

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 June 2023

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

Decision (including any steps ordered)

1. The complainant has requested the names of three police officers who, according to news reports, were found guilty of misconduct in 2007. He also asked Cheshire Constabulary to confirm whether a named individual was one of the officers. Cheshire Constabulary cited section 12 (Cost of compliance exceeds appropriate limit) to refuse to comply with the request.
2. The Commissioner's decision is that Cheshire Constabulary was entitled to rely on section 40(5B)(a)(i) (Personal information) to neither confirm nor deny whether it holds information on the person named in the request. As regards the remainder of the request, it was entitled to apply section 12(2) to neither confirm nor deny whether it holds any information falling within its scope. There was no breach of section 16 (Advice and assistance) of FOIA.
3. The Commissioner requires no steps as a result of this decision.

Request and response

4. On 27 December 2022, the complainant wrote to Cheshire Constabulary and requested information in the following terms:

"I am requesting the names of the three Police Officers who were disciplined by Cheshire Police in 2007 following a 3 year and £1m

investigation into corruption. I believe the Detective Constable may have been called [name redacted].

'EXCLUSIVE TWO DETECTIVES have been booted out of the police force in disgrace after being found guilty of stealing confiscated cash following a 39-day police disciplinary hearing - and a £1m investigation that lasted three years'

I am requesting a Freedom of Information request regarding the news reports dated back to 2007 (two of which I have copied below from Macclesfield Live and The Manchester Evening News).

The reports relate to three serving Police Officers at the time who were sacked relating to honesty and integrity offences after a lengthy investigation by the IPCC.

The report mentioned that no criminal charges were brought against the Officers, but an internal disciplinary investigation resulted in a PC of 8 years and a DC of 18 years getting sacked and losing their jobs, whilst a DS of 20 years was demoted.

At the time of the report the names of the three Police Officers were not allowed to be published due to legal reasons. I believe the law changed the following year, possible [sic] in 2008 following the Taylor Review, and that Officers could then be named following similar offences and investigations.

...

if you cannot provide the names of the three Officers please can you give an explanation why? And if not, can you please confirm if the name of the Detective Constable was in fact called [name redacted]

[links to two newspaper articles redacted]."

5. Cheshire Constabulary responded on 18 January 2023. It refused the request, citing the costs exemption at section 12 of FOIA. It said that due to its age, the requested information would not be held electronically and extensive searches would be required to establish whether it was held in manual files.
6. Following an internal review, Cheshire Constabulary wrote to the complainant on 5 May 2023. It said that section 12 of FOIA had been correctly applied. It also commented that if section 12 was set aside, the non-disclosure exemption at section 40 (Personal information) would be engaged.

Scope of the case

7. The complainant contacted the Commissioner on 12 May 2023 to complain about the way his request for information had been handled. He believed that the information would be held electronically by Cheshire Constabulary. In the event that it was not, he believed it would not take over 18 hours to locate and extract it from manual files. He also said that Cheshire Constabulary should, at the very least, be able to confirm whether the person he had named in his request was one of the officers in question, without exceeding the 18 hour limit.
8. Cheshire Constabulary refused to comply with the request on the grounds that section 12 of FOIA applied. Although it did not specify which subsection it was relying on, its arguments made it clear that it did not know whether, in fact, it held the requested information. As such, its arguments engaged section 12(2) of FOIA, which permits a 'neither confirm nor deny' response to be given.
9. The Commissioner's analysis will therefore consider whether Cheshire Constabulary was entitled to rely on section 12(2) of FOIA to neither confirm nor deny holding the requested information. As the complainant has referred to a named party in the request, he will also consider the application of section 40 of FOIA.
10. Cheshire Constabulary has stated that, in the absence of any other available information about the misconduct matters referred to in the request, it has taken the news reports referred to by the complainant at face value and has responded as such. It says that this should not be taken as Cheshire Constabulary confirming that the information in the articles was accurate or correct, or that the individual named by the complainant was, or was not, a party to any misconduct proceedings.
11. The Commissioner does not know the identities of the officers in question; he does not consider it necessary to, in order to reach a decision on the application of sections 12 and 40 in this case.
12. The Commissioner has commented on the conduct of the internal review in the 'Other matters' section at the end of this notice.

Reasons for decision

Section 40 – personal information

13. In the request, the complainant named an individual and asked Cheshire Constabulary to confirm whether he was one of the officers who was subject to the misconduct hearings referred to in the news reports.

14. In its internal review response to the complainant, Cheshire Constabulary told him that if section 12 was disapplied, the information would be exempt from disclosure under section 40 of FOIA. As the Commissioner is also the regulator for matters relating to the Data Protection Act 2018 (the 'DPA') he will consider this point first.
15. Under section 1(1) of FOIA, anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the requested information – this is referred to as 'the duty to confirm or deny'.
16. However, section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.
17. For Cheshire Constabulary to be entitled to rely on section 40(5B)(a)(i), the following two criteria must be met:
 - confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - providing this confirmation or denial would contravene one of the data protection principles.
18. It is not necessary to show that both confirming **and** denying would each result in the disclosure of personal data. The exemption will be engaged if confirming alone would meet the above criteria, and it may be applied even where the information is not, in fact, held.

Would confirming or denying that the requested information is held constitute the disclosure of a third party's personal data?

19. Section 3(2) of the DPA 2018 defines personal data as:-

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

20. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
21. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier, such as their name. 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.

22. In his request to Cheshire Constabulary, the complainant has asked it to confirm whether a named individual was one of the officers subject to misconduct proceedings in 2007. As set out above, a person's name is information which renders them identifiable. If Cheshire Constabulary was to confirm that it holds information on this point, it would reveal to the world something about the named individual, ie that they were the subject of misconduct proceedings in 2007.
23. For the reasons set out above, the Commissioner is satisfied that, if Cheshire Constabulary confirmed or denied that it held the requested information, this would result in the disclosure of a third party's personal data. The first criterion set out in paragraph 17 is therefore met.
24. In view of the reference in the request to allegations of theft, the Commissioner regards it appropriate to consider whether confirming or denying would result in the disclosure of criminal offence data.
25. Information relating to criminal convictions and offences (including allegations) is given special status in the UK GDPR. Article 10 of UK GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA 2018 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.
26. The Commissioner's guidance on criminal offence data¹ states the following regarding such information:

"This covers a wide range of information about offenders or suspected offenders in the context of:

 - criminal activity;
 - allegations;
 - investigations; and
 - proceedings.

¹ <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/lawful-basis/a-guide-to-lawful-basis/lawful-basis-for-processing/criminal-offence-data/>

It includes not just data which is obviously about a specific criminal conviction or trial, but may also include personal data about:

- unproven allegations; and
- information relating to the absence of convictions.”

27. The Commissioner is satisfied that confirming or denying that the named individual was one of the officers subject to misconduct proceedings in 2007, would involve the disclosure of information relating to alleged criminal offences. This is because the request refers to allegations of ‘stealing’ made against the officers, and theft is a criminal offence.
28. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes confirming or denying that the information is held in response to an FOIA request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA, 2018 can be met.
29. The Commissioner asked Cheshire Constabulary to consider each of these conditions and whether any of them could be relied on to confirm or deny whether it held criminal offence data falling within the scope of this request. Cheshire Constabulary has informed him that none of the conditions can be met. Having regard for the restrictive nature of the Schedule 1, Parts 1 to 3 conditions, the Commissioner considers this to be entirely plausible.
30. As none of the conditions required for processing criminal offence data are satisfied, there can be no legal basis for confirming whether or not the requested information is held; providing such a confirmation or denial would breach data principle (a) and therefore the second criterion of the test set out in paragraph 17, above, is met.
31. It follows that Cheshire Constabulary was entitled to neither confirm nor deny whether it holds the requested information regarding the named individual, on the basis of section 40(5B)(a)(i) of FOIA.

Section 12 – cost of compliance exceeds appropriate limit

32. Section 12(2) of FOIA exempts a public authority from the duty to confirm or deny if it estimates that establishing whether it holds the requested information would exceed the appropriate costs limit.
33. This limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (‘the Fees Regulations’) at £450 for public authorities such as Cheshire Constabulary. The Fees Regulations also specify that the cost of complying with a request must be calculated at a flat rate of £25 per hour. This means that Cheshire Constabulary may refuse to confirm or deny whether it holds

information if it estimates that the work involved in doing so would take longer than 18 hours.

34. It is firstly noted that, although the complainant has tried to narrow the search criteria for his request by naming an individual who he thinks might have been involved, the Commissioner has determined above that Cheshire Constabulary was not obliged to confirm or deny whether this person was the subject of misconduct proceedings. Therefore, this reduction in scope has no bearing on the Commissioner's considerations below.
35. The Commissioner has conducted internet searches on the matter, using information provided by the complainant. He was only able to find three news reports online, dating back to 2007, none of which name any of the officers. He therefore does not consider that their identities are currently in the public domain.
36. Cheshire Constabulary explained that, if held, the requested information would not be held in a way which would allow it to be located readily, due to its age (according to the request, the misconduct hearings took place 16 years ago).
37. It said that information about officer misconduct hearings is held by the force Professional Standards Department (PSD) in electronic and manual files. However, in line with official policy on the retention of conduct records², records relating to misconduct of the type referred to in the request would have been weeded and destroyed after six years. This means that, assuming they were held at the time of the hearings, PSD would nevertheless have deleted them around 2013/2014.
38. Cheshire Constabulary said that the only other location where the information might now be held, was in the individual HR files of the officers who were the subject of the misconduct hearings. Without knowing the names of the individuals in question, or any relevant reference numbers, it would be necessary to manually search the individual HR file of every officer in post in 2004 (the date at which investigations commenced, according to the request) to check whether they revealed the requested information. It confirmed that a manual check was the only method of reviewing these records, which are a combination of paper, scanned paper images and electronic documents. It explained:

² <https://www.college.police.uk/app/information-management/management-police-information/retention-review-and-disposal>

“Cheshire Constabulary has over 2200 serving police officers. While there will be variations in the number of serving police officer [sic] over time, 2000 could be used as an estimate for the number of Police Officer HR files that would need to be reviewed.”

39. As regards how long this might take, it explained that it had recently reviewed two HR files for staff that had worked for it for many years. One 'straightforward' file consisted of 361 pages. Another was composed of in excess of 150 different electronic documents. Just six of these documents equated to 288 pages.
40. Taking these as an example, Cheshire Constabulary said that, if it were to review just the information above, and allowing two minutes per page, the work involved would take over 21 hours³. Therefore, to also review the HR files of other officers to establish if they were the officers referred to in the request would clearly take compliance with the request over the section 12 cost limit by a considerable degree.

The Commissioner's decision

41. When dealing with a complaint to him under FOIA, it is not the Commissioner's role to make a ruling on what information a public authority should hold, or how it should hold it. He is not concerned with how a public authority deploys its resources, on how it chooses to hold its information, or the strength of its business reasons for holding information in the way that it does as opposed to any other way. Rather, in a case such as this, the Commissioner's role is simply to decide whether or not the requested information can, or cannot, be provided to a requestor within the appropriate cost limit.
42. The Commissioner's job here is to decide whether Cheshire Constabulary has demonstrated that the work involved in confirming or denying whether it holds the information specified in the request would be likely to exceed 18 hours, and thus the £450 cost limit established under section 12 of FOIA. It is sufficient for it to show that its estimate of the work involved is a reasonable one.
43. Cheshire Constabulary has provided an estimate that reviewing just two HR files would exceed the appropriate limit, and therefore that searching further HR files, to the point that all relevant information was located (or, alternatively, it being established that information was not held) would far exceed it. It has explained that this estimate is derived from a recent exercise in which it carried out similar work.

³ 288 + 361 pages = 649 x 2 minutes per page = 1298 minutes

44. The Commissioner considers this estimate to be credible and that it is based on a break down of just a portion of the work that would be necessary. The actual costs involved with identifying whether or not information was held would be considerably higher.
45. Having considered the searches that would be necessary and the specific estimates provided by Cheshire Constabulary as set out above, the Commissioner's conclusion is that Cheshire Constabulary has estimated reasonably that the costs involved in confirming or denying whether information is held would exceed the £450 limit established by the Fees Regulations.
46. Cheshire Constabulary was therefore entitled to apply section 12(2) of FOIA to neither confirm nor deny holding the information described in the request.

Section 16 – advice and assistance

47. Section 16(1) of FOIA provides that a public authority is required to provide advice and assistance to any individual making an information request where it would be reasonable to do so.
48. In general, where section 12 is cited, a public authority should advise the requester how their request could be refined to bring it within the cost limit, albeit the Commissioner does recognise that where a request is far in excess of the limit, it may not be practical to provide any useful advice.
49. In this case, the names of the officers referred to in the request are not known. Cheshire Constabulary explained to the complainant that without this information, the only way it could be established whether it held the information would be to search the HR file of every officer who was employed with it in 2004, until it was either located, or established that no such information was held.
50. The Commissioner has accepted Cheshire Constabulary's estimate that the work involved in doing this would considerably exceed the appropriate cost limit set under the Fees Regulations.
51. In the circumstances, the Commissioner does not see that it would be possible for Cheshire Constabulary to have offered any meaningful

advice which would be likely to result in the request being complied with, within the costs limit⁴.

52. As it would not have been reasonable to expect Cheshire Constabulary to offer advice on that point, the Commissioner finds no failure to comply with section 16 of FOIA.

Other matters

Section 45 - internal review

53. There is no obligation under FOIA for a public authority to provide an internal review process. However, it is good practice to do so, and where an authority chooses to offer one, the code of practice established under section 45 of FOIA sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales.
54. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
55. In this case the complainant requested the internal review on or before 23 February 2023 (the date Cheshire Constabulary acknowledged receipt). Cheshire Constabulary took 48 working days to complete the review, responding on 5 May 2023.
56. Cheshire Constabulary therefore did not comply with the timeliness recommendations of the code. The Commissioner has made a separate note of this, for monitoring purposes.

⁴ And, even if it could, it is likely that section 40 would prevent the disclosure of any information held

Right of appeal

57. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

58. 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.

59. 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

**Samantha Bracegirdle
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