

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

### **Decision notice**

**Date:** 22 September 2023

**Public Authority:** Chief Constable of West Midlands Police

**Address:** Lloyd House  
Colmore Circus  
Queensway  
Birmingham  
B4 6DG

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

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1. The complainant has requested information from West Midlands Police ("the public authority") in relation to a specific deceased Police Officer. The public authority refused to provide the requested information, citing section 38(1)(a)(b) of FOIA – health and safety and section 40(2) of FOIA – personal information.
2. The Commissioner's decision is that section 38(1)(a)(b) of FOIA is engaged and that the public interest lies in maintaining the exemption.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

### **Request and response**

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4. On 30 April 2023, the complainant wrote to the public authority and requested information in the following terms:

"1. The police disciplinary/personal investigatory record of PC [name redacted]. This includes but is not limited to punishments or censure or other disciplinary matters.

2. All complaints made against PC [name redacted] This includes but is not limited to punching and kicking matters.
3. All IPCC/IOPC and police reports relating to misconduct, wrongdoing, etc. by PC [name redacted]."
5. The public authority responded on 12 June 2023. It stated that it was withholding the requested information citing section 38(1)(a) and section 40(2) of FOIA.
6. Following an internal review the public authority wrote to the complainant on 26 June 2023. It upheld its original position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 30 June 2023, to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of this complaint is to determine if the public authority is correct to cite section 38(1)(a)(b) of FOIA and, if the exemption is engaged, whether the public interest lies in withholding the information or in disclosure.
9. Depending on the Commissioner's findings, he may then go on to consider the public authority's application of section 40(2).

### **Reasons for decision**

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#### **Section 38 – health and safety**

10. Under section 38(1) information is exempt information if its disclosure would or would be likely to a) endanger the physical or mental health of any individual or b) endanger the safety of any individual.
11. The Commissioner's guidance 'Health and Safety- section 38'<sup>1</sup> states 'In section 38 the word "endanger" is used rather than the word "prejudice"' and 'The use of the phrase "any individual" in section 38 includes any specific individuals, any member of the public, or groups within society'.
12. In the Commissioner's view, three criteria must be met in order to engage section 38:

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<sup>1</sup> <https://ico.org.uk/for-organisations/foi-guidance/section-38-health-and-safety/>

- 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;
  - 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 endangerment which the exemption is designed to protect. Furthermore, the resultant endangerment which is alleged must be real, actual or of substance; and,
  - Thirdly, it is necessary to establish whether the level of likelihood of endangerment being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in endangerment or disclosure 'would' result in endangerment.
13. Consideration of the exemption at section 38 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.

#### The applicable interests

14. The public authority considers that the release of the requested information, if it is held, would be likely to cause significant harm to the mental health of the family and friends of the deceased. It went on to advise that it would be extremely distressing and upsetting to those individuals, should new information be published.

#### The nature of the endangerment

15. The Commissioner's guidance states 'Endangering mental health means it must have a greater impact than causing upset and distress.
16. The Commissioner must now consider if there is a causal link between the requested information and the endangerment that section 38(1)(a) is designed to protect.
17. Returning to paragraph 12, the Commissioner recognises that a public authority will not necessarily be able to provide evidence in support of this causal link, this is because the endangerment relates to events that have not occurred. However, there must be more than a mere assertion or belief that disclosure would lead to endangerment; there must be a logical connection between the disclosure and the endangerment in order to engage the exemption

18. The public authority has explained that the disclosure of the requested information would be likely to cause significant harm to the mental health of the family and friends of the deceased. It also explained that it would be likely to interfere with the grieving process.
19. The complainant has argued that they don't consider the exemptions apply due to the Police Officer in question being deceased.
20. The Commissioner acknowledges that some information relating to the individual will already be in the public domain. However, if further information were to be released, it could cause further damage and distress to the deceased's family and friends.

#### Likelihood of endangerment

21. The public authority confirmed to the Commissioner that it was relying on the lower threshold of endangerment 'would be likely to'. The Commissioner's guidance states 'this means that even if there is below a 50% chance, there must be a real and significant likelihood of the endangerment occurring.'
22. The Commissioner accepts that the exemption is engaged at the lower threshold of endangerment. However, there may be a public interest in disclosing this information that outweighs the public interest in non-disclosure which he will now go on to consider.

#### **Public interest test**

##### Considerations in favouring disclosure

23. The public authority has explained that it acknowledges that members of the public need to be reassured that individuals have had their case fully investigated and any wrong doing identified in a timely fashion. By disclosing the requested information, it could go some way towards reassuring the public that West Midlands Police is actively being open and transparent when such matters arise, and that they operate effectively and appropriately.
24. The public authority also acknowledges that there is a strong public interest in police forces being transparent about officer misconduct.

##### Considerations against disclosure

25. The public authority has explained that some information concerning this request has already been made available in the public domain through press releases and court hearings.

26. The public authority has argued that for it to provide previously undisclosed information, it would cause undue anxiety and distress to surviving family members and friends. It advised that if further information were to be released, there is a strong risk of family and friends coming to the attention of the media and therefore leading to potential risks of intrusion regarding the details released.
27. The public authority also considered that it could endanger the mental health of surviving individuals, and others, who are not relatives who may have been previously unaware of any issue/criminality.
28. The public authority has also advised that if information were to be released, it may impact an individual's health, either physical or mental.
29. The public authority explained that there are concerns that redaction may not protect the identity of those involved due to the mosaic effect of piecing together information, with information already available.
30. The public authority also advised that should information be held, if it were to be released publicly, it may contain information about other individuals.
31. The public authority explained that if any further information is held, and if it were to be released, it could cause significant harm to the mental health of the Police Officer's friends and family, as they are still dealing with the individual's fairly recent death.

#### Balance of the public interest

32. The Commissioner agrees that there is a public interest in how West Midlands Police investigate cases. However, he agrees with the public authority that if such information were to be released, it may cause significant mental distress to the family and friends of the deceased.
33. The Commissioner therefore considers that the public interest lies in maintaining the exemption at section 38(1)(a).
34. The Commissioner notes that the public authority has submitted evidence in support of its application of section 40(2). However, as the Commissioner has upheld the exemption at section 38, he has not gone on to consider section 40 in this decision notice.

## Right of appeal

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

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

36. 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.
37. 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 .....**

**Michael Lea**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**