

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 14 June 2016

**Public Authority:** Chief Constable of Warwickshire Police  
**Address:** PO Box 55  
Hindlip  
Worcester  
WR3 8SP

#### Decision (including any steps ordered)

---

1. The complainant requested information about communications between the Chief Constables of Warwickshire and Lincolnshire Police for specified periods of time during 2015. Warwickshire Police relied on the exemptions at FOIA sections 31(3) (law enforcement), 40(5) (personal information) and 42(2) (legal professional privilege) to neither confirm nor deny holding the information requested.
2. The Commissioner decided that Warwickshire Police had applied the section 31(3) FOIA exemption correctly in neither confirming nor denying holding the requested information. He therefore did not proceed to consider the section 40(5) and 42(2) FOIA exemptions. He did however find that the delay by the police in issuing a substantive response to the request breached section 17(1) FOIA.
3. The Commissioner does not require Warwickshire Police to take any steps to comply with the legislation.

#### Request and response

---

4. On 3 November 2015, the complainant wrote to Warwickshire Police and requested information in the following terms:

*"Question 1: What contact has Chief Constable Martin Jelley had with Chief Constable Neil Rhodes concerning the case that Warwickshire Police later named Op Beehive?"*

*We would like this part of the request to be broken into two categories.*

*a: All contact for period between May and July 2015. In particular, before CC Jelley, Warwickshire Police agreed to investigate the complaints, take over the investigation.*

*b: All contact after CC Jelley, Warwickshire Police had agreed to investigate the complaints, take over the investigation. We would like this information in chronological order as regards dates of contact as well as reasons.*

*Question 2: What code of conduct / governance / rules and regulations is the Chief Constable Jelley required to follow when it concerns any potential conflicts of interest?*

*Question 3: Is CC Jelley content that there is no potential conflicts of interest relating to his agreeing to take over these complaints (Op Beehive) considering his previous dealing, relationship with CC Rhodes including during Mr Jelley's time at Northamptonshire Police (part of the East Midlands police family) as well as when both Mr Jelley and Mr Rhodes were both members on the same Police Group?*

*Question 4: What meetings, discussions / conversations have taken place between chief constables Jelley and Rhodes concerning the issue of regarding appropriate authority (AA) between 01 May and 03 October 2015.*

*Question 5: What meetings, discussions / conversations have taken place including, correspondence exchanged concerning appropriate authority (AA) between Warwickshire Police and Lincolnshire Police including their Professional Standards and legal departments between 01 May and 03 October 2015."*

5. The Independent Police Complaints Commission defines an appropriate authority as the authority responsible for considering policing complaints (<https://www.ipcc.gov.uk/faq/what-%E2%80%98appropriate-authority%E2%80%99> ).Who is the appropriate authority will differ depending on who the complaint is about. The appropriate authority is either the chief officer of the police force (usually the chief constable) or the Police and Crime Commissioner responsible for the police force complained about (if the complaint is about the chief officer or acting chief officer of the police force).
6. The police responded to the request on 4 December 2012 and neither confirmed nor denied (NCND) holding information falling within the

scope of the request relying on the section 31(3) and 40(5) FOIA exemptions.

7. Following an internal review the police wrote to the complainant on 30 December 2016 upholding its refusal of the request.

## Scope of the case

---

8. The complainants contacted the Commissioner on 30 December 2015 to complain about the refusal of their request.
9. The Commissioner noted that information provided by Warwickshire Police (the police) satisfied part 2 of the request and that part 3 of the request was not a request for recorded information. Accordingly, his investigation, focussed on the police handling of parts 1, 4 and 5 of the request.
10. During the Commissioner's investigation the police maintained their reliance on the section 31(3) and 40(5) FOIA exemptions and the Commissioner considered representations from both the complainants and the police and made enquiries regarding the extent to which relevant information was already in the public domain. He proceeded to determine whether the police were entitled to rely on sections 31(3) and 40(5) FOIA to neither confirm nor deny whether the information requested was held.
11. During the Commissioner's investigation the police additionally cited the section 42(2) (legal professional privilege) FOIA exemption in respect of some of the information asked for in part 5 of the request. Following the combined cases of the *Home Office v Information Commissioner* (GIA/2098/2010) and *DEFRA v Information Commissioner* (GIA/1694/2010) in the Upper Tribunal, a public authority is able to claim a new exemption or exception either before the Commissioner or the First-tier Tribunal and both must consider any such new claims. The Commissioner accepts that this includes new claims for an NCND response.

## Reasons for decision

---

### Section 17 – refusal of request

12. Section 17(1) of the FOIA requires a response refusing an information request to be sent within 20 working days of receipt of the request. In

this case the police failed to respond to the request within 20 working days and, in so doing, breached this requirement of section 17(1).

13. Under section 1(1)(a) of the FOIA, a public authority is obliged to advise an applicant whether or not it holds the requested information. This is known as the "duty to confirm or deny". However, the duty to confirm or deny does not always apply; public authorities may issue a NCND response through reliance on certain FOIA exemptions.

### **Section 31 – prejudice to law enforcement**

14. Section 31 FOIA states that:

*31. - (1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-*

*(a) the prevention or detection of crime,*

*(b) the apprehension or prosecution of offenders,*

*...*

*(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),*

*...*

*(2) The purposes referred to in subsection (1)(g) to (i) are-*

*(a) the purpose of ascertaining whether any person has failed to comply with the law,*

*(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,*

*(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).*

15. Section 31(3) provides that a public authority is not obliged to confirm or deny holding information described in a request if to do so would, or would be likely to, prejudice any of the matters mentioned in section 31(1). The relevant matters in this case are those set out at section 31(1)(a) (the prevention and detection of crime), 31(1)(b) (the apprehension or prosecution of offenders) and 31(1)(g) by reference to 31(2)(a) (the ascertaining of whether any person has failed to comply with the law). This is a qualified exemption, and is therefore subject to a public interest test.
16. The Commissioner did not find any evidence from his investigation to suggest that the information requested or the police operation named

had been released into the public domain by this, or any other, police force or by any of the relevant Police and Crime Commissioners.

17. The issue for the Commissioner to consider in this case is whether confirming or denying that the requested information is held would, or would be likely to, prejudice the prevention or detection of crime, the apprehension or prosecution of offenders, or the ascertaining of whether any person has failed to comply with the law.
18. When considering a prejudice based exemption such as that at section 31(3) FOIA, the Commissioner will identify the applicable interests within the relevant exemption; identify the nature of the prejudice and that the prejudice claimed is real, actual and of substance; show that there is a causal link between disclosure and the prejudice claimed; and, decide whether prejudice would or would be likely to occur.
19. As to whether the exemption is engaged, confirming or denying whether or not the police hold the requested information would effectively confirm whether an investigation was or was not taking place. The police argument was that disclosing such information before the conclusion of any investigation there might be would be likely to jeopardise its success.
20. The complainants said that they did not consider the exemptions cited to be engaged. They did not see how disclosure of information relating solely to contact between chief constables could prejudice or damage an ongoing complaints investigation when those officers were not involved with it. The information requested related to contact between named chief constables, most of which had taken place prior to any investigation commencing.
21. The police said that the information request was predicated upon confirming or denying the existence of an operation/investigation with a specific code name, confirmation or denial of which would reveal the status and scope of any investigation there might be to the detriment of any such investigation. The police stated that operation codenames were used to facilitate the security of police information and that they had no connection with the subject of an investigation and were therefore used as codenames which did not indicate subject matter. The police argued that the more specific the request, the stronger the case there is to provide a NCND response regarding investigations that may, or may not be, ongoing; they said that the questions in this information request were very specific.
22. The police said they had identified the need to adopt a consistent approach to applying NCND responses in relation to investigations that might, or might not be in progress (ie, applying it where information is

or is not in fact held). The police argued that this was vitally important in ensuring that the exemption successfully fulfils its intended purpose. Applied consistently, the application of an NCND response should not indicate whether information either was or was not held.

23. The police added that confirming or denying that they held the requested information would effectively confirm whether an investigation into the matters alluded to in the request was or was not taking place. They argued that disclosing such information before the conclusion of any investigation would be likely to jeopardise its success and undermine its effectiveness. An individual who knew they either were or were not under investigation might alter their behaviour, destroy evidence or otherwise take action to avoid being brought to justice. It might also render certain information inadmissible in court or even impinge upon a defendant's right to a fair trial.
24. Turning to the Commissioner's view, he agrees that in cases where there is an allegation of police corruption or criminal behaviour, it is important that any processes to investigate such allegations are not prejudiced by premature disclosures of information which might assist someone trying to evade justice or which might interfere with the ability of the police to successfully investigate or prosecute a crime. An individual under investigation might be unaware of that fact, and confirmation of the existence of an investigation could alert them, prejudice the gathering of evidence and lead persons of interest to the police to alter their behaviour, destroy evidence or take other evasive action. It might also render certain information inadmissible in court or even impinge upon a defendant's right to a fair trial.
25. The Commissioner recognises the importance of adopting a consistent approach to applying NCND responses, applying them both in instances where information is and is not held, to ensure that the exemption successfully fulfils its purpose. Applied consistently, the application of an NCND response should not indicate whether or not information is held.
26. The police provided the Commissioner with additional confidential submissions to further support its position. He has considered these but has not relied upon them for his decision as the case for a NCND response is made without reference to them.
27. Having regard to all the information and evidence provided, the Commissioner is satisfied that to confirm or deny holding the information would be likely to prejudice the matters identified at sections 31(1)(a) and (b) and 31(1)(g) (by reference to 31(2)(a) and (b)). He therefore decided that the exemption at section 31(3) is engaged.

## **Public interest**

28. Section 31(3) FOIA is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in confirming or denying whether information is held outweighs that in issuing an NCND response.
29. The police acknowledged the public interest in transparency about the decisions made regarding policing operations and about providing accountability and assurance that the force is appropriately and effectively engaging with the threat of criminal activity and any conduct which is improper. There is therefore a public interest in confirming or denying whether the information is held.
30. In favour of maintaining the exemption and continuing to NCND holding the requested information, the police argued that there is a strong public interest in protecting their ability to investigate allegations of criminal and improper conduct and gather evidence which may subsequently be used in further proceedings. The Commissioner agrees that for the public to have confidence in police forces it is vital that internal investigations can be carried out thoroughly and without outside interference which might jeopardise those investigations.
31. The police argued that this sometimes entailed concealing the existence of investigations until such time as they had been concluded. They reiterated that the NCND approach could only be effective if applied consistently to cases where investigations both were and were not taking place.
32. The Commissioner recognised the need to ensure transparency and accountability on the part of the police. However he found that there is a stronger public interest in protecting the ability of the police to ensure that any investigations taking place were not compromised while they were in progress. To do so would not serve the interests of justice, which sometimes entails concealing the existence of investigations until such time as they have concluded. Such an approach can only be effective if it is applied consistently, in cases where investigations both are and are not taking place.
33. Since the Commissioner considers that the public interest in issuing a NCND response outweighs that in confirming or denying whether the requested information was held, he is satisfied that the police were entitled to maintain a NCND response for the section 31(3) FOIA exemption in respect of parts 1, 4 and 5 of the information request.

34. In the light of this finding, the Commissioner did not proceed to consider the application by the police of the section 40(5) and 42(2) FOIA exemptions.



## Right of appeal

---

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: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.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 .....**

**Jon Manners**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**