

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 April 2020

Public Authority: Chief Constable of Cheshire Constabulary
Address: Police Headquarters
Clemonds Hey
Oakmere Road
Winsford
CW7 2UA

Decision (including any steps ordered)

1. The complainant requested information about digital device extraction technology in a three-part request. Ultimately, he was concerned only with Cheshire Constabulary's handling of part one of that request. Cheshire Constabulary refused to provide the requested information, citing sections 31(1)(a) – the exemption for the prevention or detection of crime and 31(1)(b) – the exemption for the apprehension or prosecution of offenders. It maintained that the balance of the public interest lay in withholding the requested information.
2. The Commissioner's decision is that Cheshire Constabulary was correct to rely on sections 31(1)(a) and (b) in relation to part one of the request, and to conclude that the balance of the public interest test favoured maintaining the exemption. Her full position is set out in a confidential annex which will be provided to Cheshire Constabulary only.
3. No steps are required to ensure compliance with the legislation.

Background

4. With reference to the request set out below, the complainant has confirmed the following:

"Complainants is the usual term for a victim of a crime, as used by the police, Crown Prosecution Service and more widely within the criminal justice system."

Request and response

5. On 4 October 2019, the complainant wrote to Cheshire Constabulary and requested information in the following terms:

"I write to request information and records under the FOIA, regarding your force's mobile phone and digital device extraction technology and practices

1. What digital device extraction technology does your force currently use to collect digital information from complainants? Please provide the following:

a. the name of the company and model of the software and/or hardware used for this purpose

b. how long it has been in use for this purpose by your force.

2. Does the digital device extraction technology that your force uses have the technical capability to set parameters for digital device extractions (e.g time frames)? If yes, please specify whether the extraction technology has the capability to set any of the following parameters in digital device extractions:

a. time frame

b. data relating to specific contacts

c. data types (e.g texts, WhatsApp messages, photos)

d. specified individual text messages

e. specified individual in-app data (e.g. WhatsApp, Facebook, email)

3. Does your force have plans to upgrade or procure new digital device extraction different technology? If so, please:

a. describe such plans;

b. describe the technical and other requirements of the new technology sought;

c. detail any steps already taken, and those planned, towards planning, budgeting, researching and procuring the new technologies;

d. if applicable, provide the name of the company and models of the software and/or hardware that is intended to be procured."

6. Cheshire Constabulary responded on 30 October 2019. For part one of the request it stated that sections 31(1)(a) and (b) of the exemption for law enforcement applied, and said that the public interest test favoured withholding the requested information. It provided the information for part two of the request and said that no information was held for part three.
7. On 1 November 2019, the complainant requested an internal review in relation to part one of his request, together with parts 3(a),(b) and (c). Following its internal review Cheshire Constabulary wrote to the complainant on 13 November 2019, maintaining its original position.
8. However, by way of assisting the complainant with his research, it also provided the complainant with a weblink to where contracts and services held by Cheshire Constabulary are routinely published¹.

Scope of the case

9. The complainant contacted the Commissioner on 13 November 2019 to complain about the way part one of his request for information had been handled. His grounds of complaint, which the Commissioner has raised with Cheshire Constabulary, were as follows:

"We appealed the refusal, on the basis that Section 31(1)(a)(b) Law Enforcement refers to the prevention or detection of crime and the apprehension or prosecution of offenders, and is not relevant nor does it apply to a request for information in relation to complainants of crime. We also submitted that there is a clear public interest for complainants and witnesses to know the

¹ <https://www.blpd.gov.uk/foi/foi.aspx>

details of the technology police are and will use to extract information from them, and the capabilities of that technology...".

10. The complainant's remaining grounds of complaint, which relate to the public interest test (also raised with Cheshire Constabulary), are set out later in this notice.
11. Although the Commissioner understands from the complainant that some police forces would appear to have complied with similar requests, the Commissioner does not consider that this sets an automatic precedent for disclosure under FOIA. Each case must be considered on its own merits.
12. The Commissioner has considered whether Cheshire Constabulary was entitled to rely on sections 31(1)(a) and/or (b) to withhold the information requested in part one of the complainant's request.

Reasons for decision

Section 31 – law enforcement

13. Section 31 of FOIA creates an exemption from the right to know if disclosing the information would, or would be likely to, prejudice one or more of a range of law enforcement activities. Section 31 can be claimed by any public authority, not just those with law enforcement functions.
14. In order to engage a prejudice based exemption such as section 31 there must be likelihood that disclosure would, or would be likely to, cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met in order to engage a prejudice based exemption:
 - Firstly, 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 interests within the relevant exemption (in this case, the administration of justice);
 - Secondly, 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,
 - Thirdly, 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.

15. Consideration of the exemption at section 31 is a two-stage process: even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
16. In this case, Cheshire Constabulary is relying on sections 31(1)(a) and (b) of FOIA. Those subsections state that information is exempt if its disclosure would, or would be likely to, prejudice:
 - (a) the prevention or detection of crime;
 - (b) the apprehension or prosecution of offenders.
17. The Commissioner accepts that there is clearly some overlap between those subsections.
18. As joint arguments have been submitted in respect of subsections (a) and (b), the Commissioner has considered these together.

The applicable interests

19. The first point for the Commissioner to consider is whether the arguments provided by Cheshire Constabulary relate to the relevant applicable interests, namely the prevention or detection of crime and the apprehension or prosecution of offenders.
20. The complainant's view is as set out in the 'Scope' section of this notice.
21. In correspondence with the complainant, Cheshire Constabulary told him:

"Disclosure of this information may well assist in minimising collateral intrusion and privacy issues, however, there is always a duty of care to the general public and the Police Service has a clear responsibility to ensure the prevention or detection of crime, and the apprehension or prosecution of offenders is always delivered. There are a number of tactics available to the Police Service to ensure the effective delivery of operational law enforcement. In this case, such policing activity is required to undertake fair investigations where it may be necessary to progress a range of reasonable lines of enquiry. An example of this maybe [sic] where accounts are provided to the police by victims, suspects and witnesses but the nature of requirements, forensic strategy and data extraction may well be required for further evidential purposes.

To disclose the specific intricacies of the technology would reveal operational capability, tactical options and operational activity.

To provide guidance, testing and research documents relating to new technologies such as those mentioned within your request could potentially reveal tactical information which could prejudice policing activities.

Intelligence led policing is an essential part of day to day policing overall. Disclosure of this information may prejudice police activities and also has potential to reveal tactical information. This information could be deemed valuable to criminals, in Serious and Organised Crime gangs including terrorists. Public Safety is of paramount importance and the Police Service will not disclose information which would jeopardise the prevention of crime and/or the safety of individuals under any circumstances."

22. Similarly, in its submission to the Commissioner, Cheshire Constabulary explained that release of the requested information would undermine its ability to fully investigate crime. It provided the Commissioner with further arguments to support its citing of the various subsections of section 31, which she has set out in a confidential annex available to Cheshire Constabulary only. This is because the arguments submitted by Cheshire Constabulary would reveal specific law enforcement details.
23. In relation to the complainant's assertion, it also explained:

"The applicant states S31 is not relevant as the information is in relation to 'complainants of crime', however, the company/software used will be used for both victims and suspects, and therefore S31 is deemed relevant."

24. The Commissioner is satisfied that the prejudice Cheshire Constabulary is envisaging in this case is relevant to the particular interests which sections 31(1)(a) and (b) are designed to protect. The exemptions provided by sections 31(1)(a) and (b) very obviously serve to protect society from crime, and the data in question here is being obtained for that purpose. Accordingly, the first limb of the three part test outlined above is met.

The nature of the prejudice

25. The Commissioner next considered whether Cheshire Constabulary demonstrated a causal relationship between the disclosure of the information at issue and the prejudice that sections 31(1)(a) and (b) are designed to protect. In her view, disclosure must at least be capable of harming the interest in some way, ie have a damaging or detrimental effect on it.

26. With regard to harm being caused by disclosure, having considered the requested information, the Commissioner is satisfied that disclosure would reveal details of Cheshire Constabulary procedures which, if disclosed, could undoubtedly assist any individuals intent on circumventing the law. This could have a detrimental effect on law enforcement. The Commissioner is satisfied that the resultant prejudice can be correctly categorised as real and of substance.
27. She is also satisfied that there is a causal relationship between the disclosure of the requested information and the prejudice which the exemption is designed to protect.
28. In relation to the complainant's argument that information had previously been disclosed on "*digital device extraction technology previously in response to other requests, even when requested in relation to all crime not victims*", Cheshire Constabulary advised the Commissioner as follows:

"The applicant points out that the information has been released previously, and states that this is 'out of date'. This reflects the comments made in the opening paragraph [of its investigation response to the Commissioner], in that the information that was once released into the public domain cannot be seen as the definitive answer now. Any releases under FOI are considered a window of opportunity as they will not remain in the public domain indefinitely."

The likelihood of prejudice

29. In correspondence with the complainant Cheshire Constabulary variously used the terms 'may well' and 'would' in relation to the likelihood of the harm it envisaged.
30. Cheshire Constabulary told the Commissioner the following:

"...the view of the NPCC [National Police Chiefs' Council] Digital Forensics Policing lead remains the same - providing this information will indicate specific tactics, capabilities and operating models which will be harmful to policing"

and

"Disclosure into the public domain would prejudice policing."

31. In light of the above, the Commissioner contacted Cheshire Constabulary and asked it to clarify which threshold it was seeking to rely on; in reply it said:

"With reference to the harm it "would be likely" to have a detrimental effect upon police force capabilities as explained in previous emails. Although the names may previously have been disclosed this is no longer the case due to the capabilities and perceived harm and changes in the current climate."

32. The Commissioner notes that Cheshire Constabulary considers that the lower threshold of 'would be likely' to occur applied in this case.

Is the exemption engaged?

33. In a case such as this, it is not enough for the information to relate to an interest protected by sections 31(1)(a) and (b), its disclosure must also at least be likely to prejudice those interests. The onus is on the public authority to explain how that prejudice would arise and why it would occur.
34. Having considered the arguments put forward by Cheshire Constabulary, the Commissioner accepts that the requested information would be useful to someone intent on establishing how Cheshire Constabulary conducts its investigations, which would be likely to be prejudicial to law enforcement.
35. Consequently, she is satisfied that its disclosure would be likely to represent a real and significant risk to law enforcement matters.
36. As the Commissioner accepts that the outcome of disclosure predicted by the public authority would be likely to occur, she is therefore satisfied that the exemptions provided by sections 31(1)(a) and (b) are engaged.

Public interest test

37. Section 31 is a qualified exemption. The Commissioner must now consider whether, in all the circumstances of the case, the public interest in maintaining the exemption at sections 31(1)(a) and (b) of FOIA outweighs the public interest in disclosing the information requested by the complainant in part one of his request.

Public interest considerations favouring disclosure

38. Arguing in favour of disclosure, the complainant made the following submissions:

"We also submitted that there is a clear public interest for complainants and witnesses to know the details of the technology police are and will use to extract information from them, and the capabilities of that technology. Complainants need to know what they are consenting to when they consent to handing over their mobile phones and digital devices for extraction by the police."

Cheshire Police has also provided information on digital device extraction technology previously in response to other requests, even when requested in relation to all crime not victims. This information is however out of date, which is why we are seeking current information. However, Cheshire Police has rejected that appeal, giving the same reasons."

39. Cheshire Constabulary acknowledged that disclosure of the requested information in part one could be said to contribute to openness and transparency.
40. It also recognised that release of the information would lead to a better informed public which may encourage individuals to provide intelligence in order to reduce crime.
41. The Commissioner would also add that there is a public interest in the use of public funds and the spend on new technologies in order to obtain best evidence.

Public interest considerations favouring withholding the information

42. Cheshire Constabulary submitted the following arguments:

"As technology advances, its use by police forces should be protected, to ensure that those with the intent to do so cannot manipulate it or undermine its purpose in any way."

43. It advised the complainant that :

"Supplying this information could compromise law enforcement tactics which would lead to a hindrance on the Police Force's ability to prevent and detect crimes. Vulnerable areas could be identified by disclosure leading to more criminal activity placing the public in harm's way. If information is released this may impact police resources e.g. vulnerable areas may need to increase their resources to reassure the public and protect the surrounding community."

44. Cheshire Constabulary provided further arguments which the Commissioner has set out in the confidential annex.

Balance of the public interest arguments

45. In reaching a view on where the public interest lies in this case, the Commissioner has taken into account the nature of the withheld information as well as the views of both the complainant and Cheshire Constabulary.

46. The Commissioner has weighed the public interest in avoiding prejudice to the prevention or detection of crime and to the apprehension or prosecution of offenders, against the public interest in openness and transparency.
47. The Commissioner accepts that there is a presumption running through FOIA that openness is, in itself, to be regarded as something which is in the public interest.
48. She also acknowledges the public interest arguments in favour of openness and transparency, and of scrutiny of policing methods.
49. The Commissioner considers that it is important that the general public has confidence in the police service, which is responsible for enforcing the law. Confidence will be increased by allowing scrutiny of how the police execute their duties. Accordingly, there is a general public interest in disclosing information that promotes accountability and transparency in order to maintain that confidence and trust.
50. The applicant further argues that there is a public interest in knowing the technology used, however, this needs to be balanced against the harm to policing and the overarching responsibility to keep people safe, ensuring forces have effective investigation techniques is paramount.
51. Furthermore, Cheshire Constabulary has explained there is information addressing these concerns from a national level in the public domain, including advice regarding consent, which provides a response to the applicant point that "*complainants need to know what they are consenting to when they consent*".²
52. The Commissioner acknowledges the serious nature of the subject matter. She also recognises that the requested information is clearly of genuine interest to the complainant. However, disclosure under the FOIA is disclosure to the world at large. She must therefore consider whether the information is suitable for disclosure to anyone and everyone.

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<https://www.npcc.police.uk/documents/NPCC%20FINAL%20CONSENT%20v1.2.pdf>,
<https://news.npcc.police.uk/releases/police-and-prosecutors-invite-victim-groups-to-discuss-concerns-about-new-consent-form> and
<https://news.npcc.police.uk/releases/npcc-comments-on-mobile-phone-data-extraction>

53. In that respect, the Commissioner is mindful that Cheshire Constabulary expressed concerns that disclosure of information relating to digital device extraction systems and techniques procedures would be likely to impact on its ability to undertake its duties effectively. She has also taken into account the argument that release of the withheld information would be likely to put victims at serious risk.
54. While restricted in what she is able to say about the withheld information without disclosing those details which are contained in the confidential annex, the Commissioner recognised Cheshire Constabulary's description of the information as comprising information which could result in vulnerable areas of its current methodology being exposed, leading to more criminal activity and thereby adversely affecting the public.
55. Clearly, disclosing information that may enable individuals seeking to conduct themselves improperly to adapt their behaviour, in order to evade detection, is not in the public interest. The Commissioner is also mindful that disclosure could allow those with criminal intent to exploit any current weaknesses potentially leading to increasing numbers of victims of crime. This would be contrary to policing purposes being relied on here, ie the prevention and detection of crime and the apprehension and prosecution of offenders.
56. In carrying out the statutory balancing exercise in this case, the Commissioner considers that appropriate weight must be afforded to the public interest inherent in the exemption - that is, the public interest in avoiding likely prejudice to law enforcement matters. Clearly, it is not in the public interest to disclose information that may compromise the police's ability to accomplish its core function of law enforcement.
57. In that respect, she recognises that there is a very strong public interest in protecting the law enforcement capabilities of a police force and she considers that appropriate weight must be afforded to the public interest inherent in the exemption - that is, the public interest in avoiding prejudice to the prevention or detection of crime and the apprehension or prosecution of offenders.
58. In the circumstances of this case, the Commissioner considers that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. It follows that Cheshire Constabulary was entitled to rely on sections 31(1)(a) and (b) of FOIA to refuse to disclose the requested information in part one of this request.

Right of appeal

59. 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

60. 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.

61. 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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