

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 March 2024

Public Authority: Chief Constable of West Midlands Police
Address: Lloyd House
Colmore Circus
Birmingham
B4 6NQ

Decision (including any steps ordered)

1. The complainant has requested information about non-crime hate incidents from West Midlands Police ('WMP'). WMP disclosed summary information, but refused to disclose logs of individual incidents, citing sections 30(1) (Investigations and proceedings), 31(1) (Law enforcement), 38(1) (Health and safety) and 40(2) (Personal information) of FOIA.
2. The Commissioner's decision is that section 30(1)(a) was applied correctly to withhold the incident logs. However, it breached section 17(3) of FOIA by failing to cite valid exemptions in its initial response to the request.
3. The Commissioner does not require further steps as a result of this decision.

Background

4. Non-crime hate incidents (NCHIs) are recorded by the police to collect information on 'hate incidents' that could escalate into more serious

harm or indicate heightened community tensions, but which do not constitute a criminal offence¹.

Request and response

5. On 9 November 2023, the complainant wrote to WMP and requested information in the following terms:

"I am writing to request the following information relating to non-crime hate incidents, specifically

- The number of NCHIs reported, and the number recorded, since 3rd June 2023 to 3rd November 2023
- A copy of the log, or record, kept by your force of all non-crime hate incidents reported since 3rd June 2023 to 3rd November 2023
 - This should include a summary of the report, the hate strand, and if possible, where/when the incident occurred. Please redact any personal data from the records.

I would like all document sent electronically please".

6. WMP responded on 24 November 2023. It disclosed a table of 110 NCHIs reported for the period covered by the request, broken down by general location, 'hate strand' and total number of incidents. It said the individual log for each incident could not be disclosed, as it would reveal personal information and information about investigations, although it did not cite particular FOIA exemptions.

7. The complainant requested an internal review on 14 December 2023. He assumed that sections 30 and 40 of FOIA had been applied to withhold the logs and he disagreed with their application, noting that when he had submitted the same request to other police forces, they had provided more detailed information.

8. WMP provided the internal review on 15 January 2024. It said that sections 30(1) and 40(2) had been correctly applied to withhold the logs.

¹ <https://www.gov.uk/government/publications/non-crime-hate-incidents-code-of-practice/non-crime-hate-incidents-code-of-practice-on-the-recording-and-retention-of-personal-data-accessible>

9. It also introduced sections 31(1) (Law enforcement) and 38(1) (Health and safety) of FOIA, to withhold the offensive language that had been used in the incidents in question. It said disclosure of offensive language would not be in accordance with the Police Code of Ethics and Standards of Professional Behaviour. As regards disclosures made by other police forces, it said that police systems and procedures are not uniform across the UK and so comparisons with other forces should not be drawn.

Scope of the case

10. The complainant contacted the Commissioner on 16 January 2024 to complain about the way his request for information had been handled. He was dissatisfied with the general handling of his request by WMP. He disagreed with its citing of section 30, arguing that proper consideration had not been given to the public interest in disclosure. He also felt it should be possible to redact any personal data before disclosing information, which would negate the need for applying section 40.
11. The analysis below considers the application of the cited exemptions.
12. The withheld information comprised 110 incident reports. Due to their volume, the Commissioner has viewed a sample of 22 reports, when considering this matter.

Reasons for decision

Section 30 – Investigations and proceedings

13. Section 30(1)(a) provides that information held by a public authority is exempt information if it has, at any time, been held by the authority for the purposes of:
 - “(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained—
 - (i) whether a person should be charged with an offence, or
 - (ii) whether a person charged with an offence is guilty of it”.
14. The Commissioner considers that the phrase “at any time” means that information can be exempt under section 30(1) of FOIA if it relates to a specific ongoing, closed or abandoned investigation.
15. Consideration of section 30(1) is a two-stage process. Firstly, the exemption must be shown to be engaged. Secondly, as section 30 is a qualified exemption, it is subject to the public interest test.

Is the exemption engaged?

16. The first step is to address whether the requested information falls within the class specified in section 30(1)(a) of FOIA.
17. The Commissioner has published guidance on section 30² which states that section 30(1) can only be claimed by public authorities that have a duty to investigate whether someone should be charged with an offence.
18. The Commissioner's guidance describes the circumstances in which the subsections of section 30(1) might apply. With respect to section 30(1)(a), the guidance says:

"The exemption applies to both investigations leading up to the decision whether to charge someone and investigations that take place after someone has been charged. Any investigation must be, or have been, conducted with a view to ascertaining whether a person should be charged with an offence, or if they have been charged, whether they are guilty of it. It is not necessary that the investigation leads to someone being charged with, or being convicted of an offence..."
19. The request seeks the logs of individual NCHIs. WMP has explained to the Commissioner that an "incident" is defined in the National Standard for Incident Recording (NSIR) as "a single distinct event or occurrence which disturbs an individual, group or community's quality of life or causes them concern". The NSIR covers all crime and non-crime incidents. WMP says it is obliged to investigate all reports of incidents which involve the perception of hostility or prejudice towards a particular characteristic, to determine:
 - whether a criminal offence has been committed, or
 - whether the incident should be recorded as an NCHI (ie the criminal threshold has not been breached, meaning that the incident should not be recorded as a crime).
20. WMP believed that the investigations into the incidents were complete at the time of the request.
21. From the information WMP provided, the Commissioner is satisfied that the withheld information relates to specific criminal investigations and, therefore, that the exemption at section 30(1)(a) is engaged.

² <https://ico.org.uk/media/for-organisations/documents/1205/investigations-and-proceedings-foi-section-30.pdf>

Furthermore, he notes that the complainant has not disagreed that the exemption is engaged. Rather, it is the balancing of the public interest in favour of maintaining the exemption, that he disputes.

The public interest test

22. Section 30(1)(a) is subject to a public interest test. This means that even though the exemption is engaged, the information may only be withheld if, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
23. When considering the public interest in maintaining exemptions, the Commissioner considers that it is necessary to be clear what they are designed to protect.
24. The purpose of section 30 of FOIA is to protect the police's (and other applicable public authorities') function of carrying out effective investigations.

Public interest arguments in favour of disclosure

25. The complainant said he was interested in knowing what had been logged since a change in Home Office guidance on NCHIs in the summer of 2023. He set out the following arguments:

“WMP does not appear to have approached the request with a presumption towards disclosure and the implication of its statement...is that it is incumbent on the arguments favouring disclosure to overcome those against - the inverse of the appropriate approach.

In *Digby-Cameron v the Information Commissioner and Bedfordshire Police and Hertfordshire Police* (EA/2008/0023 and 0025) the Tribunal found that the stage of an investigation or prosecution is a key part of the public interest test for a Section 30(1) exemption

This request is specifically about "Non Crime Hate Incidents", which are defined in College of Policing guidance as incidents "where it is determined that a crime has not been committed".³

Therefore it necessarily follows that the investigations in question are closed, and has been determined that the incident was not a crime.

³ <https://www.college.police.uk/app/major-investigation-and-public-protection/hate-crime/responding-hate>

Subsequently it is my view that the harm caused to the investigation of the specified incidents is not significant and should be afforded minimal weight in the balancing test.

Many of WMP's arguments in against [sic] disclosure in its PIT [public interest test] for Section 30(1) centre on the supposed lack of "tangible community benefit". The absence of a benefit arising from disclosure, a fact that is disputed strongly, is in itself is [sic] not an argument against disclosure and this point should be afforded no weight in the PIT in my view.

WMP also did not account for the substantial specific public interest in the requested information, as it related to how the force is adhering to new guidance from the Home Office on NCHIs.

Publishing de-identified loglines would serve the public interest by allowing the public to know whether trivial reports are still being recorded, including those relating to social media arguments – something the fresh guidance sought to avoid.

The disclosed statistics do not serve this element of the public interest, and it is for this reason I would argue that WMP's assertion of no "tangible community benefit" in the requested information is incorrect. The loglines would allow the public to understand how the recording of NCHIs has changed in light of the new guidance, whereas the statistics do not."

26. WMP said:

"The release of the withheld information may demonstrate transparency of purpose by the Police Service. The force and its officers are accountable to the public for their actions respect [sic] of any investigations they undertake and any subsequent action that is taken, disclosure would relate to the efficiency and effectiveness of the force and its officers."

Public interest arguments in favour of maintaining the exemption

27. WMP told the complainant and the Commissioner:

"Information relating to an investigation will rarely be disclosed under the provisions of the Freedom of Information Act. Whilst such information may be released in order to serve a 'tangible community benefit' it will only be disclosed following a Freedom of Information request if there are strong public interest considerations favouring disclosure. The further the considerations favouring disclosure are from a tangible community benefit, the lighter the considerations will be. In this case, it is not felt that disclosure of the requested information will serve any tangible community benefit. The force has

provided statistical figures in relation to non-hate incidents, broken down by the hate strand recorded, and it is not deemed that the provision of full logs/summaries, even in redacted form, would enhance this in any way."

The Commissioner's decision

28. When balancing the opposing public interests in a case, the Commissioner will decide whether it serves the public interest better to disclose the requested information or to withhold it because of the interests protected by the relevant exemption.
29. As the complainant has correctly identified, there is no presumption in favour of withholding information unless a "tangible community benefit" of disclosure can be proven. Rather, exempt information may only be withheld if the public interest in maintaining the exemption is stronger than the public interest in disclosure.
30. In reaching a view on where the balance of the public interest lies in this case, the Commissioner has taken into account the nature of the requested information as well as the views of both the complainant and WMP.
31. The Commissioner disagrees with WMP's assertion that no tangible benefit would flow from the disclosure of the incident logs. He considers that there is a presumption running through FOIA that openness is, in itself, to be regarded as something which is in the public interest. He also recognises the general need for transparency and accountability on the part of public authorities which are tasked with enforcing the law.
32. The Commissioner also considers there is a public interest in people being informed about how WMP responds to reported 'hate' incidents which do not constitute criminal offences. He recognises the need for transparency regarding the logging of such incidents, in order to create clear audit trails to assist during learning reviews and for decisions about resource deployment.
33. He also accepts the public interest in knowing whether the collating of information on non-crime matters is an efficient and productive use of policing resources. Disclosure of the information would inform this, by allowing the public to assess the relative seriousness, or triviality, of the reports being logged.
34. However, in carrying out this exercise, appropriate weight must be afforded to the public interest inherent in the exemption. In broad terms, the exemption at section 30(1)(a) exists to ensure the effective investigation of offences. It recognises the need to prevent disclosures that would prejudice either a particular investigation, or investigatory processes generally, including any prejudice to future investigations.

35. The Commissioner recognises the very strong public interest in protecting the investigative capabilities of the police. Having viewed a representative sample of the withheld information, the Commissioner notes that if each incident log was redacted of all personal data (in accordance with the complainant's suggestion), the disclosed information would remain sufficiently specific in terms of detail, language and description, to allow those involved (who would be familiar with the incident and with what was said and done at the time) to recognise themselves. The Commissioner is satisfied that this information would be of value to someone who had been involved in an incident, hadn't been contacted by the police, and wanted to check whether, and what, the police knew about it. He accepts that, in general, disclosure of this type of 'intelligence' information is prejudicial to the police's investigative capabilities, as it can assist potential offenders to evade apprehension – and also possibly put those who reported the matter at risk of some sort of retaliation.
36. The Commissioner also has serious concerns that disclosing information which would render individuals identifiable to one another could create a perception among the wider public that sensitive information obtained during investigations will not be held in confidence and may be disclosed to the world at large, even where evidence and statements have not resulted in a crime being recorded. He considers that there is a real chance this would deter people (particularly complainants and witnesses) from coming forward and cooperating with the police, particularly where hate incidents have been experienced. There is a very significant public interest in avoiding damage to public confidence in hate crime reporting and it is a factor of considerable weight in favour of maintaining the exemption in this case.
37. The Commissioner notes that WMP has disclosed a summary table of logged incidents. He considers that this information goes some way to satisfying the public interest in transparency on hate incident recording. He also notes that the complainant has said it would be instructive to know the extent to which social media arguments feature in the reported incidents. That being the case, he may wish to submit a fresh FOIA request asking for a breakdown of the reports on that basis, if held.
38. On balance, the Commissioner considers that the disclosure of information that could aid potential offenders, or which would deter people from reporting hate incidents, is not justified by the benefit which would flow from the disclosure of the information. For this reason, the Commissioner accepts that the public interest in maintaining the exemption is stronger than that in disclosing the withheld information.
39. Accordingly, the Commissioner is satisfied that WMP was entitled to rely on section 30(1)(a) of FOIA to refuse to disclose the NCHI logs.

40. As section 30(1)(a) of FOIA applies to the information in its entirety, it is not necessary to consider the application of the other exemptions to the same information.

Procedural matters

41. WMP failed to cite any FOIA exemptions in its refusal notice of 24 November 2023. This placed the complainant in the position of having to 'second guess' its reasons for refusal, when submitting his internal review request.
42. This was a breach of section 17(3) of FOIA, which requires public authorities to specify the exemptions being relied on.
43. The Commissioner has made a note of this for monitoring purposes.

Right of appeal

44. 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

45. 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.
46. 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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