

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 March 2024

Public Authority: Chief Constable of Humberside Police
Address: Police Headquarters
Priory Road
Hull
HU5 5SF

Decision (including any steps ordered)

1. The complainant has requested information from Humberside Police ("the public authority"), in relation to a phone call made to its call centre. The public authority refused to provide the information, relying on section 40(2) of FOIA - personal information and section 31 of FOIA - Law Enforcement.
2. The Commissioner's decision is that the public authority has correctly relied on section 40(2) of FOIA to withhold some of the information. He also considers that the public authority was entitled to rely on section 31 of FOIA to withhold some of the information. However, he considers that the remaining information is not covered by either exemption. The Commissioner has however, found that the public authority didn't comply with section 10(1) of FOIA, as it did not provide a response within the statutory timeframe.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with a copy of the call log, with the exception of the information specified in the confidential annex.

4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 31 May 2023, the complainant wrote to the public authority and requested information in the following terms:

“On the 3rd of April, 2021, a serving Humberside Police Officer, [named person], made a phone call to the Humberside Police Operations/Call Centre, about a seal on the beach at Hornsea.

Under the guidelines of the Freedom of Information Act, I would like a copy of the audible record, and any records made of the written/spoken information.”

6. The public authority responded on 7 July 2023. It refused to provide the requested information, citing section 40(2) of FOIA.
7. Following an internal review the public authority wrote to the complainant on 7 September 2023. It maintained its original position.
8. During the Commissioner’s investigation, the public authority revised its position. It provided the Commissioner with a marked-up version of the withheld information. This document identifies some of the information it contains as being withheld under section 40(2) and most of the rest as being exempt under section 31. A small quantity of the information is not marked as being withheld under either exemption.

Background

9. The incident the request refers to happened in April 2021, when there was a report of an unwell seal on a beach. This resulted in members of the British Divers Marine Life Rescue (BDMLR) attending.
10. The BDMLR members on scene determined that the seal was in a poor condition and would need to be humanely killed. A number of vets had been contacted to see if they could assist, but they were not available until much later on in the day, which would prolong the suffering of the seal. There was some dispute between members of the BDMLR regarding how things should progress with the seal.

11. The public authority was contacted to see if it had available resources to help dispose of the seal in a humane way. The public authority did deploy resources and the seal was destroyed.
12. The complainant believes that other options were available for the seal¹ and that the public authority was placed under undue pressure to deploy its resources by the individual who made the call referred to in the request.

Scope of the case

13. The complainant contacted the Commissioner on 24 September 2023, to complain about the way their request for information had been handled.
14. Based on its submissions, the Commissioner understands the public authority's position to be as follows:
 - Where the public authority is relying on section 40(2), it is not relying on section 31 (and vice versa). None of the information is deemed to be exempt under both exemptions.
 - No exemption is being relied upon in respect of the information that has not been marked-up in the copy sent to the Commissioner on 22 December 2023.
15. The Commissioner considers that the scope of his investigation is to determine whether the public authority was correct to withhold the requested information under sections 31 and 40(2) of FOIA in the manner that it has done

Reasons for decision

Section 40 - personal information

16. 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.
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¹ The Commissioner is aware, from information provided to him, that the BDMLR disputes that more humane options were available at that time. He takes no position on the matter either way.

17. In this case the relevant condition is contained in section 40(3A)(a). 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 UK General Data Protection Regulation ('UK GDPR').
18. 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.
19. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

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

21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
22. 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.
23. 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.
24. In the circumstances of this case, the Commissioner is satisfied that the names and job titles are personal information. He has considered the other information that has been withheld under section 40(2) of FOIA and is not satisfied that it is personal data. A significant amount of the information is either professional opinions or concerns the seal itself, rather than any human.
25. The people who are likely to be able to identify any individuals within the information are those who are already familiar with the incident and what was said and done at the time. The withheld information will therefore reveal nothing about any individual to such people that they did not already know.

26. The Commissioner also notes that some of the information that has been redacted is the complainant's personal. He has considered this under section 40(1) of FOIA further along in this decision notice.
27. However, with the exception of the information that is the complainant's own personal information and of the names and job titles of the other individuals, the information to which section 40(2) has been applied is not personal data. It is therefore not covered by section 40(2) of FOIA and must be disclosed.
28. The Commissioner has identified this information in the confidential annex.
29. The names and job titles fall within the definition of 'personal data' in section 3(2) of the DPA.
30. 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.
31. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

32. 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".

33. 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.
34. 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

35. 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.

36. 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.
37. 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

38. In considering any legitimate interest(s) in the disclosure of the requested information under 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.
39. 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 compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
40. In this case, the complainant has their own legitimate but personal interest in the information as part of a grievance.

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".

41. There is also a broader legitimate interest in accountability and transparency around the welfare of an animal and the involvement of the police – however, the Commissioner does not consider that simply disclosing names and job titles alone would assist wider public understanding of the incident. Disclosing the substance of the call log satisfies the wider public interest.

Is disclosure necessary?

42. '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.
43. In this case, the Commissioner is only considering whether publication is necessary to meet the complainant's private interest. In his view, it is not.
44. The complainant likely already knows the identities of the individuals referred to in the withheld information. However, even if they did not, that would not have prevented them from making a complaint to the public authority's Professional Standards division, or the Independent Office for Police Conduct. Indeed, the Commissioner understands the complainant may already have done so. Both bodies would have been able to view an unredacted version of the call log and decide whether officers had acted appropriately, without revealing this information to the world at large.
45. Publication to the world at large is therefore not necessary because it is not the least intrusive means of achieving the complainant's legitimate interest.
46. As disclosure is not necessary, it would also be unlawful. Consequently, section 40(2) of FOIA would apply.

Section 40(1)

47. Section 40(1) of the FOIA provides that any information to which a request for information relates is exempt information if it constitutes personal data of which the requester is the data subject.

48. The Commissioner's guidance³ is clear that a requestor's own personal data should not be disclosed under FOIA or the EIR, instead public authorities should handle this aspect of the request as a subject access request (SAR) under the UK GDPR or the DPA, as applicable.
49. As the Commissioner's guidance is clear that a requestor's own personal data should not be disclosed under FOIA or the EIR, he has proactively applied this exemption to the parts of the call log which contain the complainant's personal data.
50. In this case the complainant has requested a call log from a call made to the police. Within the call log, there is some information which relates to the complainant and is likely to lead to them being identified by others who are familiar with the incident. The Commissioner is satisfied that these parts of the log are the personal data of the complainant and this exemption does not require him to consider whether disclosure under FOIA might be lawful.
51. The Commissioner finds that the public authority should have applied section 40(1) to this part of the call log when refusing to provide the requested information.

Section 31 – Law enforcement

52. Section 31 of FOIA allows a public authority to withhold information which, if disclosed, could harm its own, or another public authority's, ability to enforce the law
53. Sections 31(1)(a) and (b) of FOIA apply where disclosure would, or would be likely to, prejudice:
 - (a) the prevention or detection of crime; and
 - (b) the apprehension or prosecution of offenders
54. In order for a prejudice based exemption such as section 31(1)(a) to be engaged, the Commissioner considers that three criteria must be met:
 - 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.

³ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/section-40-and-regulation-13-personal-information/part-one-is-the-request-for-personal-data/#own>

- 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 substance designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
- 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. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view, this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

55. The public authority has applied section 31(1)(a) to some of the withheld information. It told the Commissioner that disclosure of operationally sensitive and tactical information would be likely to prejudice the prevention or detection of crime.
56. The public authority has explained that FOI responses are monitored by criminals and terrorists to obtain information that may assist them in offending. It went on to add that disclosing the operationally sensitive and tactical information in this request would be likely to prejudice the prevention or detection of crime. It advised that by confirming the specific step-by-step communications in the control room such as call signs, it would give criminals the opportunity to cause disruptions over the police communications network, should they ever be successful at obtaining access to it.
57. The public authority advised that releasing the information would be likely to prejudice the prevention or detection of crime, as it could be used by offenders to facilitate crime. It gave the following example: they could deflect officers from scenes of crime or target their offending based on their understanding of where officers are currently being deployed to. The public authority explained that this in turn would lead to increased criminal or terrorist activity, or disruption to officers being deployed to the correct places and therefore would prejudice the prevention or detection of crime.

The Commissioner's position

58. The Commissioner has considered the arguments put forward by the public authority, and he accepts that the arguments relate to the prevention or detection of crime.
59. With respect to the likelihood of harm occurring, he accepts that the public authority considers that harm would be likely to occur as a result of disclosure.
60. The Commissioner however, considers that whilst the arguments are legitimate, they are very generic and do not have regard to the specifics of this case.
61. The Commissioner finds that the public authority has not set out why most of the specific aspects within the withheld information would be likely to apply in other scenarios. He considers that it is unlikely that such a scenario would be likely to happen frequently and cannot determine what information would-be criminals or terrorists would gain.
62. Had the request related to an armed robbery, the equivalent incident log may well have contained information about tactics and decision-making that would have allowed anyone planning a similar crime to anticipate the likely response.
63. However, the information relates to an incident in which a large sea creature needed to be humanely destroyed. No crime was committed. Even in coastal communities, such incidents are likely to be rare and difficult to replicate artificially. The decision-making in such a scenario will necessarily be unique and it is difficult to see (and the public authority has not explained) why the information would have broader use.
64. The Commissioner also notes the age of the information in the request. The incident occurred more than two years prior to the request and when some Covid-19 restrictions remained in place. As such, it is highly likely that changes in resource allocation took place within the public authority in the intervening period. Therefore, to the extent that the information reflected an accurate deployment of resources in 2021, it is unlikely to have been a reflection of resource deployment at the point at which the request was responded to.
65. The Commissioner does however, consider that some of the information withheld under section 31, should remain redacted: specifically the call signs. He is satisfied that such information could be used by criminals and terrorists in order to facilitate crime and disruption to the inner workings of the police – for the reasons the public authority has explained.

66. The Commissioner is not satisfied that the public authority has demonstrated that the exemption provided at section 31(1)(a) has been engaged, other than to call signs. The remaining information must therefore be disclosed

Procedural matters

67. Under section 1(1) of FOIA a public authority must (a) confirm whether it holds information that's been requested and (b) communicate the information to the applicant if it's held and isn't exempt information.
68. Under section 10(1) a public authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.
69. Under section 17(1) a public authority must issue a refusal notice in respect of any exempt information within the same timescale.
70. In this case, the complainant submitted their request on 31 May 2023. The public authority responded to the request on 7 July 2023, which is outside of the required 20 working days.

Confidential Annex

71. So as to preserve a meaningful right of appeal, the Commissioner has produced a confidential annex to this decision that will be provided to the public authority only.
72. The confidential annex specifies the information that the Commissioner has determined can be withheld and the information that should be disclosed. Necessarily this involves reference to the contents of the actual information being withheld.
73. All the Commissioner's reasoning is included in the published decision notice. No further analysis is included in the confidential annex.

Right of appeal

74. 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

75. 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.
76. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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