

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 September 2020

Public Authority: Office of the Bedfordshire Police and Crime Commissioner

Address: Bedfordshire Police Headquarters
Woburn Road
Kempston
Bedford
MK43 9AX

Decision (including any steps ordered)

1. The complainant has requested monitoring information from the Office of the Bedfordshire Police and Crime Commissioner ("the OPCC") about community grant awards. The OPCC directed the complainant to information which it published on its website about the grants that it awards. It also disclosed a substantial amount of information. However, it refused to disclose some information on the grounds that it was exempt under sections 31 (law enforcement), 36 (prejudice to the effective conduct of public affairs), 40 (personal information) and 43 (commercial interests) of the FOIA. The complainant disputed the application of the exemptions and also believed that the OPCC held further information which it had not disclosed.
2. The Commissioner's decision is that, on the balance of probabilities, the OPCC does not hold any further information beyond what has already been identified in the course of responding to this request. The Commissioner also finds that the OPCC was entitled to withhold information under section 40 of the FOIA. However, she finds that it failed to demonstrate that sections 31, 36 and 43 of the FOIA were engaged. She also finds that it breached sections 1 and 10 of the FOIA by failing to respond to the request within the statutory time for compliance.

3. The Commissioner requires the OPCC to take the following steps to ensure compliance with the legislation.
 - Disclose the Monitoring and Evaluation Plan for the Civil Orders project.
 - Disclose the 2018-19 and 2019-20 Half Year Monitoring forms for the Civil Orders project, with the exception of the information at part 4 (case studies) on both forms, which the Commissioner has found is exempt under section 40(2) of the FOIA. Names, job titles and contact information may be redacted, in line with the Commissioner's finding on section 40(2) of the FOIA.
 - Disclose the quarterly monitoring information in respect of the Gangs project. Any names, job titles and contact information may be redacted, in line with the Commissioner's finding on section 40(2) of the FOIA.
 - Disclose the ACCM Monitoring and Evaluation Plan and Year End Finance Report. Any names, job titles and contact information may be redacted, in line with the Commissioner's finding on section 40(2) of the FOIA. The complainant has confirmed he does not require banking information.
 - Disclose the Luton and Bedfordshire Youth Offending Services (Triage Custody) diversion statistics which were redacted from the final evaluation form.
 - Disclose the information withheld under section 43 in respect of the two organisations identified in the confidential annex to this decision notice.
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.

Background

5. The OPCC's website explains that it awards grants, via funding from the Ministry of Justice, with the aim of supporting organisations and projects whose work in the county helps to prevent offending, protect communities and support victims of crime to cope, recover and move forward. The OPCC publishes information about grant awards (including

the names of organisations awarded funding, the amounts they have received, a summary of each project being funded and how it meets the Police and Crime Plan) on its website¹.

Request and response

6. On 30 April 2019, referring to the publication provisions of *Schedule Part 1, 3(f) of The Elected Local Policing Bodies (Specified Information) Order 2011*², the complainant wrote to the OPCC and requested information in the following terms:

"The PCC has confirmed that "delivery targets" (Grant Conditions) are a condition of all grant agreements:

"All projects will be subject to the reporting and assurance measures, as set out in the accompanying guidance documents. To receive funding, projects will need to meet all delivery targets as specified with any grant agreement."

2.1 As it is a statutory requirement, Can you please provide details of the Grant Conditions for all the Grants that the PCC has awarded as this information has not been provided as required?"

7. There followed an exchange of correspondence between the two parties, about the request and related matters. In an email dated 2 May 2019, the OPCC commented that the complainant was "*entitled*" to receive the information. It said that some of it could be viewed via weblinks it had already provided, and that he would receive information on the financial details of the bids for the current year, in late May, once those in receipt of funding had returned the relevant paperwork that they were issued with in late April. However, following a further exchange of correspondence, in an email dated 10 June 2019, the OPCC appeared to revise its position, stating that the requested information, "*would be exempt under S43*" of the FOIA.
8. The complainant then asked to know how the public interest had been weighed in this decision, and the OPCC formally responded to the request under the FOIA, on 17 June 2019.

¹ <https://www.bedfordshire.pcc.police.uk/bedfordshire-pcc-grants-funding>

² <http://www.legislation.gov.uk/ukxi/2011/3050/schedule/made>

9. In that response, the OPCC disclosed a link to its grant fund page, which contained links to its commissioning strategy, application documentation and timescales, and summaries of successful bids. It refused to disclose individual details of "*delivery targets*"/*reporting and assurance measures*", saying that this information was exempt from disclosure under section 43(2) of the FOIA and that the public interest in maintaining the exemption was stronger than that in disclosing the information.
10. The complainant requested an internal review of the decision on 21 June 2019. He disagreed that section 43 of the FOIA was engaged and argued that the OPCC was under an obligation imposed by *The Elected Local Policing Bodies (Specified Information) Order 2011* to disclose the requested information.
11. The OPCC communicated the outcome of the internal review on 9 July 2019, upholding its original position.

Scope of the case

12. The complainant initially contacted the Commissioner on 23 July 2019 to complain about the way his request for information had been handled. He provided further information in support of his complaint on 9 August 2019, at which point it was accepted for investigation. He challenged the OPCC's application of section 43 to refuse the request, arguing:

"£5.67m of public funds have been awarded by the PCC. The PCC has a statutory duty to be open (transparent) and accountable for how these funds have been used. The PCC also has a duty to deliver value for money and the Police and Crime Panel ("PCP") has a duty to hold the PCC to account for the PCCs decisions including grant funding. It is necessary that this information is available for the PCP to meet its statutory duty and it is in the public interest that this information is available."

13. He also believed that the OPCC's internal review had not involved a genuine reconsideration of his request. He later told the Commissioner that he was not satisfied that the OPCC had disclosed all the information it held which fell within the scope of the request. In addition, the Commissioner notes that the request was not complied with within the statutory time for compliance.
14. In its response to the complainant, the OPCC had summarised the request as being for "*... a copy of the 'delivery targets*"/*reporting and assurance measures*' for each grant that has been awarded since the PCC assumed office." The complainant confirmed to the Commissioner that he considered this to be a reasonable summary of the request and

it is this definition that the Commissioner has employed when considering its handling. For clarity, the Commissioner will refer to this information as "*the monitoring information*" for the remainder of this decision notice.

15. The OPCC originally withheld the monitoring information relating to all the grants it had awarded. However, during the Commissioner's investigation (during which the OPCC had three opportunities to provide substantive arguments in support of its position), the OPCC obtained consent to the disclosure of the monitoring information from the majority of grant recipients. It disclosed their monitoring information to the complainant, with redactions made under section 40 to withhold personal data (names of staff, job titles, contact information). However, the OPCC continued to withhold a small amount of information, maintaining that it was exempt from disclosure under sections 31 (law enforcement), 36 (prejudice to the effective conduct of public affairs), 40 (personal information) and 43 (commercial interests) of the FOIA.
16. Following the combined cases of the *Home Office v Information Commissioner* (GIA/2098/2010) and *DEFRA v Information Commissioner* (GIA/1694/2010) in the Upper Tribunal, a public authority is able to claim a new exemption or exception either before the Commissioner or the First-tier Tribunal, and both must consider any such new claims.
17. The complainant suggested that, when responding to his request, the OPCC may have deliberately concealed information from disclosure, which is an offence under section 77 (offence of altering etc. records with intent to prevent disclosure) of the FOIA. The ICO's Criminal Investigations Team has considered this allegation and has judged that there is insufficient evidence to substantiate this claim.
18. Therefore, the analysis below considers the following matters:
 - the OPCC's compliance with section 10 (time for compliance);
 - the OPCC's application of sections 31, 36, 40 and 43 to withhold information; and
 - whether the OPCC disclosed all the information it held which was not exempt (section 1 of the FOIA).
19. The Commissioner has commented on the OPCC's handling of the internal review in the 'Other matters' section, at the end of this decision notice.

Reasons for decision

Section 1 – general right of access

Section 10 - time for compliance

20. Section 1(1) of the 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.
21. Section 10(1) of the FOIA states that on receipt of a request for information a public authority should respond to the applicant within 20 working days.
22. The complainant submitted his request to the OPCC on 30 April 2019. While the OPCC corresponded with him about the matters to which the request pertained, it did not formally respond to the request under the FOIA, until 17 June 2019, 32 working days later.
23. Therefore, by failing to respond to the request within 20 working days, the OPCC breached sections 1(1) and 10(1) of the FOIA.
24. The Commissioner also notes that, although the OPCC acknowledged on 10 January 2020 that further information had been identified which should be disclosed to the complainant, it took a further 22 working days until this was completed. It was also the case that the complainant had to ask again for some information which was illegible and for some information which was referred to, but omitted from, what was sent to him.
25. The OPCC said that the delay in responding to the original request was largely due to it not having been recognised as an FOIA request. It explained that the complainant was engaged in ongoing correspondence with its Chief Executive, and that this initially saw the request treated as 'normal course of business' correspondence, rather than being processed in accordance with the requirements of the FOIA.
26. On that point, the Commissioner's published guidance³ makes it clear that any letter or email to a public authority asking for recorded information is a request for information under the FOIA and it should be

³ <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/receiving-a-request/>

treated in accordance with the FOIA's provisions if the information being requested cannot be provided straight away, or if the requester mentions the FOIA.

27. With regard to the delays that surrounded the substantive disclosure of information which took place during the investigation, the OPCC said that this was due to the amount of time it took to collate and prepare the information for disclosure. It also accepted that, on revisiting the matter several months after it initially dealt with it, it misread the request as requiring data only for the year 2018-19, when in fact the request was for all years since the Police and Crime Commissioner assumed office, and this led to a further delay in disclosing that information.
28. The Commissioner notes that the OPCC was very apologetic to the complainant about this later oversight and she accepts that it was the result of a genuine error. Nevertheless, she considers that, overall, the complainant has been put to not inconsiderable trouble, in obtaining a response to this request.
29. The Commissioner uses intelligence gathered from individual cases to inform her insight and compliance function. This aligns with the goal in her draft "Openness by design"⁴ strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"⁵.

Section 1 – general right of access

30. The OPCC has acknowledged to the complainant that it has been unable to locate some information for the years 2016-17 and 2017-18, which it would normally expect to hold. The Commissioner understands that the information comprises standard documentation, which the OPCC holds for some organisations who have received awards, but not for others. The OPCC was unable to specify precisely what documents were 'missing', as it said it did not have a separate record of what documents were received, or not received, from particular organisations. It said that, having conducted searches, it was satisfied that it did not hold this

⁴ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁵ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

documentation, although it was unable to explain why this was the case. The complainant was not satisfied with this response and asked the OPCC to conduct further searches, and to consult back-up data to see whether information was available which could identify what was missing. The OPCC declined to do this, saying that it was satisfied that it did not hold the information.

31. Section 1 of the 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 him.
32. In this case, the complainant believes that the OPCC may hold further information falling within the scope of his request for the years 2016-17 and 2017-18, which it has not disclosed. The OPCC's position is that it does not.
33. 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.
34. The Commissioner will consider the complainant's evidence and arguments. She 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. She 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, she is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.

The complainant's position

35. The complainant was not satisfied with the OPCC's inability to account for why information for the years cited might be missing. He referred the OPCC to standard six year retention periods for the retention of finance and accounting records, as well as the six year rule for charitable donations under the *Limitation Act 1980*. He also maintained that the OPCC was obliged by the *Elected Local Policing Bodies (Specified Information) Order 2011* to publish such information. He considered that its failure to produce information pointed to contraventions of each of the above and that it was therefore a reasonable request that the OPCC conduct the further searches specified

by him, to check whether its back-up data could be restored to identify what was missing.

36. He also argued that the OPCC's claim not to know what information was missing seemed:

"...improbable as you know which organisation were [sic] given funding, 34 in 2016/17, according to the log on the OPCC website and must know which documents should exist, but are missing".

37. The complainant explained to the Commissioner that he was:

"...concerned at the complacency exhibited in the failure to protect public records and what seems to be a failure to report the loss of important documents (including signed contracts) to the various PCC/OPCC scrutiny bodies including Auditors."

The OPCC's position

38. The OPCC told the complainant:

"I would like to highlight to you that the Office of the Police and Crime Commissioner are aware of documents which are [sic] missing from 2016-2017 and 2017-2018. I have sent you a spreadsheet to highlight the information which has been sent to you and what documents/information we hold.

I can confirm that a full search has been completed of the system and I am unable to locate any additional documents for these years. So I am unable to provide the documents which are not saved on our system or available anywhere else. The system has been searched by me and the Commissioning officer and we are unable to locate all the documents you have requested.

I can provide the following explanation for this, that a completely different team were working on the Commissioning process throughout these years and they have left the organisation. The documents may not have been saved, may have been saved on personal drives which now have been deleted and I am unable to search back on emails as our server only keeps our emails for a period of 12 months."

39. In refusing the complainant's request for further action, it said:

"The Office of the Police and Crime Commissioner is satisfied that adequate and reasonable searches have been completed which would have revealed the documents if we held them. We believe that your request for specific searches to be completed of the Force systems, to check Force backups to be unreasonable and that specific organisation

name searches or key word searches would consume resources to an unreasonable amount. Your request so far has resulted in approximately 247 hours of OPCC time/resource and in line with the ICO guidance of 25 per hour cost, this would have resulted in £6175.00."

40. The OPCC was unable to specify what documents it was referring to when it said that information was missing, as it said it did not have a record of what documents had been received, or had not been received, from each individual organisation. However, it confirmed that adequate and reasonable searches had been conducted which would have located the documents if it held them. While it could not confirm whether or not the missing information had ever been held by the OPCC, it was satisfied that the OPCC does not hold it now. It speculated that the gaps in the information it held for the years in question may be due to information not having been saved, due to human error, or organisations not having returned documentation to it. The staff who would have processed the information no longer working at the OPCC, and so were not available to ask.
41. With regard to concerns expressed by the complainant about the possibility of wider information having been lost, the OPCC said the following:
 - The request was specifically for monitoring information relating to the OPCC's grant award process, and not for wider financial information.
 - The OPCC is subject to annual financial audit by independent auditors, as a result of which it is satisfied that it is holding and publishing information in accordance with the legal and regulatory obligations it is subject to.
42. With regard to the searches it had conducted, the OPCC provided the Commissioner with a detailed explanation of the way its electronic records are ordered (including screen shots of file hierarchies), the extensive searches it had conducted (including search terms used) and why it considered that the searches would have located all the relevant information it held. It said that all the information that had been located (which comprised many documents) had either been disclosed to the complainant or it was exempt from disclosure under one of the exemptions cited. It clarified that destruction of the information would not be in accordance with its record retention policy (a copy of which it provided to the Commissioner) and so it had no reason to believe that any relevant information had been deleted or destroyed.
43. The OPCC concluded that, while it does not know the reason why it does not hold the missing information:

"The process now is monitored closer than ever before, by the Commissioning officer and Chief Executive – previously it was managed by the Commissioning Manager not the Chief Executive".

The Commissioner's conclusion

44. 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 paragraphs 33 and 34, above, the Commissioner is required to make a finding on the civil standard of the balance of probabilities.
45. The Commissioner is satisfied that the OPCC has provided a detailed and cogent explanation of the searches it conducted and why they would be likely to locate any further monitoring information, if it was held. It has not been able to account for why it does not hold the information, however, that is not a matter for the Commissioner to pursue. She is only concerned with whether the FOIA permits access to such information as it does hold. On the question of whether the OPCC should interrogate its back-up data to see if it is capable of identifying the information which is missing, compliance with the FOIA does not oblige a public authority to create new information in order to answer a request. If it would be necessary to cross-match the names of the grant recipients with available documents to identify a document which might be missing, this would clearly constitute the creation of new information and is not something which is required by the FOIA.
46. Having taken all the above into account, the Commissioner is satisfied that the OPCC has demonstrated that it has reasonable grounds for considering that, on the civil standard of the balance of probabilities, it does not hold any further recorded information. She is therefore satisfied that it has complied with the requirements of section 1 of the FOIA in respect of this element of the request.

Section 31 – law enforcement

47. The OPCC confirmed that it was relying on section 31(1)(a) and (b) of the FOIA to withhold monitoring information relating to three grant awards made to Bedfordshire Police, in respect of two policing projects (one project receiving a grant for two consecutive years).
48. Section 31(1) of the FOIA states that:

"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-

(a) the prevention or detection of crime,

(b) the apprehension or prosecution of offenders”.

49. Section 31 is a prejudice based exemption and is subject to the public interest test. This means that not only does the information have to prejudice one of the purposes listed, but also that it can only be withheld if the public interest in the maintenance of the exemption outweighs the public interest in disclosure.
50. In order for section 31 to be engaged, the following criteria must be met:
 - the actual harm which the public authority claims would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption (in this case, the prevention or detection of crime and the apprehension or prosecution of offenders);
 - 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 or of substance; and,
 - it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure ‘would be likely’ to result in prejudice or disclosure ‘would’ result in prejudice.
51. The withheld information in this case consists of monitoring information relating to three grant awards made to Bedfordshire Police in respect of two policing projects (‘Civil Orders’ and ‘Gangs’).
52. In respect of the Civil Orders project, the OPCC withheld the Monitoring and Evaluation Plan and the Half Year Monitoring forms for 2018-19 and 2019-20. In respect of the Gangs project, the OPCC withheld quarterly monitoring information for the first and second quarters of 2019-20.
53. The first point for the Commissioner to consider is whether the arguments provided by the OPCC relate to the relevant applicable interests, namely the prevention or detection of crime and/or the apprehension or prosecution of offenders.
54. The OPCC said that the monitoring information Bedfordshire Police had provided to it revealed information about ongoing areas of policing with regard to sex offenders and gangs, including information about active court cases and offender intelligence.

55. The Commissioner is satisfied that the arguments provided by the OPCC do relate to the applicable interests stated, so the first limb of the three part test outlined above, is met.

The nature of the prejudice

56. The Commissioner next considered whether the OPCC demonstrated a causal relationship between the disclosure of the requested information and the prejudice that sections 31(1)(a) and (b) are designed to protect. In her view, disclosure must at least be capable of harming the interest in some way, ie have a damaging or detrimental effect on it.
57. The Commissioner twice asked the OPCC to answer the following questions in respect of its application of section 31:

"Please clearly explain why disclosure of the information would prejudice, or be likely to prejudice the function which a particular subsection is designed to protect.

Please ensure that you provide evidence which demonstrates a clear link between disclosure of the information that has actually been requested and any prejudice which may occur."

58. When it failed to answer the questions in any detail on the first occasion, the Commissioner asked it to address them again, and to understand that:

"In the absence of answers, the Commissioner's final decision may be that the OPCC has not demonstrated that the exemptions apply".

Civil Orders project

59. The OPCC offered no explanation as to the nature of the prejudice it envisaged (which it identified as being at the higher threshold of "would prejudice"). It stated only:

"Within the Forms there is information on active court cases of sex offenders and intelligence for law enforcement purposes. Section 31(1)(a) and (b) will cover all aspects of the prevention and detection of crime/ the apprehension or prosecution of offenders. It could apply to information on general policies and methods adopted by law enforcement agencies. The exemption also covers information held by public authorities without any specific law enforcement responsibilities. It could be used by a public authority to withhold copies of information it had provided to a law enforcement agency as part of an investigation.

The Force did not respond in time of [sic] the first response to the ICO, however I received a call from [officer's name redacted] after

the first submission to the ICO stating that the OPCC had concerns with releasing the information and [name redacted] mirrored the same concerns."

The Commissioner's conclusion

60. The Commissioner has examined the information in question. With regard to the Monitoring and Evaluation Plan for the Civil Orders project, she has been unable to identify any information which is operationally sensitive. The plan merely summarises the anticipated aims and outcomes of the project, at the point the grant was applied for. In view of this, and in the absence of cogent supporting arguments on this point from the OPCC, the Commissioner finds that the OPCC has failed to adequately identify the prejudice that it says would occur if the information was disclosed, or why it would occur. It follows that she is not persuaded that section 31 is engaged in respect of the document. The OPCC must therefore take the action set out in paragraph 3, above.
61. With regard to the Half Year Monitoring forms, the Commissioner has, for the same reasons as above, found that the OPCC has not demonstrated that section 31 is engaged in respect of the information. However, she notes that the OPCC also made brief representations that some of the information constituted personal data. She notes that part 4 of the Half Year Monitoring forms for both 2018-19 and 2019-20, contain case studies. Although anonymised, the case studies contain information about particular offenders, including their patterns of offending and strategies employed to deal with them. The Commissioner has therefore considered whether the information contained in part 4 of the Half Year Monitoring forms for 2018-19 and 2019-20 comprises personal data, under section 40, below.
62. However, with regard to the remaining information in the Half Year Monitoring forms, the Commissioner requires the OPCC to take the action set out in paragraph 3, above.

Gangs project

63. As with the Civil Orders project, the OPCC failed to identify the prejudice that it said *would* occur if the information was disclosed, or why it would occur. It merely reproducing a response that it had received from Bedfordshire Police, which stated:

*"The quarterly reports although not specific do make mention of work [Bedfordshire Police] have conducted which is of a sensitive nature, I have no problem with us replying to that effect and the reason for us not to share is due to the ongoing **covert** nature of the work being conducted. What can be revealed is that PCC work with you/your company around the management of Organised crime which includes working with a large number of partners internally and externally and*

the reports that are shared with the PCC contain sensitive information that should not be public knowledge."

The Commissioner's conclusion

64. The information in question summarises work by Bedfordshire Police's Gangs project during two quarters, at a fairly broad level. As Bedfordshire Police itself identified, the information does not go into specifics. However, the Commissioner is mindful that Bedfordshire Police referred to the "**covert nature of the work**" (its emphasis) being undertaken.
65. The Commissioner has conducted internet research to ascertain the extent to which information about Bedfordshire Police's Gangs project is in the public domain. She found several reports on Bedfordshire Police's website publicising its work on tackling gang activity, including references to funding received from the OPCC and top-level descriptions of policing strategies and particular outcomes. She considers that this is information which publicly indicates that gang activity is an important area of policing for the force and one in which it is actively engaged. While the Commissioner would accept that it is a sensitive area of policing which will involve covert operations, she is unable to identify any information of that nature in the quarterly reports, and neither, apparently, could Bedfordshire Police. As above, the Commissioner has therefore been unable to identify the prejudice which the OPCC believes would occur as a result of the disclosure of this information, or why it would occur.
66. It therefore follows that she is not persuaded that section 31 is engaged in respect of the quarterly monitoring information and the OPCC must take the action set out in paragraph 3, above.

Section 40 – personal information

67. The OPCC cited section 40(2) of the FOIA to redact names, job titles and personal contact details of staff members on documentation supplied by grant award recipients. It has also applied section 40(2) to withhold case studies supplied by a number of award recipients as examples of the work done, from which it says individuals can be identified. As explained in paragraph 61, above, the Commissioner has also considered whether section 40(2) applies in respect of the case studies supplied by Bedfordshire Police, which the OPCC had argued were exempt from disclosure under section 31 of the FOIA.
68. 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.

69. In this case, the relevant condition is contained in section 40(3A)(a)⁶. This applies where the disclosure of the information to any member of the public would contravene any of the Data Protection principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
70. 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.
71. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

"any information relating to an identified or identifiable living individual".

73. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
74. 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.
75. 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.

Names, job titles, contact details

76. The Commissioner considers that names and job titles are pieces of information which identify particular individuals. Personal contact email addresses and telephone numbers are pieces of information which relate to those identifiable individuals. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

⁶ As amended by Schedule 19 Paragraph 58(3) DPA.

Case studies

77. The OPCC applied section 40(2) to withhold monitoring information from several grant recipients which contained case studies, describing scenarios involving vulnerable clients and actions that had been taken. The Commissioner has also considered the case study information described in paragraph 61.
78. As set out above, the two main elements of personal data are that the information must relate to a living person and that the person must be identifiable. In this case, the clients in the case studies are referred to anonymously. However, the Commissioner notes that the case studies are sufficiently specific to enable the clients and their family members, who would have personal knowledge of the involvement they had had with the award recipients, to recognise themselves in the descriptions.
79. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the case study information both relates to and identifies the individuals described. This information therefore also falls within the definition of 'personal data' in section 3(2) of the DPA.
80. 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.
81. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

82. 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".

83. In the case of an FOIA request, 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.
84. 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.

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

85. Article 6(1) of the 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 Article applies.

86. 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"⁷.

87. 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.

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

Legitimate interests

89. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and

⁷ 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".

commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

90. The complainant has explained that his overall reason for requiring the requested documentation is to scrutinise the grant awards process, to ascertain whether the conditions under which grants were awarded by the OPCC have been adhered to and whether the OPCC has conducted adequate monitoring. Explaining his reasons for requiring information down to the level of signatories' names, he said:

"...it verifies who received public funds and whether all of the necessary documentation were [sic] completed properly. It is clear from some of the first documents sent to me that on a number of occasions documents have not been completed and/or signed. If these areas of forms are redacted, it is then impossible to determine whether the correct policy and procedure has been followed, i.e. the fact that it might not been followed could easily be concealed by redaction."

91. The Commissioner considers that the general interests of accountability and transparency are served by independent scrutiny of the grant award process and therefore that the complainant is pursuing a legitimate interest with the request.

Is disclosure necessary?

92. '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 the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

93. The OPCC has explained to the Commissioner that its grant award process does have formal, independent oversight:

"In terms of transparency, the OPCC employees an [sic] Commissioning Officer which continually monitors the service and performance via the organisations returns and monitoring visits which are conducted throughout the year. The OPCC is audited by independent auditors (RSM) which completed commissioning audits annually to ensure that all of the OPCC funded organisations have been monitored effectively and any failures have been address [sic] appropriately and reported any serious concerns throughout the right

channels. The Commissioning process of the OPCC and the organisations are discussed at the Police and Crime Panel to ensure transparency throughout the life of the contract."

94. Therefore, any failure to adhere to the terms under which grants have been awarded would be identified and dealt with, firstly by the OPCC itself, and thereafter, by independent auditors, via the appropriate formal channels. The OPCC provided the Commissioner with evidence in support of this point.
95. Therefore, in the particular circumstances of this case, the Commissioner does not consider that disclosure under the FOIA is *necessary* to meet the legitimate interests identified in paragraph 91.
96. The Commissioner further notes that some of the case study information comprises criminal offence data and special category data, both of which may only be disclosed with the data subject's consent or if the data subject has deliberately made this data public. Neither condition is present in this case.

The Commissioner's conclusion

97. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
98. The Commissioner has therefore decided that the OPCC was entitled to withhold the names, job titles and contact details of the individuals identified in the completed grant documentation, and the case studies, under section 40(2), by way of section 40(3A)(a).

Section 43 – commercial interests

99. The OPCC initially withheld all the requested information which was not exempt from disclosure, under section 43(2) of the FOIA. However, following a series of disclosures made to the complainant during the investigation, in a letter to the ICO dated 13 March 2020, the OPCC set out its final position with regard to the application of section 43(2). It said that it was maintaining the application of section 43(2) to withhold some monitoring information in relation to just two grant awards, where consent to disclosure from the grant recipients had not been obtained.
100. Section 43(2) of the FOIA states:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

Is section 43(2) engaged?

101. In order for section 43 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 exemption (ie be prejudicial to the commercial activities of any person - an individual, a company, the public authority itself or any other legal entity);
- 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 or of substance; and,
- it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure '*would be likely*' to result in prejudice or disclosure '*would*' result in prejudice.

102. The first point for the Commissioner to consider is whether the arguments provided by the OPCC relate to the relevant applicable interests.

103. The term '*commercial interests*' is not defined in the FOIA. However, the Commissioner's guidance on the application of section 43⁸ of the FOIA explains that a commercial interest relates to a person's ability to participate competitively in a commercial activity, such as the purchase and sale of goods or services. Their underlying aim may be to make a profit, however, it could also be to cover costs or to simply remain solvent.

104. The Commissioner asked the OPCC to provide full arguments setting out why it considers that the exemption is engaged. She explained that its submissions should identify whose commercial interests it believed would, or would be likely to, be prejudiced in the event of disclosure, and details of the nature of the prejudice itself. She also asked it to provide evidence that any arguments relating to third parties' interests

⁸ <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section43-foia-guidance.pdf>

were a genuine reflection of concerns known to be held by those third parties.

105. By way of background, the OPCC explained that it awards grants to organisations to deliver specific projects and services, covering such things as victims of crime services, funding for national modern slavery helplines and training. It said it routinely publishes the following information about the grants it awards, on its website⁹:

"Details of each grant (including crime and disorder reduction grant) made by the PCC, including:

- *the conditions (if any) attached to the grant,*
- *the recipient of the grant,*
- *the purpose of the grant and*
- *the reasons why the body considered that the grant would secure, or contribute to securing, crime and disorder reduction in the body's area, where appropriate."*

106. The OPCC also publishes all standard application documentation on its website. Addressing the complainant's concerns that it was not complying with *The Elected Local Policing Bodies (Specified Information) Order 2011* with regard to publishing sufficient information, it said that he had complained about this to Bedfordshire Police and Crime Panel, an external body which sits under Bedford Borough Council and considers complaints about the Police and Crime Commissioner. It said that Bedfordshire Police and Crime Panel had found that the information which the OPCC publishes is reasonable and that further documents do not need to be published on the OPCC website.

107. The OPCC said that the information it publishes has also been scrutinised by CoPaCC¹⁰, an independent organisation which monitors policing governance in England and Wales. It said the OPCC was

⁹ For example, for 2019/20, see <https://www.bedfordshire.pcc.police.uk/fluidcms/files/files/Funded-organisations-19-20-v3.pdf>

¹⁰ <https://policinginsight.com/about/>

awarded a Transparency Quality Mark¹¹ by CoPACC for the way in which it provides public access to information about what it does.

108. The OPCC said that while it routinely publishes general information about the conditions attached to each grant, more detailed monitoring information is not in the public domain and has been withheld under section 43(2) of the FOIA. It said that grant recipients are required to provide this information to the OPCC on a monthly/quarterly/half yearly basis, and it is compiled into a report which is sent to the Ministry of Justice. The OPCC told the Commissioner that no other Police and Crime Commissioner discloses monitoring information.
109. The OPCC said that disclosure would prejudice the commercial interests of third parties, namely, the two organisations which had not consented to the disclosure of their monitoring information.
110. The OPCC said that it had asked the two organisations for their views on whether the monitoring information could be disclosed in response to the request. It said that neither organisation had responded to its enquiry. It had therefore applied the exemption on their behalf and offered arguments of its own construction as to why their commercial interests would be prejudiced by the disclosure of the information.
111. The OPCC said that it was adopting the higher threshold of prejudice, saying that the disclosure of monitoring information *would* prejudice the commercial interests of each organisation.
112. In support of its position that the monitoring information is commercially sensitive and its disclosure would prejudice the organisations' commercial interests, the OPCC provided the Commissioner with submissions which themselves contain commercially sensitive information, which it would be inappropriate to publish here. The Commissioner has therefore reproduced them in a confidential annex to this decision notice, to be made available only to the OPCC.

The Commissioner's conclusion

113. The Commissioner's guidance on section 43 says the following about applying section 43(2) in respect of information about third parties:

"Where the disclosure of requested information may potentially prejudice a third party's commercial interests, a public authority

¹¹ <https://www.bedfordshire.pcc.police.uk/2018-01-pcc-recognised-with-national-award-for-openness-and-transparency>

should consult with the relevant third party about such disclosure at the time of the request."

114. The guidance also says:

"When a public authority wants to withhold information on the basis that to disclose the information would or would be likely to prejudice the commercial interests of a third party, it must have evidence that this does in fact represent the concerns of that third party. It is not sufficient for the public authority to speculate on the prejudice which may be caused to the third party by the disclosure."

115. The OPCC's attention was specifically drawn to this requirement by the Commissioner, during her investigation.

116. Having considered the OPCC's arguments, the Commissioner has concluded that, in this case, the OPCC has not demonstrated that section 43 is engaged. She has reached this decision because the OPCC has not provided any evidence that its arguments in support of the application of section 43 are a genuine reflection of the concerns of the organisations to which the monitoring information relates. The Commissioner has had regard to the Tribunal's comments in *Derry City Council v Information Commissioner EA/2006/0014*¹² when reaching this decision.

117. It follows that she finds that the OPCC was not entitled to rely on section 43 of the FOIA to withhold the monitoring information relating to the two organisations which had not consented to its disclosure. The OPCC must therefore take the steps set out in paragraph 3.

Section 36 – prejudice to effective conduct of public affairs

118. Section 36(2)(c) of the FOIA states:

"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—

...

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

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<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i69/Derry.pdf>

119. The OPCC sought to apply section 36 to withhold information where public authorities had expressed reservations about disclosure and/or another exemption had been applied. The OPCC did so on the basis that to disclose information against the wishes of the public authority, and/or in contravention of another cited exemption, would be detrimental to its working relationship with that public authority.

120. The Commissioner has determined that most of this information comprised case studies, which she has already found to be exempt under section 40(2) of the FOIA. It has therefore not been necessary to consider whether the case study information is also exempt under section 36 of the FOIA.

121. However, a small amount of information which is not covered by any of the analysis already undertaken above has been considered here. This concerns the following:

- ACCM 2016/17 Monitoring and evaluation plan
- ACCM 2017/18 Year End Finance Report
- Luton and Bedfordshire Youth Offending Services (Triage Custody) – diversion statistics.

122. In determining whether the exemption has been correctly engaged, the Commissioner is required to consider the qualified person's opinion with regard to the exemption, 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, and that it was given by a 'qualified person' (within the meaning of section 36(5)(o));
- ascertain when the opinion was given; and
- consider whether the opinion was reasonable.

123. For bodies such as the OPCC, section 36(5)(o) of the FOIA defines a 'qualified person' as:

"any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown".

124. The OPCC was twice asked by the Commissioner to answer a series of detailed questions about its application of section 36. With specific reference to section 36(2)(c), the Commissioner explained that for the exemption to be engaged, the OPCC must demonstrate that its qualified person had given the opinion that the exemption was engaged. However, the submission she subsequently received from the OPCC

made no reference to the qualified person having had any involvement in the decision to apply the exemption.

125. The Commissioner explained this requirement to the OPCC a further time. In response, the OPCC explained that the information in scope related to information supplied by third parties and that each had expressed the view that the information should not be disclosed. It again made no mention of the involvement of the OPCC's qualified person in the decision to apply section 36.

The Commissioner's conclusion

126. Since section 36(2)(c) of the FOIA will only be engaged if the opinion of the OPCC's qualified person has been sought and obtained, and the OPCC has supplied no evidence that this has been done, the Commissioner has no option but to conclude that section 36(2)(c) of the FOIA is not engaged in respect of this information.

127. The OPCC should therefore take the action described in paragraph 3 in respect of information identified at paragraph 121.

Other matters

128. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

Internal review

129. The Commissioner cannot consider the way in which a public authority conducted an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA.

130. Part 5 of the section 45 Code of Practice¹³ states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. It goes on:

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

"5.8 The internal review procedure should provide a fair and thorough review of procedures and decisions taken in relation to the Act. This includes decisions taken about where the public interest lies if a qualified exemption has been used. It might also include applying a different or additional exemption(s).

5.9 It is best practice, wherever possible, for the internal review to be undertaken by someone other than the person who took the original decision. The public authority should in all cases re-evaluate their handling of the request, and pay particular attention to concerns raised by the applicant."

131. The complainant has expressed the view to the Commissioner that the internal review conducted in this case was cursory and essentially a "rubber stamping" exercise to confirm the original decision, and that the request was not reconsidered by the reviewer in any meaningful way.
132. The Commissioner asked the OPCC to comment on the complainant's concerns that the review was focussed on justifying the decision to withhold the information, rather than on conducting a genuine reconsideration of the request.
133. However, when responding, the OPCC did not address this point, and merely directed the Commissioner to internal correspondence reiterating its belief that the exemption was engaged.
134. The Commissioner considers that the OPCC's response to her failed to explain how the review had been conducted. She would remind the OPCC of the recommendations contained in paragraphs 5.8 and 5.9 of the section 45 Code of Practice, when conducting internal reviews. As noted in paragraph 29, above, the Commissioner uses intelligence gathered from individual cases to inform her insight and compliance function.

Routine publication of information

135. As part of her decision on this case, going forward, the complainant asked the Commissioner to instruct the OPCC to routinely publish the requested information, in order to render future FOIA requests for it unnecessary.
136. The Commissioner is unable to accede to his request. Decision notices are issued in response to complaints made to the Commissioner under section 50(1) of the FOIA and they are limited in their coverage to matters pertaining to requests for information that have been made, as set out in section 1(1) of the FOIA.

Right of appeal

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

138. 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.

139. 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

Samantha Bracegirdle
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Wycliffe House
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SK9 5AF