

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 October 2016

Public Authority: Chief Constable of West Midlands Police
Address: Lloyd House
Colmore Circus
Birmingham
B4 6NQ

Decision (including any steps ordered)

1. The complainant requested information concerning an alleged internal investigation that was conducted into a named police officer from West Midlands Police ("WMP"). WMP would neither confirm nor deny holding any information, citing section 40(5)(personal information) of the FOIA. The Commissioner's decision is that it was entitled to rely on section 40(5). No steps are required.

Background

2. There are various on-line articles related to this request. They refer to the officer named in the request and unsubstantiated allegations that he conducted an on-line campaign of abuse against a named female. The claims also state that the officer faced a misconduct hearing and received a final written warning by way of sanction.
3. WMP has confirmed that there is no official confirmation connecting the named officer with these allegations. It advised the Commissioner that:

"There is a quote from a West Midlands Police spokesman that states "West Midlands Police is assisting Sussex Police in connection with an ongoing inquiry regarding a serving West Midlands police officer."

4. WMP further advised that:

“One page on a website that is not allied to a national newspaper claims that it contains extracts of a letter written by the Crown Prosecution Service which names [name redacted]. However, that website does state that the police would not confirm that the letters were official. It also qualifies the origin of the letters by stating that one letter was ‘apparently’ from the CPS”.

Request and response

5. On 11 May 2016 the complainant wrote to WMP and requested information in the following terms:

“I would like to obtain information relating to the internal investigation that was conducted by West Midlands Police into PC [name redacted] in 2013. The Investigating Officer was Detective Inspector [name redacted]. The resulting Misconduct Meeting took place on 5th December 2013.

Specifically, I would like to see a copy of the formal notice that was served to PC [name redacted] to inform him that he was being investigated for [offence redacted]. This notice will have been issued at some point between 10th July and 6th August 2013.

I would like to see transcripts of interviews with PC [name redacted]. The first of these is likely to have taken place shortly after his arrest, sometime around 21st August 2012.

I would like to see a copy of the voluntary response that PC [name redacted] gave to the Investigating Officer on 6th August 2013.

I would like to see a copy of the warning that was issued to PC [name redacted]. This would have been issued sometime around 2nd November 2013.

I would like to see a copy of the Investigating Officer’s final report into PC [name redacted].

I would like to see a copy of PC [name redacted]’s formal response to the allegations against him, which was submitted ahead of the Misconduct Meeting.

I would like to see transcripts of the Misconduct Meeting. This took place on 5th December 2013”.

6. WMP responded on 9 June 2016. It would neither confirm nor deny that it held any of the requested information, citing section 40(5)(personal information) of the FOIA.
7. Following an internal review WMP wrote to the complainant on 1 July 2016. It maintained its position.

Scope of the case

8. The complainant contacted the Commissioner on 1 July 2016 to complain about the way his request for information had been handled. The Commissioner required further information from him, which was provided on 21 July 2016.
9. The Commissioner will consider whether WMP was entitled to neither confirm nor deny holding the requested information by virtue of section 40(5) of the FOIA.

Reasons for decision

Section 40 - personal information

10. The analysis below considers section 40(5)(b)(i) FOIA. The consequence of section 40(5)(b)(i) is that if a public authority receives a request for information which, if it were held, would be the personal data of a third party (or parties), then it can rely on section 40(5)(b)(i), to refuse to confirm or deny whether or not it holds the requested information.
11. Consideration of section 40(5) involves two steps: firstly, whether providing the confirmation or denial would involve the disclosure of personal data, and secondly, whether disclosure of that personal data would be in breach of any of the data protection principles

Is the information personal data?

12. The first step for the Commissioner to determine is whether the requested information, if held, constitutes personal data, as defined by the Data Protection Act 1998 (the "DPA"). If it is not personal data, then section 40 cannot apply.
13. The DPA defines personal data as:

*"...data which relate to a living individual who can be identified
a) from those data, or*

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."

14. 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 or has them as its main focus.
15. The main focus of this request is a named police officer. As the complainant clearly refers to this officer, the Commissioner is satisfied that the requested information, if held, would be that officer's personal data.

Is the information sensitive personal data

16. Sensitive personal data is personal data which falls into one of the categories set out in section 2 of the DPA. The Commissioner considers the relevant category in this instance is:

(g) the commission or alleged commission by him of any offence.

17. In this case, given that the request relates to what would have originally concerned an arrest and, subsequently, a misconduct hearing, the Commissioner is satisfied that any confirmation or denial as to the existence of the requested information falls under sub-section 2(g) in relation to the named individual.
18. Having accepted that the request is for the sensitive personal data of a living individual other than the applicant, the Commissioner must go on to consider whether confirming or denying if the information is held would contravene any of the data protection principles. Both WMP and the Commissioner consider that the first data protection principle is relevant in the circumstances of this case.

Would confirmation or denial breach the first data protection principle?

19. The first data protection principle states -

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

(a) at least one of the conditions in Schedule 2 is met, and

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

20. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. In this case, it would be processed were WMP to confirm or deny whether it holds any information as this action alone would disclose something about the named officer. This means that the confirmation or denial can only be given if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions and also a Schedule 3 condition. If confirmation or denial would fail to satisfy any of these criteria, then it is not necessary to confirm or deny whether the information is held. The Commissioner has first considered whether disclosure would be fair.
21. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
 - the individual's reasonable expectations of what would happen to their information;
 - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned);
 - any legitimate interests in the public having access to the information; and,
 - the balance between these and the rights and freedoms of the individuals who are the data subjects.
22. The Commissioner recognises that staff would have an instinctive expectation that WMP, in its role as a responsible data controller, will not disclose certain information about them and that it will respect their confidentiality. This is especially the case when it relates to allegations of criminality or disciplinary matters.
23. The named officer has never been publically associated with the allegations and the Commissioner therefore accepts that he would have no expectation to be named, if indeed he is the relevant officer, especially so long after the event.
24. As to the consequences of disclosure upon a data subject, the question – in respect of fairness - is whether disclosure would be likely to result in unwarranted damage or distress to that individual.
25. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the withheld information. She will also take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public at large, without conditions.

26. The Commissioner considers that, in most cases, the very nature of misconduct-related data means it is more likely that disclosing it will be unfair. In this case it is compounded by the fact that acknowledging that there is any related misconduct information about the named officer would also confirm that he was initially arrested and his actions were considered by the CPS in case there was a criminal case to pursue. Given the sensitivity of the subject matter, the Commissioner considers that confirmation or denial in this case could lead to an intrusion into the private life of the individual concerned and the consequences of any such disclosure could cause damage and distress to that party.
27. Notwithstanding a data subject's reasonable expectations or any damage or distress caused, it may still be fair to disclose information, or in this case confirm or deny if information is held, if there is a more compelling public interest in doing so. Therefore the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in confirming or denying if the information is held.
28. The Commissioner would stress that this is a different balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Given the importance of protecting an individual's personal data the Commissioner's 'default position' is in favour of protecting the privacy of the individual. The public interest in confirming if information is held must outweigh the public interest in protecting the rights and freedoms of the data subject if providing confirmation or denial is to be considered fair.
29. The interest in disclosure must be a public interest, not the private interest of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.
30. The complainant is of the opinion that:

"All Misconduct Hearings must be open to the public and therefore I am entitled to receive details relating to and minutes from that hearing. Releasing information from a publicly accessible hearing clearly does not constitute a breach of the principles of the Data Protection Act."

31. WMP has countered this by saying:

"The Police (Conduct) (Amendment) Regulations came into force on 1st May 2015. It is important to note that these Regulations were not back-dated and made no mention of publishing information regarding Misconduct Hearings that took place before that time. In other words Parliament did not intend to make any alteration to the

publication of information regarding Police Misconduct Hearings that took place before this time. If that had been the intention these Regulations would have specified it.

As the alleged misconduct took place in 2013 it pre-dates these regulations, and therefore if any hearing did take place it should follow the regulations that were in force at that time. At that time there was no obligation to hold those hearings in public or to publish information regarding them. This has a bearing on the considerations regarding fairness which are contained in the discussions below.

In any case, even if a misconduct hearing had taken place in public, the time elapsed since the original event would raise questions as to whether the information could still be considered as 'public'."

32. The complainant also advised the Commissioner that he was personally aware that there was a misconduct hearing which was attended by a member of the public. The Commissioner can find no public statement to corroborate this and she thinks it is important to understand that, whilst the complainant may have personal knowledge of a matter, this does not mean that it is considered to be in the "public domain". When considering whether or not something is public knowledge it must be known to the wider public not just to the complainant personally.
33. The Commissioner acknowledges that the integrity of police officers is of genuine public interest. Their actions need to be lawful and their individual conduct is of paramount importance to the maintenance of the public's trust in the police service as a whole.
34. However, if indeed any misconduct issues concerning this officer were investigated, then the Commissioner believes that the appropriate authorities will already have been aware of any related concerns and that they will have dealt with the matters in an official manner. This will ensure that any issues will be resolved via the appropriate channels rather than through a disclosure to the world at large through the FOIA. Therefore, if any action was deemed necessary in connection with the named officer then this will have already been undertaken and, if any disclosure was deemed necessary, then this would have been done in a carefully managed way, outside the terms of the FOIA.
35. In light of the nature of the information and the reasonable expectations of the individual concerned, the Commissioner is satisfied that confirming or denying if the requested information is held would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the data subject; she considers these arguments outweigh any legitimate interest in disclosure. She has therefore

concluded that confirmation or denial in this case would breach the first data protection principle and therefore finds the exemption at section 40(5) is engaged and the duty to confirm or deny did not arise.

36. As the Commissioner has determined that it would be unfair to confirm or deny if the information is held, it has not been necessary to go on to consider whether this is lawful or whether one of the schedule 2 and schedule 3 conditions is met.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

38. 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.
39. 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
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