

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 August 2016

Public Authority: Office of the Police and Crime Commissioner of Lincolnshire

Address: Lincolnshire Police Headquarters
Deepdale Lane
Nettleham, near Lincoln
LN2 2LT

Decision (including any steps ordered)

1. The complainant requested information from the Office of the Police and Crime Commissioner (OPCC) for Lincolnshire relating to complaints made about the Chief Constable of Lincolnshire Police.
2. The OPCC refused to provide the requested information citing the exemption under section 40(2) of the FOIA (personal information) as its basis for doing so.
3. The Commissioner's decision is that the OPCC incorrectly withheld information relating to complaints about the Chief Constable by virtue of section 40(2). The Commissioner requires the public authority to disclose the withheld information.
4. The OPCC must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 16 January 2016, using the whatdotheyknow website, the complainant wrote to the OPCC for Lincolnshire and requested information in the following terms¹:

"Dear Lincolnshire Police and Crime Commissioner,

(1) Please disclose the number of complaints, both recorded/non-recorded, made against Chief Constable Neil Rhodes in the past year (16.01.2015 to 16.01.2016)

(2) How many of the complaints met the Independent Police Complaints Commission referral criteria

(3) How many times have you referred Chief Constable Rhodes to the Independent Police Complaints Commission

(4) What was the outcome of each referral

(5) What was the nature of each of the complaints against Chief Constable Rhodes

(6) What was the outcome of each of the complaints".

6. The OPCC responded on 11 February 2016. It refused to provide the requested information citing section 40(2) of the FOIA (personal information) as its basis for doing so.
7. Following an internal review the OPCC wrote to the complainant on 25 February 2016 maintaining its original position.

Scope of the case

8. The complainant contacted the Commissioner on 1 March 2016 to complain about the way her request for information had been handled. She told the Commissioner:

"The same request was made to 3 other OPCCs and they were answered.... My request [to Lincolnshire OPCC] has not been dealt with correctly nor transparently".

¹ https://www.whatdotheyknow.com/request/complaints_made_against_chief_co_2

9. Although the Commissioner understands from this that other OPCCs would appear to have complied with a similar request, this does not set an automatic precedent for disclosure under the FOIA. Each case must be considered on its merits.
10. The complainant also told the Commissioner:

"I can not see how releasing details about complaints made against the Chief Constable could be considered sensitive personal data".
11. The Commissioner acknowledges that in its correspondence with the complainant, the OPCC said:

"information about complaints and disciplinary matters is undoubtedly sensitive personal data".
12. During the course of the Commissioner's investigation, the Commissioner sought clarification from the OPCC as to whether its position was that the withheld information constitutes personal data or *sensitive* personal data according to the definition in section 2 of the Data Protection Act 1998.
13. In response, the OPCC confirmed that it considers that all of the withheld information is personal data, but that it is not *sensitive* personal data.
14. The analysis below considers the OPCC's application of section 40(2) to that information.

Reasons for decision

Section 40 personal information

15. 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(3) or 40(4) is satisfied.
16. In this case the relevant condition is contained in section 40(3)(a)(i). This applies where the disclosure of the information to any member of the public would contravene any of the principles in Schedule 1 of the Data Protection Act 1998 (DPA).

Is the information personal data?

17. Section 1 of the DPA defines personal data as:

"...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the 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. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
20. In correspondence with the Commissioner, the OPCC told her:

"The requested information is the personal data of Chief Constable Neil Rhodes. All of the withheld information is considered to meet the definition of personal information as defined within the DPA".

21. The Commissioner accepts that the requested information is the personal data of the Chief Constable: he is clearly identifiable having been named in the request and the information would also clearly relate to him.

Would disclosure breach any of the data protection principles?

22. Having accepted that the information requested constitutes the personal data of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach any of the data protection principles.
23. In this case, the OPCC considers that disclosure would breach both the first and second data protection principles.
24. The Commissioner considers that the OPCC failed to provide substantive arguments in support of its view that the second principle applies. In cases involving section 40(2) of the FOIA, the Commissioner considers that the data protection principle that is most likely to be relevant is the first principle. On that basis, and in the absence of specific arguments from the OPCC, the Commissioner has considered the extent to which the first data protection principle is relevant in this case.
25. The first data protection principle states:

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless

(a) at least one of the conditions in Schedule 2 is met”.

Would disclosure contravene the first data protection principle?

26. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that in this case the information can only be disclosed if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

Would disclosure be fair?

27. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public.

28. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:

- the data subject’s reasonable expectations of what would happen to their information;
- the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned); and
- the balance between the rights and freedoms of the data subject and the legitimate interests of the public.

Reasonable expectations

29. In the Commissioner’s view, a key issue to consider in assessing fairness is whether the individual concerned has a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual’s general expectation of privacy and also the purpose for which they provided their personal data.

30. The Commissioner acknowledges that the complainant has requested a mix of statistical information and narrative relating to complaints about the Chief Constable of Lincolnshire, including the nature and outcome of the complaints.

31. The Commissioner has published guidance on requests for personal data about public authority employees². In that guidance, she recognises that it is reasonable to expect that a public authority would disclose more information relating to senior employees than more junior ones but that it is always necessary to consider the nature of the information and the responsibilities of the employees in question.
32. The Commissioner recognises that people generally have an expectation that a public authority, in its role as a responsible data controller, will not disclose certain information, such as personnel matters, and that it will respect their confidentiality.
33. The Commissioner accepts that personnel matters are generally dealt with in confidence regardless of the seniority of the data subject. The Commissioner is also mindful that the OPCC told her that there is no statutory obligation to disclose the requested information.
34. She accepts that the Chief Constable may have an expectation that the information would not be disclosed.
35. However, given the senior status of his position and that the requested information relates to him in his professional capacity, the Commissioner considers that the Chief Constable could not reasonably have a legitimate expectation that this information would not be disclosed.

Consequences of disclosure

36. As to the consequences of disclosure upon the individual named in the request, the question here is whether disclosure would be likely to result in damage and distress to them. On this point, the Commissioner accepts that some minor distress may occur through disclosure contrary to the limited expectation of confidentiality noted above. She does not, however, consider that any more material damage would be likely to occur.

The legitimate public interest

37. Assessing fairness also involves balancing the individuals' rights and freedoms against the legitimate interest in disclosure to the public.

² https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

38. Even though disclosure may cause distress to the individual concerned, and they may have a reasonable expectation that the information will not be disclosed, this does not mean that disclosure would necessarily be unfair. In this case, the Commissioner must consider the legitimate public interest in disclosure and balance this against the rights of the Chief Constable.
39. The interest in disclosure must be a public interest, not the private interest of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest: the Commissioner must consider whether or not it is appropriate for the requested information to be released to the general public.
40. The Commissioner accepts that legitimate interests include the general public interest in transparency. In that respect, the complainant argued that:

"Nationally, high profile events and widespread media coverage has initiated an ongoing debate about integrity in the police service. The government, Her Majesty's Inspectorate of Constabulary, the Association of Chief Police Officers (ACPO) and the College of Policing have responded by developing initiatives to demonstrate that the service is aware of public concern, is acting to raise standards of integrity and will increase openness and transparency of the police service in general in order to increase public confidence".

41. The OPCC told the complainant:

"A distinction may be drawn between a request, for instance for details of how many first class rail tickets the Chief Constable has used, where we would want to be transparent about public expenditure and information about complaints and disciplinary matters which should rightly be viewed as personal data".

42. In reaching a decision on fairness, the Commissioner is mindful of the nature of the information and the role of the data subject.
43. She has also taken into account her guidance with regard to balancing rights and freedoms with legitimate interests when dealing with a request for personal data about public authority employees which states:

"Under the DPA, the exercise of balancing the rights and freedoms of the employees against the legitimate interest in disclosure is different to the public interest test that is required for the qualified exemptions listed in section 2(3) FOIA. In the public interest test, there is an assumption in favour of disclosure because the public

authority must disclose the information unless the public interest in maintaining the exemption outweighs the public interest in disclosure. In the case of section 40(2) the interaction with the DPA means the assumption is reversed; a justification is needed for disclosure”.

44. The Commissioner recognises that information about an individual's private life will deserve more protection than information about them acting in an official or work capacity – their public life. She also acknowledges that the more senior a person is, the less likely it is that disclosing information about their public duties will be unwarranted or unfair.
45. In the circumstances of this case, with due regard to the nature of the requested information and despite the likely expectation of the Chief Constable that such information would not be disclosed under the FOIA, the Commissioner is satisfied that the legitimate interests of the public are sufficient to justify any negative impact to the rights, freedoms and interests of the individual concerned. She therefore considers that disclosure of information relating to complaints about the Chief Constable in his public life would be fair.

Schedule 2 DPA

46. Having determined that it would be fair to disclose the requested personal data as it relates to the Chief Constable's public life rather than personal matters, the Commissioner has gone on to consider whether a condition in Schedule 2 of the DPA would be met. In relation to the conditions in Schedule 2, the Commissioner considers that the most relevant condition in this case is the sixth.

47. Schedule 2 condition 6 permits disclosure where it is:

“necessary for the purposes of the legitimate interests pursued by the data controller or by a third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”

48. In other words, for the condition to be met, disclosure must satisfy a three part test:

- there must be a legitimate interest in disclosing the information;
- the disclosure must be necessary for that legitimate interest; and

- even where the disclosure is necessary it must not cause unwarranted interference or harm to the rights, freedoms and legitimate interests of the data subject.
49. The Commissioner is satisfied that she has considered the first and third parts of the test in concluding that disclosure is fair. This leaves the second part of the test. Accordingly, the Commissioner has considered whether it is necessary to disclose the requested information in order to meet the identified legitimate interests.
50. Following the approach taken by the then Information Tribunal in *House of Commons v ICO & Leapman, Brooke, Thomas* (EA/2007/0060 etc), and approved by The High Court, the Commissioner recognises that there must be a pressing social need for any interference with privacy rights and that the interference must be proportionate.
51. The Commissioner has therefore considered whether there is a pressing social need for the disclosure of the information in this case. She has also considered whether any pressing social need is likely to be satisfied in some other way.

Is there a pressing social need to disclosure

52. In considering the 'necessity' test, the Commissioner must first establish the pressing social need – in other words, what the legitimate interests in disclosure are. In this case, she is satisfied that the legitimate interests in disclosure are transparency and the accountability of the OPCC in relation to complaints about the Chief Constable in his professional role.
53. In the circumstances of this case, and mindful of the seniority of the employee concerned, the Commissioner is satisfied that there is a pressing social need for disclosure.

Is disclosure necessary to meet the identified legitimate interests?

54. With respect to what the complainant considers to be an overriding requirement for transparency and accountability, she argued that there was a need to increase openness and transparency in order to increase public confidence in the police service.
55. The Commissioner notes that the individual concerned is the Chief Constable. The Commissioner and the First-tier Tribunal have, on occasions, placed a strong weight on the disclosure of personal information where this is necessary in order for senior public or civil servants to be held accountable for their actions.

56. This is on the basis that senior officials working within public authorities should have some degree of expectation that their actions in carrying out their role must be transparent and that information pertaining to this may be disclosed.
57. The Commissioner acknowledges that disclosure of the information could augment and assist the public's understanding of the nature of complaints involving a Chief Constable in their public life and how they are dealt with.
58. Taking the above into account, the Commissioner is satisfied that disclosure is necessary to meet a pressing social need and that there is no other means of meeting it that would interfere less with the privacy of the individual concerned.

Would disclosure have an excessive or disproportionate adverse effect on the legitimate interests of the data subject?

59. In considering the potential effect of disclosure, the Commissioner has already addressed much of the limb of the test when considering fairness. For example she has considered the reasonable expectations of the Chief Constable as to whether the information would be disclosed.
60. Given his senior rank, the Commissioner considers that it would not be unreasonable or unexpected that the public interest would require transparency about complaints made against the Chief Constable in his professional role.
61. Having already established that the processing is fair, the Commissioner is also satisfied that release of the information would not cause any unnecessary interference with the rights, freedoms and legitimate interest of the data subject. She is therefore satisfied that the schedule 2 condition is met.

Is there a lawful basis for disclosure

62. For the first data protection principle to be satisfied, disclosure must be lawful, as well as fair. The approach of the Commissioner to the issue of lawfulness under the first data protection principle is that she will find that disclosure would be lawful unless the public authority has advanced convincing arguments as to why disclosure would be unlawful.
63. In this case, the Commissioner has not been made aware of any such arguments in relation to the withheld information relating to the Chief Constable in their professional role. She therefore considers that its disclosure would be lawful and that the information should be disclosed.

Right of appeal

64. 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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

65. 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.
66. 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

Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF