

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 12 October 2017

**Public Authority:** Chief Constable of South Yorkshire Police  
**Address:** South Yorkshire Police HQ  
5 Carbrook Hall Road  
Sheffield  
South Yorkshire  
S9 2EH

#### Decision (including any steps ordered)

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1. The complainant has requested email correspondence between South Yorkshire Police ("SYP")'s previous Chief Constable David Crompton and South Yorkshire Police and Crime Commissioner's Office (the "PCC") which relates to the Hillsborough inquests. SYP provided some information but refused to provide the remainder citing sections 31(1)(g) and 31(2)(b) (law enforcement), 40(2) (personal information) and 21 (information accessible by other means) of the FOIA. The complainant disputed the citing of section 31 only. The Commissioner's decision is that SYP has correctly applied section 31(1)(g) with subsection 2(b) to the withheld information and that the public interest favours maintaining the exemption.
2. The documents considered to be in the scope of the request were itemised and provided to the Commissioner in a spreadsheet. There are four documents where SYP relies on sections 42(1) (legal professional privilege) and 31(1)(a) and (b) (law enforcement) to forego disclosure. However, SYP did not formally cite these exemptions and did not advise the complainant about them, thereby breaching section 17(1) of the FOIA. SYP should either disclose these four items to the complainant or issue a valid refusal notice as set out in section 17 of the FOIA.
3. SYP 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

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4. On 29 September 2016 the PCC published the following statement on its website<sup>1</sup>:

*"At the conclusion of a lengthy statutory process, the South Yorkshire Police and Crime Commissioner, Dr Alan Billings, has made his decision to call for Chief Constable David Crompton to resign, with immediate effect.*

*Mr Crompton was suspended by the Police and Crime Commissioner on 27 April this year, following a statement he made the day after the jury gave its verdicts at the end of the Hillsborough inquests. On 26 April, the jury concluded that the 96 who died at Hillsborough were unlawfully killed and the football supporters did not cause or contribute to their deaths. The Chief Constable apologised on behalf of the force. Those who heard the apology thought it was not only for what had happened in the past but also for questions that were asked by the Chief Constable's legal team at the inquests which touched on fan behaviour and caused the families distress.*

*However, the statement the following day sought to justify the questioning. It was heard as an attempt to shift blame to others and this undermined the integrity of the apology. It brought immediate criticism of the Chief Constable both locally and nationally.*

*The suspension was made to consider a proposal to remove the Chief Constable under Section 38 of the Police Reform and Social Responsibility Act. The statutory process required the Commissioner to seek and consider the views of HM Chief Inspector of Constabulary, Sir Thomas Winsor, the Chief Constable and the South Yorkshire Police and Crime Panel, before making his decision. The Police and Crime Panel held a private scrutiny meeting in Rotherham Town Hall on Friday 16 September. They considered written submissions from the Police and Crime Commissioner, the Chief Constable and HM Chief Inspector, as well as hearing directly from the Commissioner and the Chief Constable. The Panel gave*

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<sup>1</sup> <http://www.southyorkshire-pcc.gov.uk/News-and-Events/News/2016/September/South-Yorkshire-Police-and-Crime-Commissioner-Calls-for-the-Removal-of-Chief-Constable-David-Crompton.aspx>

*unanimous support to Dr Billings' proposal in their detailed recommendation.*

*Dr Alan Billings, South Yorkshire Police and Crime Commissioner, said: "After careful consideration of all the views and correspondence I have received, I have decided that I should accept the Police and Crime Panel's recommendation and should call on the Chief Constable to resign with immediate effect. This is due to the erosion of trust and confidence in his leadership which would have continued and intensified as long as he remained in post. This would not have been in the interests of South Yorkshire police or people".*

5. Background papers relating to the process are also available on the same webpage.
6. Mr Crompton sought permission to have his requirement to resign judicially reviewed, which was done via the High Court. Although it postdates this request, that judgment is now available online<sup>2, 3</sup>; he was successful in his application.

## **Request and response**

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7. Following previous correspondence, on 30 September 2016 the complainant wrote to SYP and re-submitted the following information request which had originally been made on 4 May 2016:

*"Please provide the recorded information held relating to interaction, including correspondence, between chief constable David Crompton and the South Yorkshire PCC's office relating to the Hillsborough inquests.*

*In terms of correspondence, I would expect this to be almost entirely email correspondence with only a small number of staff at the PCC's office and easily searchable through a key word search. If it helps further, the key individuals are likely to be the PCCs themselves and the PCC's chief executive's office.*

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<sup>2</sup> <http://www.bbc.co.uk/news/uk-england-south-yorkshire-40219092>

<sup>3</sup> <https://www.judiciary.gov.uk/wp-content/uploads/2017/06/the-queen-oao-david-crompton-judgment-final.pdf>

*Should there be a time issue, I am content for email correspondence only to be searched. I do not expect every email to be checked for reference and am content for only those that include the words "Hillsborough" and "inquest(s)" to be traced and disclosed.*

*In terms of meetings, I would expect this to be easily identified through agenda items for the regular meetings between the PCC and chief constable.*

*Again, I am content for only such agenda items to be traced and disclosed. I do not expect every agenda item to be checked for reference.*

*I do not seek any information outside the parameters highlighted".*

8. As an earlier request had previously been refused on cost grounds, this request was subsequently refined on 23 June 2016 as follows:

*"I'm happy to settle on emails between the chief and Shaun Wright, Alan Billings and [name redacted - PCC staff] with the key words as previously highlighted...*

*In terms of emails, I am happy for communications directly referring to the chief's suspension and all communications following the chief's suspension to be excluded as these may relate specifically to the ongoing process".*

9. On 21 December 2016 SYP responded. It provided some information within the scope of the request but refused to provide the remainder. It cited sections 31(1)(g), 31(2)(b), 40(2) and 21 of the FOIA as its basis for doing so.
10. On 23 December 2016 the complainant requested an internal review of SYP's citing of sections 31(1)(g) & (2)(b) only. SYP sent the outcome of its internal review on 20 January 2017; it maintained its position.
11. The Commissioner commenced her investigation on 9 May 2017, raising various queries with SYP and requesting a copy of the withheld information. SYP was unwilling to provide the Commissioner with a copy of the withheld information for her to consider, therefore, on 27 July 2017, she issued an Information Notice requiring this, along with a full response to her enquiries. This was complied with, late, on 11 September 2017.

## Scope of the case

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12. The complainant contacted the Commissioner on 20 January 2017 to complain about the way his request for information had been handled. He asked her to consider the application of sections 31(1)(g) & (2)(b) to his request arguing that in his view it is not engaged and, even if it were deemed to be engaged by the Commissioner, that the public interest favoured disclosure.
13. The Commissioner will consider whether SYP is entitled to rely on sections 31(1)(g) & (2)(b) below.
14. Any information that has been considered by SYP in respect of this request has been provided to the Commissioner, along with a spreadsheet, and each related document has been given a reference number. For simplicity, this notice refers to any documents using the same numbering system.

## Reasons for decision

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### Section 31 – law enforcement

15. This is being considered in relation to information which has been withheld by SYP under reference numbers 6, 8, 10, 12, and 13. It relates to various email chains which are partly duplicated.
16. Section 31(1)(g) 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 -  
(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2).”*
17. In relation to the specified purposes under subsection (2), SYP explained that the relevant function is that contained at section 2(b). This is:

*“the purpose of ascertaining whether any person is responsible for any conduct which is improper”.*
18. Section 31 is a prejudice-based exemption. In order 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 interest within the relevant exemption;
  - 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.
19. The relevant applicable interest cited is that it must be the function of a public authority, in this case the PCC, to ascertain whether any person is responsible for conduct which is improper. In respect of the PCC, the function in question should be imposed by statute; the Commissioner is unlikely to accept that the exemption is engaged unless legislation which specifically imposes a positive duty on the PCC to fulfil that purpose can be identified.
20. The Commissioner's guidance on this exemption<sup>4</sup> states the following:

*"50. Improper conduct relates to how people conduct themselves professionally. For conduct to be improper it must be more serious than simply poor performance. It implies behaviour that is unethical.*

*51. The Information Commissioner would generally expect there to be a formal code of conduct that members of a profession are expected to adhere to and a recognised definition of improper conduct. In many cases such a code is likely to be supported by statute though this is not a prerequisite. It will be necessary, on a case by case basis, to identify the relevant definition and which elements of any code of conduct it applies to. This exemption will apply if disclosure would prejudice a public authority's ability to ascertain whether elements of the code falling within the stated definition of improper conduct have been breached.*

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<sup>4</sup> <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

*52. Public authorities that have functions of ascertaining whether someone is responsible for improper conduct are likely to include those tasked with upholding professional standards such as the General Medical Council, or the Nursing and Midwifery Council".*

21. In its initial refusal notice to the complainant SYP advised him:

*"This exemption is engaged due to the current ongoing judicial review of the Police and Crime Commissioner's (PCC) decision to call for the resignation of former Chief Constable David Crompton".*

22. It is the complainant's view this exemption is not engaged. He explained to the Commissioner that his request seeks information on the communications between David Crompton and the PCC's office in relation to the Hillsborough inquests. He advised that SYP has engaged the exemption on the premise that Mr Crompton has lodged a judicial review following the PCC's decision to require him to resign. He has argued:

*"It is submitted this case does not fall under [this exemption] as Mr Crompton was not subject to specific disciplinary action under a code of conduct and the process to remove him was instead based on a more nebulous 'loss of confidence' on the part of the PCC.*

*Determining whether it was reasonable for the PCC to ask the chief constable to resign is not the same as "ascertaining whether any person is responsible for any conduct which is improper."*

*The reasons advanced by the PCC referred to Mr Crompton's lack of judgement in relation to the wording of a press release following the conclusion of the inquests and at no stage was Mr Crompton accused of unethical conduct which almost certainly would have fallen under the disciplinary code.*

*This is not a case that involves a public body deciding whether a doctor is fit to practise or a police officer is fit to serve or should be subject to disciplinary action.*

*Further, this request relates to how South Yorkshire Police and the PCC handled the inquests and is not aimed at re-running or seeking information in relation to the process to remove him.*

*The ICO should note that detailed information relating to Mr Crompton's removal has been openly published on the PCC's website: <http://www.southyorkshire-pcc.gov.uk/News-and-Events/News/2016/September/South-Yorkshire-Police-and-Crime-Commissioner-Calls-for-the-Removal-of-Chief-Constable-David-Crompton.aspx>*

*The published information underlines the ability of a public body to openly publish information surrounding Mr Crompton's departure and the force's handling of the inquests.*

*It also highlights that the reasons cited for the action against Mr Crompton focussed on the wording of the press release, not the handling of the inquests”.*

23. In justifying its engaging of this exemption SYP has advised the Commissioner that:

*“The basis for the exemption of this material under S31(2)(b) is founded in both S38 and Schedule 8 of the Police Reform and Social Responsibility Act 2011. This section of the legislation relates directly to the appointment and removal of a Chief Constable by the Police and Crime Commissioner...*

*Following the suspension of the Chief Constable under S38 of the Police Reform and Social Responsibility Act 2011, there is a requirement under Schedule 8 of the Act for the actions of the Police and Crime Commissioner to be referred to the independent Police and Crime Panel who scrutinise the whole process. No final decision can be taken by the PCC until such time as it is ratified by the Police and Crime Panel”.*

24. Section 38 of the Police Reform and Social Responsibility Act 2011<sup>5</sup> (the “PRSRA”) states the following:

*“Appointment, suspension and removal of chief constables*

*(1)The police and crime commissioner for a police area is to appoint the chief constable of the police force for that area.*

*(2)The police and crime commissioner for a police area may suspend from duty the chief constable of the police force for that area.*

*(3)The police and crime commissioner for a police area may call upon the chief constable of the police force for that area to resign or retire.*

*(4)The chief constable must retire or resign if called upon to do so by the relevant police and crime commissioner in accordance with subsection (3).*

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<sup>5</sup> <http://www.legislation.gov.uk/ukpga/2011/13/section/38/enacted>

*(5) Schedule 8 (appointment, suspension and removal of senior police officers) has effect.*

*(6) This section is subject to Parts 1 and 2 of Schedule 8.*

*(7) This section and Schedule 8 are subject to regulations under section 50 of the Police Act 1996”.*

25. Schedule 8 of the PRSRA refers to the appointment, suspension and removal of senior police officers with part 2 of the schedule relating to the suspension and removal of chief constables. This states that if a police and crime commissioner suspends a chief constable from duty under section 38, the commissioner must notify the relevant police and crime panel of the suspension.
26. Further details about the processes that were followed are available on the PCC's website, as referred to in paragraph (6) above.
27. In the Commissioner's view it is clear that statute exists which specifically relates to the processes concerning the removal of a Chief Constable from office by a PCC and that such removal involves written representations from the parties concerned. Whilst she accepts that the withheld information does not directly refer to Mr Compton's suspension, it is clear to her that this would not be possible as it relates to matters prior to that suspension. However, having viewed the withheld information she is of the opinion that it is of direct relevance to the circumstances surrounding that suspension and it is therefore relevant to the processes falling under the remit of the PRSRA.
28. She further notes SYP's comments above where it is stated that the Independent Police Complaints Commission (IPCC) were assessing one complaint, and investigating another complaint, about David Crompton's conduct at the Hillsborough inquests. However, SYP did not provide any further details so the Commissioner is unable to consider this point any further.
29. Having considered the views of both parties and the wording of the PRSRA legislation the Commissioner is satisfied that the PCC has a relevant statutory function which is caught by this exemption.
30. As with any prejudice based exemption, a public authority may choose to argue for the application of regulation 31(1)(g) on one of two possible limbs – the first requires that prejudice 'would' occur, the second that prejudice 'would be likely' to occur. SYP has stated that it believes the likelihood of prejudice arising through disclosure is one that is likely to occur, rather than one that would occur. While this limb places a weaker evidential burden on SYP to discharge, it still requires SYP to be able to demonstrate that there is a real and significant risk of the prejudice occurring.

31. The Commissioner will next consider how disclosure of the information would be likely to prejudice the PCC's function in establishing whether any person is responsible for conduct which is improper.

32. In its refusal notice SYP has argued:

*"It would be harmful to release information that forms or is likely to form part of the judicial review proceedings being taken against the PCC by the former Chief Constable David Crompton. These proceedings are currently ongoing. Disclosure of information that could be used as evidence in these legal proceedings, at this stage, may cause them to be prejudiced. South Yorkshire Police will not compromise any ongoing legal proceedings".*

33. In its internal review it added:

*"The material in question is now subject to an ongoing judicial process and it is the view of the panel that disclosure of the exempt information would be likely to lead to prejudice. There is a real and actual risk of harm of prejudice to the proceedings if this information is disclosed prior to it being considered in the High Court".*

34. Clearly the proceedings were currently ongoing at the time of the request as it is evident that permission to seek a judicial review has now been granted. Having had the benefit of reading the judgment, the Commissioner therefore accepts that the requested information was of relevance to those proceedings, which are in turn connected to the PRSRA, and she agrees that the prejudice envisaged by SYP was both real and significant. She therefore concludes that the exemption was properly engaged.

35. This exemption is subject to a public interest test. The test is whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **Arguments in favour of disclosure**

36. SYP acknowledged that there will always be a public interest in disclosing information which allows scrutiny of how public authorities operate and undertake their statutory functions.

37. It also advised:

*"Disclosure would be seen as embracing an ethos of openness, transparency and accountability. The information relates to the Hillsborough Inquests and South Yorkshire Police's approach to the verdicts, which has been subject to criticism in the press.*

*Therefore, disclosure at this time would provide information necessary for public debate and comment in 'real time'.*

38. The complainant has argued

*"Given the handling of the inquests has been called into question, given the traumatic history of Hillsborough and the role of South Yorkshire Police therein and given the extraordinary investment of public money by the PCC in the inquests, there is an overwhelming public interest in disclosure".*

And:

*"It is submitted South Yorkshire Police have not given sufficient weight to the public interest and in the context of Hillsborough it is vital for public confidence that transparency is paramount".*

### **Arguments in favour of maintaining the exemption**

39. SYP has provided the following arguments:

*"The former Chief Constable David Crompton is taking judicial review proceedings against the PCC following his decision to call for the Chief's resignation. This judicial review is currently ongoing and disclosure of information into the public domain that forms part of or is likely to form part of those proceedings may result in causing the proceedings prejudice.*

*Disclosure could infringe the rights of both the PCC and former Chief Constable to a fair investigation of the issue".*

40. It also argued that, whilst the status of the Chief Constable's suspension was within the public interest and so was disclosed, there was a countering public interest in providing reassurance that any process of this nature is handled impartially.

### **Balance of the public interest**

41. SYP has advised that it has taken into consideration the high profile nature of the Hillsborough inquests and the significant public interest in them. It explained that its approach to the inquests and suspension of the Chief Constable had been weighted against the need for the judicial review to be carried out without prejudice or compromise and that it had concluded that the public interest in withholding the information was stronger. It had reached this view on the basis that the judicial review needed to be carried out to completion without prejudice to either party involved.

42. When considering the public interest arguments, the Commissioner can take into account the severity and likelihood of prejudice identified, and this in turn will affect the weight attached to the public interest arguments for the exemption being maintained.
43. The Commissioner considers that, as argued by the complainant, the public interest arguments in favour of disclosure are strong in view of the high profile of any subject matter relating to the Hillsborough inquests.
44. However, she also notes that the requested information itself is not being withheld on the basis that it relates to the inquests *per se*, rather it is being withheld because it relates to the Chief Constable's personal dealings with the PCC and its relevance to his resignation. As such, although it may be of relevance to the inquests, it is being withheld under this exemption because of its impact on the Chief Constable personally.
45. The withheld information consists of emails between the Chief Constable and the PCC, the background to which can be read in the judgment which can be found at paragraph 5 above. These obviously had a direct bearing on that judgment, and the Commissioner considers that they will continue to do so as part of any judicial review that may follow.
46. Although the Commissioner accepts the weighty arguments in favour of disclosure of all information connected to the Hillsborough inquests, on this occasion she finds that these are outweighed by the requirement to maintain the integrity of the judicial processes which were occurring at the time this request was made, and are likely to remain ongoing. Once such processes have been completed then it is hoped that the findings will be disclosed and it is likely that the need to protect the information requested here will be measurably reduced.
47. The Commissioner concludes that, at the time of the request and under the current circumstances, the public interest in maintaining this exemption outweighs that in disclosure and that the information has been properly withheld.

### **Section 17 - refusal of request**

48. Section 17(1) states that:

*"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of part II relating to the duty to confirm or deny is relevant to the request, or on a claim that information is exempt information must, within the*

*time for complying with section 1(1), give the applicant a notice which-*

*(a) States that fact,*

*(b) Specifies the exemption in question, and*

*(c) States (if that would not otherwise be apparent) why the exemption applies".*

49. As previously explained, SYP provided the Commissioner with a spreadsheet itemising documents it had considered for disclosure in this case. Within this are four items, designated as 15a, 215a, 217 and 218, which SYP has indicated are exempt under section 42 (legal professional privilege) and 31(1)(a) and (b) (law enforcement). However, no specific arguments have been provided and these exemptions have not been formally cited at any point during this investigation. Furthermore the complainant has not at any point been advised that they are being relied on.
50. As the reliance on these was unclear, at a late stage the Commissioner asked SYP to confirm which limb of section 31 it was relying on in respect of document 15a in case it was intended to be caught by the exemption at 31(1)(g) as considered above. SYP confirmed that it was relying on 31(1)(a) and (b).
51. In view of the considerable time delays to date the Commissioner finds it is not appropriate to afford SYP further time to consider its position thereby delaying the serving of this notice.
52. Therefore, these four items should now either be disclosed or a valid notice should be issued in compliance with section 17 of the FOIA.
53. In failing to issue a valid refusal notice SYP has breached section 17(1).

## **Other matters**

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54. Although not raised as an issue by the complainant, the Commissioner notes that it took SYP almost 6 months to respond to his information request and this delay has been logged. The Commissioner routinely monitors the performance of public authorities and their compliance with the legislation. Records of procedural breaches are retained to assist the Commissioner with this process and further remedial work may be required in the future should any patterns of non-compliance emerge.

## Right of appeal

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55. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

56. 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.
57. 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**