

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 22 March 2021

**Public Authority:** Chief Constable of Greater Manchester Police  
**Address:** Openshaw Complex  
Lawton Street  
Manchester  
M11 2NS

#### **Decision (including any steps ordered)**

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1. The complainant requested information relating to a police officer found guilty of using racist language. The Chief Constable of Greater Manchester Police ("GMP") relied upon sections 30 (investigations), 38 (health and safety) and 40(2) of the FOIA (third party personal data) to withhold the requested information.
2. The Commissioner's decision is that GMP has correctly relied upon section 40(2) of the FOIA to withhold the requested information. However, in failing to respond to the request within 20 working days, GMP breached sections 10(1) and 17(1) of the FOIA.
3. The Commissioner does not require further steps to be taken.

#### **Background**

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4. In 2017, two police officers ("Officer A" and "Officer B") were diverted from their duties to attend an incident of public disorder in Manchester and provide support to their colleagues. Officer B had a bodyworn video camera operating whilst the officers were in attendance.
5. When other officers from GMP were reviewing all the bodyworn video footage from the incident, in preparation for prosecution arising out of the incident, they discovered an inappropriate conversation had taken

place between Officer A and Officer B. Officer A was considered to have used racist language.

6. An Independent Office for Police Conduct ("IOPC") investigation found a case to answer and Officer A received a final written warning following a hearing for gross misconduct.

## **Request and response**

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7. On 12 July 2019, referring to the IOPC report, the complainant requested information of the following description:

*"[1] Provide the body worn video where racist language was used. Please provide the whole video, not just the racist language as context is important.*

*"[2] Provide a transcript of the conversation.*

*"[3] Provide the IOPC report.*

*"[4] Provide a recent facial photo of [Officer A] (so that the public can recognise him when they see a him)."*

8. On 29 August 2019, GMP responded. It refused to provide the requested information. GMP relied on section 30(1)(a)(i), section 38 and section 40(2) of the FOIA to withhold the information.
9. The complainant requested an internal review on 22 September 2019. GMP finally reported the outcome of its internal review on 5 March 2021. It appeared to withdraw its reliance on all but the section 40(2) exemption.

## **Scope of the case**

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10. The complainant first contacted the Commissioner on 7 February 2020 to complain about the way his request for information had been handled. At that point, no internal review had been carried out.
11. On 13 February 2020, the Commissioner wrote to GMP asking it to complete its internal review within 10 working days.
12. On 3 August 2020, the complainant contacted the Commissioner again to note that GMP still had not completed its internal review. In view of the approach she had taken during the early days of the pandemic and the fact that GMP had failed to comply with her informal directions, the

Commissioner decided to accept the case for investigation without waiting for the completion of the internal review.

13. The Commissioner first wrote out to GMP on 26 November 2020 to seek submissions. GMP responded to say that, due to internal turmoil within the organisation (the Chief Constable had recently departed) and turnover of staff it would need further time in which to provide its response. It also noted that, because of the relationship to a court case, it would struggle to provide the information within the scope of element [1] of the request. The Commissioner agreed that GMP could, for the time being, just provide a copy of the IOPC report and this was finally provided on 5 February 2021.
14. After considerable chasing from the Commissioner, GMP finally provided its submission on 10 March 2021.
15. Having considered the contents of the information within the scope of element [3] of the request (ie. the IOPC report), the Commissioner considers that she has sufficient knowledge of the content of all of the information within the scope of the remaining elements to reach a decision. Given the difficulties in obtaining the video, she considers it would serve no useful purpose to delay the complaint.
16. The scope of the complaint is therefore to determine whether GMP is entitled to rely on section 40(2) of the FOIA to withhold the information.

## **Reasons for decision**

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### **Section 40 personal information**

17. 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.
18. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. 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').

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

19. 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.
20. 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?*

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

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

22. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
23. 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.
24. 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.
25. The original version of the request identified Officer A by name and rank. The Commissioner therefore considers that the only information GMP could have provided which would satisfy the request would be information relating to Officer A. The officer's name and the finding of gross misconduct are also in the public domain.
26. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to Officer A. She is satisfied that this information both relates to and, when read with the request, identifies Officer A. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
27. 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.
28. The most relevant DP principle in this case is principle (a).

*Is any of the information criminal offence data?*

29. Information relating to criminal convictions and offences is given special status in the GDPR.
30. Article 10 of the GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to:
- (a) The alleged commission of offences by the data subject; or*
  - (b) Proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.*
31. GMP did not consider that either Officer A or Officer B was ever subject to criminal proceedings. However, it noted that the video footage was captured whilst the officers were in attendance at a crime scene and would therefore contain images of the crime scene. It thus argued that the footage would be the criminal offence personal data of the individual(s) who committed the offence(s).
32. The IOPC report contains a description of the images captured by the video. Based on this description, the Commissioner considers that a person who had watched the video would be able to identify the location at which the footage was shot – particularly if that person had knowledge of the area in question. By combining knowledge of the location with the date of the incident, the Commissioner was able to identify the individual(s) who were subsequently charged with the offence(s). She therefore considers that the footage can be linked with a specific criminal offence and the name of an offender.
33. Whilst the report also indicates that neither Officer A nor Officer B had a central role in the criminal investigation that followed, the fact that the Officer B's footage was reviewed as part of the investigation into a criminal offence indicates that it is information relating to the "proceedings for an offence committed or alleged to have been committed by the data subject". The Commissioner therefore considers that the footage is criminal offence personal data – although she notes that it is also the personal data of Officer A and Officer B.

*Would disclosure contravene principle (a)?*

34. 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".*

35. 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.
36. 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.
37. In addition, if the requested data is criminal offence data, in order for disclosure to be lawful and compliant with principle (a), it must also meet the requirements of Article 10 of the GDPR.
38. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.
39. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under the FOIA are the conditions at Part 3 paragraph 29 (consent from the data subject) or Part 3 paragraph 32 (data made manifestly public by the data subject).
40. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this particular data public.
41. As none of the conditions required for processing criminal offence data are satisfied there is no legal basis for its disclosure. Processing this criminal offence data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

*Lawful processing – Article 6(1)(f) of the GDPR*

42. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that “*processing shall be lawful only if and to the extent that at least one of the*” lawful bases for processing listed in the Article applies.
43. 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*<sup>2</sup>.

44. 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:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
45. 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*

46. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, the narrower and more trivial the interest, the less likely it is to outweigh the rights of the data subject.
47. Unfortunately GMP's response fell into error because it appeared to identify its obligation to respond to FOI requests as the legitimate interest. The construction of the FOIA is such that disclosure of personal

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<sup>2</sup> 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".*

data is not a legal obligation on a public authority – nor is it a legitimate interest.

48. The wording of section 40(3A) of the FOIA makes clear that, in assessing whether the exemption applies, the public authority must consider whether disclosure "***otherwise than under this Act***" would contravene a DP principle. The public authority is thus required to consider whether it could lawfully disclose the personal data to the world at large – even if no one had requested it.
49. GMP did appear to identify an interest in transparency. The Commissioner also considers that, on the facts of this particular case, there is a further legitimate interest in ensuring that the police (who of course are required to enforce the law) are themselves upholding the highest standards of professional behaviour and abiding by the laws they have a responsibility to enforce.
50. However, the Commissioner considers that there is no legitimate interest in disclosing an image of Officer A. This would add nothing to the public understanding of events and nor would it make the police any more or any less transparent or accountable.

*Is disclosure necessary?*

51. '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.
52. Because it had identified complying with its FOIA obligations as the legitimate interest, GMP considered that disclosure would be necessary to meet the legitimate interest.
53. Having considered the IOPC report and the nature of the remaining information, the Commissioner is not convinced that disclosure is necessary to achieve the legitimate interests she has identified in this case.
54. The fact that Officer A was found guilty of gross misconduct, the reason for that finding and the punishment the Officer faced, are all in the public domain. Officer A would also have had the right to present their version of events and to pursue avenues of appeal.
55. The Commissioner therefore considers that the legitimate interests, both in terms of upholding standards and in terms of general transparency are met by the information already in the public domain.



56. The complainant considered that the public needed to know exactly what words had been used. He argued that if the officer's words had been targeted at a particular ethnic community, that community had a right to that information so that members would know whether they could approach Officer A with confidence.
57. The Commissioner is not convinced by this argument. The fact that Officer A used racist language is in the public domain. The implication of the complainant's argument is that, whilst the community that was "targeted" by Officer A's language would not feel comfortable approaching them, other ethnic minority communities might.
58. In the Commissioner's view, racist language is racist language – regardless of the particular community it is aimed at. In her view, disclosure of the exact words used would serve no useful purpose and would only inflame a delicate situation.
59. Whilst disclosure of the report would enable the public to see how the investigation had been carried out, the Commissioner still considers that the legitimate interest is met by publishing the outcome of the misconduct hearing. Publishing the investigation report as well would not make Officer A any more accountable and would do little to advance any broader interests in transparency. It would however be more intrusive towards the privacy of Officer A.
60. 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. However, had she done so, it is highly likely that she would have concluded that the additional intrusion into the privacy of the data subject was not justified by any legitimate interests in disclosure.
61. 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). As disclosure would breach one of the DP principles, section 40(2) of the FOIA applies and GMP was entitled to withhold the information.

#### Procedural Matters

62. Section 10 of the FOIA requires a public authority to confirm or deny holding information within the scope of the request within 20 working days – even if an exemption allows the information itself to be withheld.
63. Section 17(1) of the FOIA requires a public authority to issue a refusal notice citing the exemptions upon which it wishes to rely within 20 working days.

64. GMP failed to confirm or deny holding information and failed to issue its refusal notice within 20 working days. It therefore breached sections 10(1) and 17(1) of the FOIA.

## **Other matters**

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### *Internal review*

65. Whilst there is no statutory time limit for completing an internal review, the Commissioner considers that they should normally be completed within 20 working days and should never take longer than 40 working days.
66. In this case, GMP took 18 months to complete its internal review despite the Commissioner's intervention. The Commissioner also notes that the internal review was already considerably late, well before the pandemic began to take effect.

### *Confirmation or denial*

67. Unless a specific exemption allows a public authority to neither confirm nor deny holding information, the Commissioner would normally expect any response to a information request to contain an explicit statement confirming the extent of relevant information that the public authority holds.
68. At various points in its response, GMP referred to the same information being "redacted", "withheld", "disclosed" and "available". It also referred at one point to the refusal "not being taken as confirmation or denial that GMP holds the information". This appeared to have resulted from paragraphs being copied and pasted from other documents without an overall sense check of the response. The Commissioner considers this to be poor practice.

## Right of appeal

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69. 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](mailto:grc@justice.gov.uk)

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

70. 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.
71. 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 .....**

**Pamela Clements**  
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