

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 March 2013

Public Authority: Merseyside Police

Address: Canning Place
Liverpool
L69 1JD

Decision (including any steps ordered)

1. The complainant has requested disclosure of a photograph held by the Merseyside Police force (the police) and used by it as evidence while investigating certain criminal and related matters. The photograph was alleged to evidence improper conduct by then serving members of the police while they were on duty.
2. The Commissioner's decision is that the police have applied FOIA correctly in relying on the exemption at section 30(1) and the associated public interest balance to withhold the requested information.
3. The Commissioner does not require the police to take any steps beyond those already agreed to ensure compliance with the legislation.

Request and response

4. On 30 August 2012, following correspondence with the police, the complainant wrote to the Commissioner to say that he was not content with its continuing to withhold from him photographs he had requested originally on 1 February 2012 and which had led to a previous investigation by the Commissioner, his case reference FS50443698. Both requests followed the dismissal of five former police officers arising from an incident in which they had allegedly posed for mobile phone photographs of themselves behaving inappropriately whilst on duty.
5. One of the photographs had been published by the police in a redacted form on 4 August 2011. Other photographs held by the police had not been published and were being withheld from the complainant. The published photograph showed the former police officers apparently

behaving inappropriately during an official search of a premises. The former officers have been dismissed for gross misconduct and have been the subject of connected proceedings.

Scope of the case

6. On 14 September 2012 the police told the Commissioner that, following the conclusion of his previous investigation on 25 June 2012, the police had considered the information request afresh. The police said that they held relevant photographs but withheld them relying on the exemptions in sections 30(1), 30(2) and 40(2) FOIA. The police told the Commissioner that this represented their firm view of the matter.
7. On 24 October 2012 the Commissioner's staff viewed the withheld photographs.
8. On 13 November 2012, following further correspondence, the Commissioner formed the view that, with the exception of one photograph, the unpublished photographs held by the police should be disclosed in a cropped and pixelated redacted form, analogous to that used for the photograph published on 4 August 2011.
9. On 22 November 2012 the police indicated that it was willing to accept the Commissioner's view and resolve the matter informally.
10. On 18 December 2012 the complainant told the Commissioner that, while he largely accepted the Commissioner's view, he did not accept that one photograph should continue to be withheld and asked the Commissioner to proceed to a decision about that one photograph.
11. The Commissioner has therefore considered the application to the information contained in the unpublished photograph (referred to hereafter in this Notice as "picture A") of section 30 FOIA and the associated balance of the public interest.
12. The police maintained before the Commissioner that the section 40(2) exemption applied to picture A in addition to the section 30(1) and 30(2) FOIA exemptions.

Reasons for decision

13. Section 30 of FOIA states:

"(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-

(i) whether a person should be charged with an offence, or

(ii) whether a person charged with an offence is guilty of it,

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or

(c) any criminal proceedings which the authority has power to conduct."

"(2) Information held by a public authority is exempt information if-

(a) it was obtained or recorded by the authority for the purposes of its functions relating to-

(i) investigations falling within subsection (1)(a) or (b),

(ii) criminal proceedings which the authority has power to conduct,

(iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or

(iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and

(b) it relates to the obtaining of information from confidential sources."

14. Section 30(1) applies to information that has at any time been held by the police for the purposes of an investigation that the police have a duty to carry out with a view to it being ascertained whether a person should be charged with an offence. The information in question must relate to a specific investigation and not to investigations in general.

15. The police confirmed to the Commissioner that picture A had been held by them in relation to relevant criminal and connected investigations. No evidence was presented to the Commissioner or seen by him that cast doubt on that. He therefore decided that the section 30(1) FOIA exemption was engaged, a decision that the complainant accepted.
16. As section 30(1) FOIA is a qualified exemption, the Commissioner has gone on to consider the balance of the public interest. When deciding the balance of the public interest, the Commissioner considered matters relevant to investigations and proceedings conducted by the police.

Public interest arguments in favour of disclosing the withheld information

17. The Commissioner recognised that there will always be a public interest in achieving transparency and accountability of police operations.
18. The complainant told the Commissioner that he believed picture A to depict a serious offence which, he said, was made worse by what he described as aggravating features. The complainant said he recognised that the past publication of a related photograph by the police, and the current willingness to disclose some further photographs, demonstrated transparency and accountability on their part. However, in the complainant's view, that had been undermined by the failure to report what he said was the most serious transgression by those involved. In the complainants' view an aggravated offence, of the kind that he speculated picture A represented, should almost always result in prosecution and there had been none in relation to picture A. In his view, the nature of the offence that he speculated had been committed was serious and had implications for the local culture of policing. The transparency of the police disciplinary process had not, in his view, been sufficient to show that cultural issue had been tackled. (For the avoidance of doubt, the Commissioner, whose staff have viewed picture A, makes clear that he makes no comment on the complainant's beliefs as to the contents of picture A.)
19. The complainant said that it was not clear that the full nature of the offending behaviour had been disclosed to those he described as the victim(s). He presented this as a factor favouring disclosure. The Commissioner regards the circumstances surrounding searches of premises as a matter for the authorities authorising the searches and not in itself a matter for or against the disclosure of information. In this matter the Commissioner saw nothing in the evidence put before him to suggest that there might have been any irregularities in the process of authorising the search. The police also told the Commissioner that they had consulted on aspects of this matter with the Independent Police Complaints Commission and the Information Commissioner saw that the

decision to withhold picture A was consistent with that Commission's response to the police.

Public interest arguments in favour of withholding the information

20. There is a strong public interest in maintaining the section 30 exemption in order to protect witnesses and informants, and in not deterring potential witnesses from making statements for fear that their evidence might not be treated in confidence. Also for maintaining the independence of the judicial and prosecution process and preserving the criminal court as the sole forum for determining guilt.
21. The police told the Commissioner that disclosure of picture A would impede any related investigations or any criminal investigation that might take place or be considered against the former officers. If information of an evidential nature were to enter the public domain, the right to a fair trial in any future proceedings that might be contemplated would be undermined as a consequence.
22. The Commissioner recognises the strong interest in principle in protecting information acquired by the police during their investigations, especially while matters remain unconcluded. He received evidence from the police that, in this matter, connected proceedings had not been completed at 25 June 2012, the date of the information request, or within 20 working days later.
23. The police have already issued information to the public and media confirming that the former officers had behaved improperly during a premises search. The police had also made clear to the public that appropriate and proportionate disciplinary and other action had been taken. The former officers had all been dismissed from the police for reasons arising from this incident. The publication of further photographic material would not, the police said, add significantly to the knowledge that the public already has of this matter; a view which the Commissioner accepted on the basis of the evidence before him which included the contents of picture A.
24. The Commissioner saw that the police had sought and received expert independent and confidential advice and guidance about the possible publication of picture A (the advice). During his investigation, the Commissioner was shown the advice in strict confidence and saw that it weighed the public interest balance clearly in favour of withholding the information in picture A. He accepted the police evidence that publishing picture A would have an adverse impact on community relations which would damage the confidence of some members of the community in the impartiality of the police and make it more difficult for them to obtain the full cooperation of all members of the community when carrying out future investigations.

Balance of the public interest

25. In determining the balance of the public interest with regard to the disclosure or withholding of picture A, the Commissioner put considerable store by the need for the police to demonstrate proper transparency, responsibility and accountability for the actions of its officers which argues for disclosing the photographs including picture A. He also recognised that the proactive publication by the police in 2011 of a photograph and suitable media report by the police of the inappropriate behaviours of their former officers had already gone some way to meeting this obligation in ways that were proportionate. He had regard for the recent agreement by the police to disclose the other photographs they held, other than picture A, in a cropped and pixelated redacted form.
26. The Commissioner saw weighty public interest factors for continuing to withhold picture A as set out above. He found especially persuasive the fact that connected matters had not been fully resolved and the need for the outcomes of investigations and proceedings to be decided in the proper forum rather than engaging in 'trial by media'. The Commissioner also gave significant weight to the confidential expert advice received by the police in the context of picture A.
27. Accordingly he decided that the balance of the public interest lay in favour of maintaining the section 30(1) FOIA exemption in respect of picture A and required the police to take no further steps in regard to it.

Personal information – section 40 FOIA

28. In the light of his decision on the application of the section 30(1) FOIA exemption to the information in picture A, the Commissioner did not proceed to consider the application to it of the section 30(2) and section 40(2) exemptions.

Right of appeal

29. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

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

30. 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.
31. 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

Gerrard Tracey
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