

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 February 2024

Public Authority: Office of the Police and Crime Commissioner for Cheshire

Address: Cheshire Constabulary HQ
Clemonds Hey
Oakmere Road
Winsford
CW7 2UA

Decision (including any steps ordered)

1. The complainant has requested information about its staff from the Office of the Police and Crime Commissioner for Cheshire ("OPCC").
2. The OPCC directed the complainant to information online about one part of his request. It would neither confirm nor deny ("NCND") holding the remaining information, citing section 40(5) (Personal information) of FOIA. The Commissioner finds that this exemption is not engaged.
3. The Commissioner requires the OPCC to take the following steps to ensure compliance with the legislation:
 - Confirm or deny whether any information is held.
 - If information is held, the OPCC should either disclose it or issue a refusal notice explaining why it is exempt from disclosure.
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 20 June 2023, the complainant wrote to the OPCC and requested the following information:

“Can you please let me know:

1. How many staff are employed in the PCC's office?
2. How many of the employees have served in the police?
3. What were the roles of those who have served in the police?”

6. On 18 July 2023, the OPCC responded. It provided a weblink to part (1) of the request¹ which showed the structure of the OPCC. It refused to confirm or deny whether it held the other requested information, citing section 40(5) (Personal information) of FOIA.

7. The complainant requested an internal review on 1 August 2023. He said:

“For point 2, I have asked for no personal information and so your reason for refusal to provide the information I have requested is irrelevant.

For point 3, I believe that this information is important for the public to know what positions, if any, any ex-police members hold so that the public knows that the PCC's office is working for the public and not for the police”.

8. The OPCC provided an internal review on 18 August 2023, in which it maintained its position.

Scope of the case

9. The complainant contacted the Commissioner on 29 August 2023 to complain about the way his request for information had been handled. His grounds were as follows:

¹ <https://www.cheshire-pcc.gov.uk/SysSiteAssets/media/downloads/commissioner-and-office/the-office/staff-information/opcc-structure-may23.pdf>

"I have requested from the Cheshire Police and Crime Commissioner information regarding how many staff are ex-police employees. I have not asked for any names but the reply said this was personal information I requested and therefore not disclosable. I disagree, hence my complaint. I think it is important to know how independent the Cheshire Police and Crime Commissioner is from Cheshire Police. The Commissioner is himself an ex Assistant Chief Constable of Cheshire Police".

10. The Commissioner will consider whether the OPCC was entitled to rely on section 40(5) of FOIA to NCND holding any information for parts (2) and (3) of the request below.
11. The OPCC has confirmed that it did not consider the previous employment of the Police and Crime Commissioner² himself as being subject to the request, as the request referred to his staff rather than to him personally.

Reasons for decision

Neither confirm nor deny ("NCND")

12. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request.
13. The decision to use a NCND response will not be affected by whether a public authority does, or does not, in fact hold the requested information. The starting point, and main focus for NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.
14. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held.
15. The OPCC has taken the position of neither confirming nor denying whether it holds any of the requested information in its entirety, citing

² <https://www.cheshire-pcc.gov.uk/commissioner-and-office/about-john-dwyer/>

section 40(5) of FOIA. The issue that the Commissioner has to consider is not one of disclosure of any requested information that may be held, it is solely the issue of whether or not the OPCC is entitled to NCND whether it holds any information of the type requested by the complainant.

16. Put simply, in this case the Commissioner must consider whether or not the OPCC is entitled to NCND whether it holds any information about whether its employees have ever previously served as police officers.
17. The OPCC has said that the information described in the request, if it was held, would be fully exempt from disclosure by virtue of section 40 of FOIA.

Section 40 - Personal information

18. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.
19. Therefore, for the OPCC to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request the following two criteria must be met:
 - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

20. Section 3(2) of the Data Protection Act 2018 defines personal data as: "any information relating to an identified or identifiable living individual".
21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable. 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.
22. The initial factor for the Commissioner to consider is whether or not the OPCC simply confirming or denying whether it employs any ex-police officers would reveal any personal information, ie whether anyone would be identifiable from such an action. The OPCC has not clearly explained

how revealing whether or not it employs any ex-officers could allow for any individual to be identified and it is not obvious to the Commissioner how this could occur. If it does employ ex-police staff, then disclosing the number itself could potentially say something about the staff were, for example, all of the staff ex-officers, but this is not under consideration at this point. Having considered the wording of this part of the request, the Commissioner is not persuaded that disclosing whether or not any of its 16 members of staff are ex-officers, would result in their identification.

23. Regarding the third part of the request, which refers to the roles of any ex-police officers, this matter is not an issue which the Commissioner needs to consider at this point. The OPCC needs firstly to confirm or deny whether it employs any relevant staff. Then consideration as to whether the disclosure of any roles would become a possible identifying factor would need to be taken into account. (The Commissioner would also suggest that this part of the request is clarified with the complainant as it is not entirely clear whether he is seeking to ascertain the roles of any ex-officers prior to joining the OPCC or what their current roles are within the OPCC.)
24. For the reasons set out above the Commissioner has concluded that if the OPCC confirmed whether or not it held the requested information this would not result in the disclosure of a third party's personal data. Therefore, the first criterion set out above is not met and it cannot rely on section 40(5B) of FOIA in the circumstances of this case to refuse to confirm or deny whether the requested information is held.
25. The OPCC should take the steps outlined in paragraph 3 above.

Right of appeal

26. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

27. 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.
28. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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