

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 June 2019

Public Authority: Greater Manchester Combined Authority
(GMCA)

Address: Churchgate House
56 Oxford Street
Manchester
M1 6EU

Decision (including any steps ordered)

1. The complainant has requested information from the GMCA concerning the temporary and substantive appointments of Assistant Chief Constables (ACCs) to the Greater Manchester Police (GMP). The GMCA responded supplying some information falling within the scope of the request but refused to supply the remainder, relying on sections 40(2) – personal data and 36(2)(c) – prejudice to the conduct of public affairs, of the FOIA 2000. It also denied holding some of the requested information.
2. The Commissioner's decision is that the GMCA is entitled to rely on section 36(2)(c) and 40(2) to withhold information, and that on the balance of probability it does not hold any further information falling within the scope of the request.

Request and response

3. On 11 September 2018 the complainant wrote to the GMCA and requested information in the following terms:

'By way of the Police Reform and Social Responsibility Act, 2011, the chief constable must consult the Police and Crime Commissioner (the Deputy Mayor in the case of GMCA) before appointing a person as an assistant chief constable of the force.

That is taken to mean both temporary and substantive appointments.

Accordingly please disclose all data held in respect of such appointments and the statutory duty to consult. The relevant period being 1st April, 2017 and the date upon which this information request is acknowledged by GMCA.'

4. The GMCA responded on 5 October 2018, confirming that the Deputy Mayor had been consulted on the recruitment of a permanent Assistant Chief Constable (ACC) and prior this, on a number of temporary appointments. However it stated that these were private meetings and not documented.
5. The complainant requested a review on the same date. The GMCA responded on 6 December 2018, accepting that it did hold information falling under the scope of the request. It supplied some information, but withheld third party personal data under section 40(2) of the FOIA, and candidate interview questions under section 36(2)(c) – prejudice to the effective conduct of public affairs.

Scope of the case

6. The complainant contacted the Commissioner on 29 November 2018 to complain that the GMCA had failed to respond to his review request. The GMCA responded a week later, and on 18 December 2018 the complainant contacted the Commissioner again to object to the Authority's response.
7. The complainant maintains that the information disclosed by the GMCA only relates to one appointment – Maboob Hussain, and that there have been three other relevant appointments in the period – Annette Anderson, Rob Potts and Russ Jackson. He also considers that based on

similar requests made to other public authorities, the GMCA is not disclosing all information it holds falling within the scope of the request.

8. The Commissioner therefore considers the scope of the case to be whether the GMCA is entitled to rely on sections 40(2) and 36(2)(c) of the FOIA to withhold the information, and whether it has complied with section 1 of the FOIA by identifying all information held falling within the scope of the request

Reasons for decision

Section 40 personal information

9. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
10. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
11. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
12. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

13. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

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.
15. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
16. 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.
17. The GMCA has withheld the emails and names of junior staff involved in the administration of the appointments, including a meeting with the Deputy Mayor. The content of the emails has been disclosed to the complainant.
18. Having considered the withheld information, the Commissioner is satisfied that the information identifies specific junior members of staff and therefore this information falls within the definition of 'personal data' in section 3(2) of the DPA.
19. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

20. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

21. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
22. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

23. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"².

24. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- (a) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - (b) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - (c) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
25. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

26. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
27. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be

² Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

28. The complainant has requested information concerning the appointments of ACCs and the statutory duty to consult with the Deputy Mayor. The only legitimate interest that the Commissioner can identify is that of providing a complete picture of all people involved in the appointment process to evidence transparency.

Is disclosure necessary?

29. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
30. In this case the withheld information concerns junior staff acting in an administrative capacity only, with no authority over the appointment decisions. The Commissioner does not consider that disclosure of this information is necessary in order to satisfy the legitimate interest of transparency as the names and emails of junior staff makes no material difference to the information already disclosed about the ACC appointment process.
31. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

The Commissioner's view

32. The Commissioner has therefore decided that the GMCA was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Section 36 – prejudice to effective conduct of public affairs

33. Under section 36(2)(c), the GMCA has withheld the interview questions used to appoint to the ACC posts. Section 36(2) provides that information is exempt if, in the reasonable opinion of the qualified person, its disclosure:

'(c) would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs.'

34. It should be noted that the GMCA works in partnership with the GMP regarding ACC appointments, and that the employing responsibility remains with GMP.
35. Section 36 of the FOIA is unique in that it requires the public authority's 'qualified person' (QP) to give their reasonable opinion that disclosure of the information requested would or would be likely to cause the prejudice or inhibition envisaged. To determine whether the exemption is correctly engaged, the Commissioner is required to consider the QP's opinion as well as the reasoning that informed that opinion. Therefore the Commissioner must:
- ascertain who the qualified person is;
 - establish that they gave an opinion;
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
36. The QP in this case is Liz Treacy, the GMCA's Solicitor and Monitoring Officer. The QP's opinion was provided on 29 November 2018, and further arguments concerning the application of the exemption were provided during the course of the Commissioner's investigation.
37. The next issue for the Commissioner to consider is whether or not the QP's opinion is reasonable. The Commissioner considers the plain meaning of the word reasonable to be sufficient in its application, which according to the Shorter Oxford English Dictionary is 'in accordance with reason; not irrational or absurd'. It is important to note that the QP's opinion may not be the only reasonable opinion, there may be other opinions that are different but also reasonable. However this does not render the QP's opinion unreasonable.
38. The GMCA has stated that:
- 'Disclosure of the interview questions would severely prejudice the ability of the GMCA to appoint to Assistant Chief Constable (ACC) level. The role of an ACC is one that builds public and organisational confidence and trust and enables the delivery of an effective policing service. This is a senior role, which requires a highly effective and qualified individual.'*
- The specific prejudice would be our ability to offer an effective service through selecting and recruiting the right candidates and our ability to offer a fair recruitment process.'*
39. It goes on to explain that release of the interview questions through a FOIA request could make them available to candidates. As the request

was made via the WDTK portal, this would make the questions available to anyone caring to search for them. This would be unfair as some candidates may know the questions in advance and others not:

'Short of giving all the questions as part of the application process, to disclose the questions under FOIA may lead to advantages for some and disadvantages for others.'

40. In addition to the unfairness element, knowing too much about the questions is likely to remove the element of quick thinking from the assessment process and lead to rehearsed answers, as well as enabling candidates to get others to prepare answers for them, resulting in the wrong candidate being selected. The GMCA has made reference to a similar request for interview question made to the ICO, which also was refused citing section 36(2)(c):
https://www.whatdotheyknow.com/request/interview_questions
41. In coming to the conclusions above, the Monitoring Officer had sight of the interview questions and also consulted with relevant colleagues within the GMCA and partner organisations i.e. Greater Manchester Police (GMP). The Commissioner therefore accepts that the opinion of the QP concerning the withholding of the interview questions was reasonable one, and that section 36(2)(c) is engaged.

The Public Interest Test

42. Section 36 of the FOIA is a qualified exemption and so is subject to a public interest balancing test as set out in section 2(2)(b) of the FOIA. This means that even when the exemption is engaged, the information can only be withheld if, in all the circumstances of the case, the harm of disclosure outweighs the public interest in disclosure. Having accepted that the QP's opinion is reasonable in the circumstances the Commissioner must decide what weight to give that opinion and make her own judgement on the severity, extent and frequency of the anticipated prejudice
43. The GMCA has considered that the public interest in disclosing the interview questions rests in promoting transparency and the opportunity for public scrutiny. It would support openness and a public understanding of the candidate selection process, of which the interview questions are a part. The Commissioner agrees that there is inherent public interest in the principles of openness and transparency of public authorities, particularly where recruitment of senior public officials are concerned. It has noted that the interview questions, if disclosed, could be rewritten for future recruitment panels. The complainant himself has not provided any specific arguments regarding the public interest and disclosure of the interview questions.

44. However, the GMCA has also provided clear arguments as to why disclosure of the interview questions is not in the public interest as it would be likely to prejudice the effective conduct of public affairs by hampering the fairness and effectiveness of recruiting ACCs. Prior knowledge of the interview questions by some candidates would create an unequal process and provide those candidates with this foreknowledge the opportunity to prepare answers and canvass the opinions of others. This could result in an inappropriate appointment and affect the provision of an effective policing service.
45. The GMCA has also argued that release of the questions would '*have a detrimental impact on the ability for the GMCA to work with GMP*'. This is because although the GMCA holds the interview questions in its own right as a public authority with responsibility for crime and policing in Manchester, the employing responsibility for ACCs remains with GMP. The selection process for ACCs illustrates the partnership between GMP and the GMCA, which by way of the Police Reform and Social Responsibility Act 2011 requires the Chief Constable to consult with the Police and Crime Commissioner (Deputy Mayor of the GMCA) before appointing ACCs.
46. The GMCA has relied on the bar of 'would be likely to prejudice', which is less than 'would prejudice'. However, the Commissioner considers that the detriment and harm created by candidates having access to the questions prior to interview would be such that it would severely affect the fairness and integrity of the appointment process. So even if the chance of the prejudice occurring is less than 50%, the consequences should it occur are significant and would damage the entire recruitment exercise. Even if the questions were changed for each recruitment round, the disclosure of the withheld questions would, in the words of the GMCA:

'give enough away about the nature, type and focus of questions so as to disrupt our recruitment process'.

47. For these reasons the Commissioner is satisfied that the public interest in maintaining the exemption outweighs the public interest in disclosure and therefore the GMCA is entitled under section 36(2)(c) to withhold the interview questions for the post of ACC.

Section 1 – general right of access

48. Section 1(1) of FOIA states that

'Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.'

49. When the GMCA first responded to the complainant's request, it confirmed that the Deputy Mayor was consulted on the ACC appointments (as required by the Police Reform and Social Responsibility Act 2011) but that they were private meetings and no records were kept.
50. The complainant challenged this assertion in his request for a review stating that it was an offence to delete information requested under FOIA and that there was no provision in the Police and Social Reform Act 2011 for secret meetings.
51. The GMCA responded to the review request, disclosing an outlook calendar entry concerning a meeting on 3 September 2018 between the Deputy Mayor and Chief Constable to discuss the ACC appointments. It also disclosed an email stating the Deputy Mayor is on the interview panel and the ACC candidate pack.
52. The complainant did not accept that this was the only information held by the GMCA as it appeared to only concern ACC Maboob Hussain and there had been three other appointments in the relevant period: Annette Anderson, Rob Potts and Russ Jackson. He also mentioned requests he had made to two other public authorities that suggested the GMCA's searches were incomplete, or data missing / withheld. It was on this basis that the complainant contacted the Commissioner.
53. As part of her investigation, the Commissioner asked the GMCA to explain why there was no information regarding Annette Anderson, Rob Potts and Russ Jackson. She also requested responses to a series of detailed search questions including:
 - What searches were carried out to check no information was held within the scope of the request and why would these searches have been likely to retrieve any relevant information?
 - If searches included electronic data, which search terms were used did the search include information held locally on personal computers used by key officials and on networked resources and emails?
 - If the information were held would it be held as manual or electronic records?
 - Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?

- If recorded information was held but is no longer held, when did the GMCA cease to retain this information? If relevant:
 - Does the GMCA have a record of the document's destruction?
 - What does the GMCA's formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can the GMCA describe the way in which it has handled comparable to records of a similar age?
 - If the information is electronic data which has been deleted, might copies have been made and held in other locations?
 - Is there a business purpose for which the requested information should be held? If so what is this purpose?
 - Are there any statutory requirements upon the GMCA to retain the requested information?
54. The GMCA explained that the PA to the Deputy Mayor undertook a search of electronic records including emails that resulted in the disclosed information. The Commissioner has seen email exchanges between GMCA staff demonstrating that a number of people were asked whether information was held, including notes of discussions, and outside of that produced by the PA, they have all confirmed there is none. The GMCA also confirmed that no information had been deleted or destroyed.
55. The GMCA sought to find whether there was a written process for any consultations, but discovered there was not. It noted that as the Chief Constable and Deputy Mayor are on the interview panel, consultation would be done through the appointment process rather than separate meetings.
56. Regarding the meeting held on 3 September 2018, the PA has confirmed that no notes were taken. The GMCA does not consider that any meetings took place secretly, and that generally the duty to consult will have taken place through the overall appointment process.
57. The GMCA notes that the appointment of Robb Potts occurred before the time period referred to in the request.
58. The Commissioner provided the complainant with the opportunity to explain why, based on information provided by other public authorities, he considered that the GMCA was withholding information other than that subject to an exemption. The complainant made reference to the WDTK website but not specific requests. In any event, information held by one public authority will not be the same as another, particularly in

this case as each authority involved in the ACC appointment process has a different role.

59. In scenarios where there is dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. Based on the email evidence provided by the GMCA and answers to the Commissioner's search questions, combined with the lack of clear arguments from the complainant to demonstrate more information is likely to be held, the Commissioner concludes that on the balance of probability i.e. more than 50%, the GMCA does not hold any further information falling within the scope of the request than that already disclosed or subject to an exemption.

Right of appeal

60. 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@justice.gov.uk

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

61. 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.
62. 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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF