "Act"). This was later varied to add sections 21(1), 36(2)(b)(ii), 40(2) and 42(1).

The Commissioner's decision is that the exemptions in section 21 and 22 are not engaged. However, he does find that section 36(2) is engaged and that the public interest in maintaining the exemption outweighs that in disclosure. He has not therefore considered the applicability of the other exemptions. The complaint is partly upheld.

The Commissioner's role

1. 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 the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. The request concerns part A19 of the Police Pensions Regulations¹ which relate to the compulsory retirement of a police officer after 30 years service. This states:

“Compulsory retirement on grounds of efficiency of the force

A19.—(1) This Regulation shall apply to a regular policeman, other than a chief officer of police, deputy chief constable or assistant chief constable, who if required to retire would be entitled to receive a pension of an amount not less than 2 thirds of his average pensionable pay or would be entitled to receive a pension of such an amount if it did not fall to be reduced in accordance with Part VIII of Schedule B (reduction of pension related to up-rating of widow's pension).

(2) If a police authority determine that the retention in the force of a regular policeman to whom this Regulation applies would not be in the general interests of efficiency, he may be required to retire on such date as the police authority determine”.

3. A draft force policy is available on line² which includes the following statements:

“To help mitigate financial risk, Greater Manchester Police (GMP), may as part of an overall package, utilise Regulation – A19, which allows Police Authorities to compulsory retire police officers (up to and including Chief Superintendents) who complete 30 years pensionable service.”

“Subject to GMPA approval and delegated authority the Chief Constable will formally notify the force of the commencement of the use of Regulation A19. A notice to this effect will be placed on Force Orders.”

“On the date at which A19 is activated there will be a group of officers who have in excess of 30 years of pensionable service.

The affected officers will be advised in writing of the requirements under Regulation A19 for them to be compulsorily retired. This letter will give 3 months notice of an intended

¹ <http://www.legislation.gov.uk/uksi/1987/257/contents/made>

² <http://meetings.gmpa.gov.uk/mgConvert2PDF.aspx?ID=721>

retirement date and will also include information relating to time owing, annual leave etc. The letter will also include advice for the officer in terms of making any personal representation about the application of Regulation A19”.

4. The draft policy is dated February 2011 with a proposed implementation date of 1 July 2011.

The request

5. On 11 April 2011 the public authority received the following information request:

“Please can you search the “sent” box of Chief Constable Peter Fahey [sic] E mail account and send me copies of all emails that contain the term A19 between 1/1/10 and 1/4/11

(A10 refers to Regulation A19 of the Police Pensions Regulations which can enforce a Police Officer to be retired at 30 years)

Please can you perform the same search for ACC Terry Sweeney

Please can you perform the same search for ACC Dawn Copley

Please can you perform the same search for ACO Potts”.

6. On 11 May 2011 the public authority responded. It advised the complainant that the information was exempt by virtue of section 22(1)(c) as the information was intended for future publication. It further explained that the requested data was part of an ongoing “Project Optimus” programme concerning rationalisation within the force. It stated that once the project had been finalised all “minutes of meetings, other information and background papers” would be made available on its publication scheme. It drew his attention to the following publication:

<http://meetings.gmpa.gov.uk/mgConvert2PDF.aspx?ID=536>

7. On 12 May 2011 the complainant requested an internal review.
8. On 10 June 2011 the public authority responded. It introduced further exemptions, namely those at sections 21(1), 40(2), 42(1), and 36(1)(b) and (2)(b)(ii).

The investigation

Scope of the case

9. On 21 June 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specified the following to the Commissioner.
 - The information he required was emails between Chief Officers.
 - He did not require any information concerning contact between these Officers and those Officers who would be affected by the enacting of A19.
 - He did not require any information which was properly protected by legal privilege.
 - He did not accept that section 21 applied to emails and commented that no reference had actually been made to the emails sought.
 - He asked the Commissioner to consider the citing of sections 21 and 36.
10. The complainant has also raised concerns regarding the reasonableness of any opinion given by the "qualified person" as some of the data requested concerns him directly. The Commissioner has commented about this in "*Other matters*" at the end of this Notice.

Chronology

11. On 11 July 2011 the Commissioner advised the public authority that he had received a complaint and he sought copies of the withheld information in readiness for his investigation. On 18 July 2011 this was provided.
12. On 25 July 2011 the Commissioner commenced his investigation. He raised various queries and discussed some issues with the public authority. He received a written response on the same day.
13. Further queries were also answered in reasonable time.

Analysis

Substantive procedural matters

14. Before considering the two exemptions below the Commissioner would like to clarify his view on requests for emails. This is also available on his website in *Line to Take* number 171³. This is that:

"... an email will contain transmission information in the header and footer and may contain contact details in the email signature. What a person's actual signature looks like on a letter will be information over and above their name. The exact wording or phrasing of a document is also part of the information. However, the physical characteristics or evidential quality of a document (eg the paper it is printed on, the value of an original over a photocopy as evidence) are not information recorded in that document – for the purposes of the Act a complete and accurate copy will record the same information as the original.

In practice, if a copy of a document has been requested, the easiest and most reliable way to ensure that all the information within it has been provided will therefore be to provide a copy. However, in some cases it may also be possible to provide an accurate transcript of the contents of a document. The important thing is to consider whether all of the information contained in the document has been provided".

Section 21 – information accessible to applicant by other means

15. Section 21 of the Act states that information which is reasonably accessible to the applicant is exempt information. It is an absolute exemption, and therefore no public interest test is required.
16. It is the Commissioner's view that the relevant consideration in relation to section 21 is whether the requested information is reasonably accessible to the complainant. For the exemption to be engaged the Commissioner must be satisfied that:
- the complainant has already found the information; or
 - the public authority is able to direct the complainant precisely to the requested information, i.e. it must be reasonably specific about

³www.ico.gov.uk/for_organisations/freedom_of_information/internal_guidance.aspx

where the information is held so that the complainant can find it without difficulty.

17. The public authority advised the complainant that, at the time of his request, some of the information he requested was contained in a published report (see paragraph 6 above).
18. On viewing this report it is clear that it contains none of the emails requested. Some of the information contained within the emails may be directly cited within the report, but it is not possible to ascertain which elements are concerned and which party they are attributable to. Therefore, the Commissioner concludes that this exemption is not engaged.

Exemptions

Section 22 – information intended for future publication

19. The public authority has argued that all of the information falling within the scope of this request is exempt from disclosure by virtue of section 22(1)(c).

20. Section 22(1) provides that:

“Information is exempt information if-

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),...

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).”

21. In order to determine whether section 22 is engaged the Commissioner therefore needs to consider the following questions.
 - Is the information requested actually held by the public authority?
 - When the request was submitted, did the public authority have an intention to publish the information at some date in the future?
 - If so, was this date determined when the request was submitted?
 - In all the circumstances of the case, is it ‘reasonable’ that information should be withheld from disclosure until some future date (whether determined or not)?

Is the information requested actually held?

22. The Commissioner has been provided with a copy of the requested information so its existence is not in doubt.

When the request was submitted, was there an intention to publish the information at some date in the future?

23. The public authority indicated that details of the project would be published once it was completed and that there was a 'planned publication strategy'. It also advised that Regulation A19 was subject to ongoing meetings and that minutes of these meetings were also regularly published.
24. The Commissioner also enquired as to whether or not the emails specified would be published in the future. The public authority advised that it was: *"unlikely that these emails will be published in their current form"*.
25. The public authority went on to explain that it understood the Act to relate to the information contained within those emails rather than copies of the emails themselves and, therefore, that: *"the information relating to A19 held within these emails is considered to be intended for future publication"*.
26. As explained above, the request is clearly for email and the authors and dates of those emails forms part of that request. The Commissioner does not agree that there is an intention by the public authority to release this level of detail even if some extracts from within the emails were to be included.

Was the date of publication determined when the request was submitted?

27. When the Commissioner asked about the publication strategy he was advised:

"Although there are no set dates for when information is to be published. There is a clear and documented intention to publish this information a[t] a later date therefore [I] it is my belief that any information which is held and covered by this publication strategy attracts a Section 22 exemption".

28. It is therefore clear to the Commissioner that no date for publication has been determined.

In all the circumstances of the case, is it 'reasonable' that information should be withheld from disclosure until some future date (whether determined or not)?

29. The Commissioner concludes that the full details from within the emails themselves will certainly not form part of any future publication, whether it is in the form of minutes at related meetings or of any final report. Whilst some of the content of the emails may become available at some time it will not be possible to ascertain the source. Furthermore, there is no actual date for intended publication so that it is currently 'open ended'.
30. On the basis of his findings above the Commissioner is satisfied that section 22(1) is not engaged. It is not therefore necessary for him to consider the public interest in disclosure.

Section 36 – prejudice to the conduct of public affairs

31. The Commissioner was initially unclear as to whether or not this exemption had been applied to the information in its entirety. He asked the public authority to again consult with the qualified person and confirm whether or not this was his intention. The qualified person provided this confirmation, as referred to below.
32. As this exemption has been applied to all of the information the Commissioner will consider it first.
33. The public authority has cited two limbs of this exemption, namely 36(1)(b) and (2)(b)(i).
34. Section 36(1) states that:

"This section applies to-
(a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
(b) information which is held by any other public authority".

35. Section 36(2)(b)(i) states that:

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-
(b) would, or would be likely to, inhibit –
(i) the free and frank provision of advice".

36. Information may be withheld under section 36(2)(b)(i) if its disclosure, in the reasonable opinion of a qualified person, would or would be likely to inhibit the free and frank provision of advice. It was stated in the Tribunal decision of *Guardian Newspapers Ltd & Heather Brooke v the Information Commissioner & the BBC* (EA/2006/0011 & EA/2006/0013) that:

"On the wording of section 36(2)(c) we have no doubt that in order to satisfy the statutory wording the substance of the opinion must be objectively reasonable..." (paragraph 60).

37. On the weight to be given to the process of reaching a reasonable opinion, the Tribunal further noted that:

"...in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at..." (paragraph 64) "...can it really be said that the intention of Parliament was that an opinion reached, for example, by the toss of a coin, or on the basis of unreasoned prejudice, or without consideration of relevant matters, should qualify as 'the reasonable opinion of a qualified person' under section 36 merely because the conclusion happened to be objectively reasonable?"

38. In determining whether section 36(2)(b)(i) was correctly engaged by the public authority the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:

- establish that an opinion was given;
- ascertain who was the qualified person or persons;
- ascertain when the opinion was given; and
- consider whether the opinion was objectively reasonable and reasonably arrived at.

39. The public authority has explained that the qualified person's opinion was initially sought, and provided, on 11 May 2011 prior to its first refusal. However, for some unknown reason, it was not relied on at this stage. Prior to the internal review a further submission was made and again an opinion was provided saying that disclosure 'would' be prejudicial.

40. The public authority has provided the Commissioner with a copy of the qualified person's opinion from both occasions as well as the submissions which were put to him to enable him to reach the opinion.

41. The following submissions were put to the qualified person's staff officer:

"... with regards to the emails sent to us re this FOI request. I was wondering if Mr Fahey [sic] had any concerns regarding the disclosure of any of the data connected to A19 contained within the emails, in particular would Mr Fahey [sic] consider disclosure to be prejudicial to the effective conduct of public affairs?"

42. The response was:

"I've just spoken to the Chief Constable and we have discussed Section 36 FOI and he agrees that this particular request, i.e. sent emails regarding A19 would inhibit the free and frank exchange of views for the purpose of deliberation. Chief Officers often need to communicate frankly by email where conversation is not possible whilst discussing existing or new or emerging policy or procedure".

43. This original response was not relied on, rather the response sought solely to rely on the view that the information would eventually all be made available. Nevertheless, it indicates the qualified person's view, in his capacity as the qualified person, and covers all of the emails concerned.

44. On 6 June 2011, at internal review stage, a fuller submission was put to the qualified person's staff officer. During this submission the author stated:

"In addition to [section 22] I also plan to include the following exemptions as they each relate to some of the emails content;

- *Section 21 – Information already in the public domain*
- *Section 40(2) – Personal Information*
- *Section 42 – Legal Professional Privilege*

Once information covered by these exemptions has been removed the content of the emails are greatly reduced./ However, some information remains and I plan to apply Section 36 (Disclosure likely to prejudice the effective conduct of Public Affairs) to this information. Therefore providing none of the information to the requestor....

Requested Action – That the Chief Constable consider the application of the Section 36 exemption in relation to the emails in questions [sic] and authorises the withholding of the same".

45. The response, dated 9 June 2011, was:

"On behalf of the Chief Constable thanks for the briefing note, it was very helpful. He has considered the application of the S36 exemption in relation to the emails and his position remains the same and he authorises the withholding of the emails".

46. Upon viewing the qualified person's opinion, it does not specifically mention section 36(2)(b)(i). However, the qualified person's original response, as cited above, clearly uses this wording and his later response says that his view remains the same.

47. The qualified person's opinion is that the relevant prejudice in this case *would* occur. The threshold to prove this is higher than if the public authority had claimed that the prejudice *would be likely* to occur. In dealing with the issue of the likelihood of prejudice, the Commissioner notes that, in the case of *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005), the Information Tribunal confirmed that *"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk"* (paragraph 15). He has viewed this as meaning that the risk of prejudice need not be more likely than not, but must be substantially more than remote.

48. The Commissioner considers that, at the time of the request, the project was incomplete and therefore the advice contained within the withheld information was still being relied upon and it was likely that further advice would need to be provided by the parties involved. The Commissioner considers that the timing of the request increases the likelihood of the prejudice occurring.

49. The Commissioner considers that the withheld information does contain very candid advice to assist in decision making relating to the topic in question. The Commissioner accepts it is a reasonable opinion that, if this advice were disclosed, it would cause officials involved to be less candid in the advice they provide in the future in relation to such projects, including other projects which are already being considered and future projects which have not yet commenced. Whilst the Commissioner does not accept that officials will be put off providing advice in full it is not unreasonable to conclude that the depth and rigour of advice provided would be affected – which would have a damaging impact upon future decision making.

50. The Commissioner accepts that it was reasonable to conclude that disclosure would be likely to inhibit the free and frank provision of advice in the future. He considers that the information does contain very free and frank advice and that if it were disclosed officials would

be likely to be more restrictive in relation to the frankness of advice provided in the future.

51. The complainant has also expressed concern that the qualified person may not have read all of the information requested and that he was therefore not able to make a balanced decision. However, the Commissioner is of the view that the qualified person was directly involved with the issues under consideration and so he will have been aware of the nature of the emails. Furthermore, as author of some of the material he would obviously be aware of the content. The Commissioner does not therefore consider that this is a relevant argument put forward by the complainant.
52. The Commissioner is of the view that the opinion of the qualified person is a reasonable one and that it has been reasonably arrived at. He therefore finds that section 36(2)(b)(i) was correctly engaged.
53. As the Commissioner has decided that the exemption is engaged, he has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn upon the Information Tribunal's decision in the case of *Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC* (the *Brooke* case).
54. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would be likely to inhibit the free and frank provision of advice.

Public arguments in favour of disclosing the requested information

55. The public authority has provided the following arguments:

"When information relates directly to the decision making of the Forces' Chief Officers there is an clear public interest in disclosures which would give the public a better understanding of how these Officers conduct their affairs.

This is additionally important in matters such as these which are highly controversial and subject to current public scrutiny and debate.

I am aware that the issues of Police Forces discussing the implementation of Regulation A19 has been subject to a plethora of media attention and directly effects many Police Officers as employees and members of the public as tax payers.

There is an inherent public interest in informing members of the public how their taxes are being spend and the decisions which may effect this spending in future."

Public interest arguments in favour of maintaining the exemption

56. The public authority has provided the following arguments:

"The majority of the information you have requested relates to the free and frank exchange of views for the purposes of deliberation.

The information contained within the emails in question is of a largely conversational nature and it is perceived that these conversations would be considered private by those involved

Chief Officers rely on these emailed conversations to discuss arising issues of a sensitive and/or urgent nature. It is paramount that parties involved in these conversations feel confident to speak openly and without obstruction.

If these emails were to be disclosed it is likely that confidence if conducting conversation via email would be reduced and these conversations via email would have to cease for fear of further disclosure and the possible negative ramifications of the same. Were this process to cease it would greatly inhabit this Force's ability to exchange 'free and frank views for the purposes of deliberation' and conduct core-policing functions

Disclosure of this information prior to the conclusion of the Optimus Project would likely hinder the Projects' ability to function efficiently. This, in turn, would be likely to hinder the Forces' ability to save public money and ultimately cost GMP as organisation and the tax payer. This would also be likely to inhibit the Forces' ability for function optimally as a Police Force which would be to the determent of the public they serve."

Balance of the public interest arguments

57. The public authority drew the following conclusions:

"In this case the strongest consideration in favour of disclosure is that disclosure of the requested information would assist in the furtherance on an ongoing public debate of a controversial nature. The strongest factor in favour of non-disclosure is that disclosure of the requested information would prejudice the ability of the Force to exchange free and frank views for the purposes of deliberation on emerging issues.

Although I recognise that there is a public interest in the disclosure of information relating to the particular issue of the implementation of Regulation A19, this must be outweighed by the fact that the disclosure of this information would hinder the Forces' ability to converse openly, not just on this issue, but on any future issues arising."

58. The Commissioner considers that there is a strong public interest in furthering understanding of this controversial topic which would increase the quality of public debate on the issue. He considers that disclosure would be very much in the public interest because implementation of Regulation A19 by the public authority would affect many individuals and would also have the potential to be mimicked by other police forces throughout the country.
59. The Commissioner also considers that disclosure could increase public confidence in the way Chief Officers conduct their business.
60. The Commissioner considers, however, that there is a strong public interest in not damaging the relationship between Chief Officers and their ability to discuss their business informally during the decision making stage. The Commissioner has given significant weight to this argument due to the timing of the request and the fact that, at the time the request was made, the issues were still 'live' and final conclusions had not been made. He further acknowledges that, once completed, the results of the project will be publicised and the public will therefore be made aware of the final deliberations without encroaching on the personal views of the individual officers concerned when reaching their decisions.
61. The Commissioner therefore considers that the public interest in maintaining the exemption outweighs the public interest in disclosure. He considers that this applies to all of the withheld information and he has not therefore gone on to consider either section 40 or 42.

The Decision

62. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- it correctly relied on section 36(2)(b)(i) to withhold the requested information.
63. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- it was incorrect to cite sections 21 and 22.

Steps required

64. The Commissioner requires no steps to be taken.

Other matters

65. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.

The qualified person

66. The complainant expressed concern that the qualified person is one of the subjects of his request. He suggested that his opinion may therefore not be reasonable.
67. The "qualified person" is defined within section 36(5) of the Act. In respect of police forces this is covered under paragraph (o)(iii), and the appropriate person is a person who is authorised by a Minister of the Crown. Accordingly, the qualified person for this case necessarily falls to be the Chief Constable. The only requirement the Commissioner can consider in this case is that the opinion is sought from the correct person, which cannot be disputed in this case.

Right of Appeal

68. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk.

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is sent.

Dated the 20th day of September 2011

Signed

**Jon Manners
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