

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 September 2013

Public Authority: The Chief Constable of Warwickshire Police

Address: Warwickshire Constabulary HQ
PO Box 4
Warwick
CV35 7QB

Decision (including any steps ordered)

1. The complainant requested information in relation to events following a fatal fire. Warwickshire Police confirmed that it held some of the requested information. However, it refused to provide that information, citing various exemptions. The Commissioner has concluded that some of the information withheld by virtue of sections 40(2) (personal information), 31 (law enforcement) and 30 (investigations) of FOIA has been incorrectly withheld.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - disclose to the complainant the information listed in the confidential annex to this decision notice.
3. The public authority 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

4. By way of background to this complaint, Warwickshire Police told the Commissioner:

"On 2 November 2007, four fire-fighters from Warwickshire Fire and Rescue Service died whilst attempting to fight a warehouse fire at Atherstone on Stour in Warwickshire. As a result Warwickshire Police launched their biggest and most complex investigation ever".

Request and response

5. On 28 June 2012 the complainant requested information of the following description:
 - "1. A copy of the detailed response sent by A Parker (in relation to the request for an apology from Mr Farnell WCC) re the fatal fire at Atherstone.*
 - 2. The reasons why [named individual 1]'s evidence was not used and the fee for this service. Is a copy of this report available?*
 - 3. The fees and associated costs charged by [named individual 2] in relation to his reports and attendance at court.*
 - 4. The date that [named individual 3] was due for retirement from the force having completed the 30 years' service and how much this has cost to continue to employ him since this date (in relation to the trial of the Warwickshire fire-fighters)."*
6. (The Commissioner understands that the 'detailed response' referred to in the request relates to a letter from Andy Parker, Chief Constable of Warwickshire Police, to Councillor Alan Farnell, leader of Warwickshire County Council).
7. Warwickshire Police responded on 25 July 2012. It confirmed that it held some of the requested information. However, it refused to provide the information requested at part (1) of the request, citing sections 40(2) (personal information) and 31(1) (law enforcement) of FOIA.
8. With respect to the information requested at part (2) of the request, it explained that it was bound by the decision of the trial judge not to disclose the written evidence of the named individual. It also cited section 30(1) (investigations and proceedings) of FOIA in relation to that information.
9. With respect to part (3) of the request – fees and costs charged by a named individual - it refused to provide the requested information, citing the section 43 exemption (commercial interests) as its basis for doing so.
10. Warwickshire Police provided the date when the individual named in that part of the request completed 30 years' service but advised that he was

not due to retire at that time. Accordingly it denied holding the information requested at part (4) of the request.

11. The complainant requested an internal review on 31 July 2012. Warwickshire Police sent her the outcome of its internal review on 20 September 2012. It upheld its original position, clarifying that it was citing sections 32(1)(c) (court records), 30 and 31 in respect of the information requested at part (2) of the request.

Scope of the case

12. The complainant contacted the Commissioner on 11 November 2012 to complain about the way her request for information had been handled.
13. Having read her correspondence, the Commissioner considers that information in scope of points 1 and 2 of the request is the information that is relevant to her complaint. He wrote to the complainant on that basis and invited her to respond if that was not the case.
14. As the complainant did not contact him further, the scope of the Commissioner's investigation has been with respect to Warwickshire Police's handling of points 1 and 2 of the request. He has considered whether Warwickshire Police is entitled to rely on the exemptions in sections 40(2) and 31 of FOIA as a basis for refusing to provide the information requested at part (1) of the request. He has also considered whether it is entitled to rely on the exemptions in sections 30 and 32 of FOIA as a basis for refusing to provide a copy of the report as requested at part (2) of the request.

Reasons for decision

Part (1) of the request – the letter

15. The Commissioner has first considered Warwickshire Police's withholding of the information requested in part (1) of the request - the letter from the Chief Constable to Councillor Farnell. For the purposes of this decision notice, the Commissioner will refer to it as 'the letter'.
16. At the start of his investigation, the Commissioner asked Warwickshire Police to provide him with '*a copy of the withheld information (clearly marked with which exemptions apply)*'.
17. In response, Warwickshire Police provided the Commissioner with a copy of the letter. While much of the letter was clearly marked to show where Warwickshire Police considers an exemption applies, the remainder was unmarked.

18. With respect to those parts of the letter that are unmarked, the Commissioner has concluded that Warwickshire Police does not consider that an exemption applies. He therefore orders disclosure of those parts of the letter.
19. The Commissioner has next gone on to consider those parts of the letter which Warwickshire Police considers engage the section 40 exemption.

Section 40 personal information

20. Section 40(2) of FOIA provides an exemption from the disclosure of personal 'data' where the information is the personal information of a third party and its disclosure would breach one of the data protection principles of the Data Protection Act (DPA).
21. Warwickshire Police argued that disclosure of the withheld information:

"would enable individuals to be identified and would include their personal data. ... disclosure would identify individuals which would be in breach of the Data Protection Principles".

Is the information personal data?

22. The first step for the Commissioner to determine is whether the requested information constitutes personal data, as defined by the DPA. If it is not personal data, then section 40 cannot apply.
23. Personal data is defined in section 1(1) of the DPA 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."
24. 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 some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
25. Describing the nature of the withheld information, Warwickshire Police told the complainant:

"The letter contains personal information relating to a number of individuals, not just relating to the three Fire Fighters who stood trial for Gross Negligence Manslaughter";

and

"The letter was private correspondence between the Chief Constable and Cllr Farnell and was never intended for public circulation".

26. In determining whether the information constitutes personal data the Commissioner has considered some of the Warwickshire Police's arguments within a Confidential Annex, the contents of which will be provided to the public authority only.
27. The Commissioner has issued guidance on 'Determining what is personal data'¹ in which he addresses an issue which he considers relevant in this case. That issue relates to the need to consider whether the individual is giving a personal opinion or is putting forward views on behalf of another individual, company or organisation (for example, the individual's employer).
28. That guidance states:

"The views of a company or organisation as expressed by its agent (either an employee or professional representative), are not personal data about the agent. The focus of the comments does not concern the employee's or agent's personal views but concerns the company's position".
29. In the Commissioner's view, the Chief Constable's letter – a response to public comments made by the Councillor – is correspondence between two individuals, each with a public profile. He has found no evidence to support the assertion that it is private correspondence.
30. Similarly, he has found no evidence in relation to the context in which the letter was written to indicate that it was anything other than work-based correspondence. The Commissioner considers that the views expressed by the Chief Constable, albeit strongly worded, are expressed

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http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Data Protection/Detailed specialist guides/PERSONAL DATA FLOW CHART V1 WITH PREFACE001.aspx

in a work capacity and on behalf of the Constabulary. In line with his guidance, he does not consider that the views expressed are the personal data of an individual.

31. Having considered all the arguments put forward by Warwickshire Police, the Commissioner is not satisfied that it has demonstrated that the content of the letter withheld under section 40 constitutes the personal information of the Chief Constable or the Councillor.
32. The Commissioner also recognises that the information in the letter, that Warwickshire Police have sought to withhold, also contains references to other third parties, who all occupy senior positions. He accepts the limited references, indicating the individuals' broad involvement with the matter and their job roles do constitute their personal data. He has therefore considered whether disclosure would breach the DPA.

33. The first data protection principles provides:

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, and.

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met

34. He finds that it would be clearly be fair and lawful to disclose this information – no reasonable expectation of privacy has been demonstrated, there is a necessary legitimate public interest in disclosing their involvement, and there would not be any detriment caused by disclosing this information. Disclosure would also meet schedule 2 condition 6 of the DPA. In conclusion, the first data protection principle would not be breached by disclosure.
35. The Commissioner therefore finds that Warwickshire Police applied the section 40 exemption incorrectly and the information solely withheld under this exemption should be disclosed.
36. For the avoidance of doubt, the Commissioner has detailed the information to be disclosed in a confidential annex to this decision notice, a copy of which will be provided to Warwickshire Police only.

Section 31 law enforcement

37. The Commissioner has next considered Warwickshire Police's citing of section 31 in relation to the remaining parts of the letter. Section 31 provides a prejudice-based exemption which protects a variety of law enforcement interests.

38. Consideration of this exemption is a two-stage process. First, the exemption must be engaged as a result of prejudice being likely to occur. Secondly, the exemption is qualified by the public interest, which means that, unless the public interest in the maintenance of the exemption outweighs the public interest in disclosure, the information should be disclosed.
39. In this case, Warwickshire Police has cited section 31(1)(c) and (g). Those subsections relate, respectively, to the administration of justice and the exercise by any public authority of its functions for any of the purposes specified in subsection (2).
40. With respect to the latter, Warwickshire Police confirmed that it is relying on subsection 2, paragraphs (a), (c), (e) and (i) – ascertaining whether any person has failed to comply with the law, whether there is justification for regulatory action, to establish the cause of an accident and to ensure the health, safety, and welfare of persons at work. In this case, by way of explanation, Warwickshire Police told the Commissioner that these areas fall, for example, within the remit of any HM Coroner inquest proceedings that may ensue.
41. With respect to the prejudice test, the Commissioner has followed the approach as set out in his guidance, namely to:
- identify the applicable interests within the relevant exemption;
 - identify the nature of the prejudice; and
 - decide on the likelihood of the occurrence of prejudice.

Applicable interests

42. Warwickshire Police told the complainant:

"The detailed response letter comments on aspects of the criminal investigation into the tragic fire at Atherstone-on-Stour in 2007 and was written in confidence because legal proceedings taken under Health and Safety at Work Act 1974 provisions have yet to be concluded. These legal proceedings involve a consideration of reports made as part of the Police investigation and release of the response letter could adversely prejudice those proceedings. Moreover, HM Coroner Inquest proceedings have yet to be held".

43. It subsequently told her:

"...whilst the trial of the three individual fire fighters has concluded, proceedings against Warwickshire County Council in its capacity as the Fire and Rescue authority, are ongoing".

44. The Commissioner asked Warwickshire Police to address him further on its view that disclosure of the information would compromise effective law enforcement.

45. In response, Warwickshire Police told the Commissioner:

"At the time of the initial refusal, and the review, criminal proceedings were on-going.... It was also made clear ... to [the complainant] that this exemption would apply pending the Inquest, which has still not yet been listed".

46. Warwickshire Police was unable to provide the Commissioner with any information about the likelihood of an inquest taking place *"as it is a decision for the Coroner to make"*.

The nature of the prejudice

47. Warwickshire Police explained to the Commissioner why it considered that prejudice would be caused by disclosure in this case. For example, with respect to disclosure having a wider effect on future investigations, it considers that the letter comments on aspects of the criminal investigation into the fire. In its view, the investigative strategies described could be used again in future investigations.

48. With respect to its reliance on 31(1)(g), Warwickshire Police described the detrimental effect it envisaged on any Coroner's inquiry.

The likelihood of prejudice

49. In this case, Warwickshire Police told the Commissioner that disclosure *"would prejudice"*, as opposed to *"would be likely to prejudice"*, the administration of justice (section 31(1)(c)). With respect to section 31(1)(g) and prejudice to any Coroner's Inquiry as a result of disclosure, it variously told him:

"such disclosure could in our view prejudice...."

"the letter may influence - and therefore prejudice -"

Is the exemption engaged?

50. In the Commissioner's view, the prejudice that the authority has envisaged must be real, actual or of substance. The disclosure must at least be capable of harming the interest in some way, that is have a damaging or detrimental effect on it. If the consequences of disclosure would be trivial or insignificant, there is no prejudice. He also considers that the authority must be able to show how the disclosure of the specific information requested would, or would be likely to, lead to the

prejudice. If the authority cannot show that the prejudice would or would be likely to occur, then the exemption is not engaged.

51. With respect to section 31(1)(g), the Commissioner considers that Warwickshire Police was given the opportunity to demonstrate the likelihood of further proceedings, for example an inquest or public inquiry. In his view, Warwickshire Police's arguments about the likelihood of the former happening are weakened by the uncertainty that an inquest will be held. In the Commissioner's view, its submissions indicate that such proceedings are unlikely.
52. The Commissioner also considers that there is not sufficient evidence of prejudice to individuals, for example before a Public Inquiry should one be held in the future. He therefore attributes limited weight to the argument of likelihood.
53. Having considered its submissions, the Commissioner has concluded that the public authority has demonstrated no real or significant likelihood of prejudice resulting to the exercise by a public authority of its functions under subsection 2. The exemption provided by section 31(1)(g) is not, therefore, engaged. Having reached this conclusion it has not been necessary to go on to consider where the balance of the public interest lies in respect of the information withheld by virtue of section 31(1)(g).
54. With respect to Warwickshire Police's citing of section 31(1)(c), the Commissioner acknowledges that 'the administration of justice' is a broad term: it applies to the justice system as a whole.
55. In the Commissioner's view, some of the reasons Warwickshire Police put forward in relation to its reliance on section 31(1)(c) are of a general nature, relating to strategies and high level investigative procedures rather than specific processes.
56. Having duly considered the arguments, the Commissioner's view is that Warwickshire Police has failed to demonstrate how the disclosure of some of the information withheld by virtue of section 31(1)(c) would or would be likely to harm the particular interest that that exemption is designed to protect. It follows that he does not find the exemption engaged in respect of that information.
57. For the avoidance of doubt, the Commissioner has detailed the information to be disclosed in a confidential annex to this decision notice, a copy of which will be provided to Warwickshire Police only.
58. With respect to the remainder of the withheld information, the Commissioner's view is that prejudice has been demonstrated and he is therefore satisfied that the exemption is engaged. Accordingly, he has

next considered where the balance of the public interest lies in respect of the information he considers engages the section 31(1)(c) exemption.

The public interest test

59. As a qualified exemption, section 31 is subject to the public interest test which is set out in section 2(2)(b) of FOIA. Section 2(2)(b) provides that such an exemption can only be maintained where:

"... in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information".

60. In other words, where a public authority is satisfied that the release of the information requested would prejudice law enforcement activities, it can only refuse to provide the information if the public interest in withholding the information outweighs the public interest in disclosing it.

Public interest arguments in favour of disclosing the information

61. Warwickshire Police acknowledged that where disclosure relates to the efficient and effective conduct of Warwickshire Police and its ability to conduct investigations then *"there is undisputed public interest"*.

62. It told the complainant:

"In this tragic high profile case, there would be public interest in knowing the reasons, from the Police perspective, for the adoption of the investigative procedures used".

63. It also acknowledged that disclosure in this case *"could assist individuals by raising awareness of issues which may be of relevance to them"*.

Public interest arguments in favour of maintaining the exemption

64. In favour of withholding the information at issue, Warwickshire Police told the complainant:

"Where the current or future law enforcement role of the Force may be compromised by the release of information, the effectiveness of the force will be reduced".

65. In correspondence with the Commissioner, it stated its view that there is a significant public interest in safeguarding investigative techniques for future investigations - *"strategies which could be used again in future investigations"*.

Balance of the public interest arguments

66. The Commissioner recognises that following the conclusion of the prosecutions in relation to the Atherstone fire, the public exchange of views by senior officials attracted significant public interest, and local and national debate and reaction. Disclosure of the information would further their understanding of the how the relevant public authorities involved interacted with each other.
67. The Commissioner recognises that the public have a significant legitimate and genuine interest in the transparency and accountability of the emergency services responsible for their safety and protection.
68. The Commissioner also accepts that it is clearly in the public interest for the police to carry out, unhindered, its law enforcement functions including investigations. He recognises the significant public interest in safeguarding the fair administration of justice.
69. Taking all of the above into consideration, the Commissioner's decision is that the public interest in avoiding prejudice to the administration of justice outweighs the public interest in disclosure in all the circumstances of this case. He is therefore satisfied that the information which he considers engages section 31(1)(c) was correctly withheld.

Part (2) of the request – the report

70. The Commissioner has next considered Warwickshire Police's application of exemptions to the report requested at part (2) of the request. During the Commissioner's investigation, Warwickshire Police confirmed that it considers that sections 30 and 32 of FOIA apply. The Commissioner has first considered its citing of section 30.

Section 30 investigations and proceedings

71. Section 30 of FOIA is a class-based exemption, which means that there is no need to demonstrate harm or prejudice in order for the exemption to be engaged.
72. Section 30 has two halves: subsection (1) concerns information held for particular investigations and proceedings which the public authority has the power or duty to conduct, whilst subsection (2) protects information relating to confidential sources.
73. During the course of the Commissioner's investigation, Warwickshire Police confirmed that it is relying on section 30(1)(a)(i) and 30(2)(a)(i).

Section 30(2)

74. For information to be exempt under section 30(2) it must both relate to the public authority's investigations or proceedings **and** relate to confidential sources.

75. With respect to its reliance on section 30(2), Warwickshire Police told the Commissioner that there was a clear expectation that the advice provided in the report was provided in confidence to the police.
76. In the Commissioner's view, there is a difference between confidential sources and confidential information. A confidential source is a person who provides information on the basis that they will not be identified as the source of that information. This position is further explained in the Commissioner guidance on section 30².
77. The Commissioner, having considered the matter, does not find section 30(2) engaged on the basis that, while the information itself may be confidential, the individual providing it could not be considered a confidential source for the purposes of section 30(2).

Section 30(1)

78. Section 30(1) exempts, as a class, any information held at any time by a public authority for the purposes of a criminal investigation or criminal proceedings conducted by it.
79. In the Commissioner's view, the phrase 'at any time' means that information is exempt under section 30(1) if it relates to an ongoing, closed or abandoned investigation.
80. In order for the exemption to be applicable, any information must be held for a specific or particular investigation and not for investigations in general.
81. Warwickshire Police told the complainant:

"[A named individual] was engaged to advise and inform the investigation team throughout the enquiry and was never intended to be a prosecution Court Expert.There are ongoing legal proceedings arising from this matter.....and therefore release of any material arising from the Police/HSE joint investigation could prejudice those ongoing proceedings and is therefore exempt under section 30 (investigations)".

82. In this case, the Commissioner is satisfied that the report at issue relates to a specific investigation. He is also satisfied that Warwickshire

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http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/investigations-and-proceedings-foi-section-30.ashx

Police has a duty to conduct investigations of the sort described in section 30(1)(a).

83. It follows that he has concluded that the exemption is properly engaged.

The public interest test

84. Section 30(1) provides a qualified exemption and is therefore subject to the public interest test under section 2(2)(b) of FOIA.

Public interest arguments in favour of disclosure

85. When requesting an internal review, the complainant told the Police:

"I believe there is a strong public interest in knowing this information and it may be that given the findings it could protect life and property ... this was a fire report and it should not be suppressed".

86. Warwickshire Police acknowledged that releasing information from an investigation file into the public domain would contribute to the openness and accountability of Warwickshire Police.

Public interest arguments in favour of maintaining the exemption

87. Warwickshire Police told the complainant that such information would only be released if there was a strong public interest consideration. In this case it said:

"it is difficult to find any justification that disclosure under FOIA would serve a core policing purpose or provide a tangible community benefit".

88. In correspondence with the Commissioner, Warwickshire Police further argued the importance of protecting a 'safe space' for reports written by independent investigators for the police who instructed them.

Balance of the public interest arguments

89. In the Commissioner's view, the weight given to arguments in favour of disclosure will depend largely on the need for greater transparency in relation to the subject matter and the extent to which disclosure of the information in question will meet that need.

90. In this case, the Commissioner, having regard to the subject matter of the information at issue, acknowledges that there is clearly a significant public interest in transparency, openness and accountability. The Commissioner recognises the public interest in the public being informed

on such issues to enable them to engage in debate and discussion about what can be learnt from such a tragic incident.

91. Conversely, the Commissioner understands that there is a strong public interest in supporting protection of a public authority's internal investigative report which must remain full and frank without fear of its content being made routinely available to the public.
92. In the Commissioner's view, were it the case that no effort had been made to act upon the content of the report, it is possible that the public interest in the information in question might have been sufficient to equal the public interest in the maintenance of this exemption. However, the Commissioner is satisfied that that is not the case here.
93. This is not to say that he would never conclude that such a report should not be published, but, on this occasion, he is of the opinion that there is evidence to demonstrate that reasonable action has been taken, in the public interest, and this lessens the public interest case for disclosure.
94. The Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosure. As he has found that the information was correctly withheld under section 30, the Commissioner has not gone on to consider Warwickshire Police's application of section 32.

Right of appeal

95. 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

96. 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.

97. 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

Steve Wood
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