

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 April 2013

Public Authority: Police and Crime Commissioner for North Yorkshire¹

Address: PO Box 106, Ripon
HG4 5WA

Decision (including any steps ordered)

1. The complainant requested a copy of a report relating to the re-assessment of injury pensions paid out to retired police officers.
2. The Commissioner's decision is that the public authority did not correctly engage the exemption at section 36(2)(c) FOIA in relation to the entirety of the report. However, he finds that the public authority was entitled to withhold a small portion of the report on the basis of section 40(2) FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the report with the exception of paragraphs 2.6, 2.7 and 3.2 which were correctly withheld on the basis of section 40(2) FOIA.
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.

¹ The complaint was actually made against North Yorkshire Police Authority which was replaced by the Police and Crime Commissioner for North Yorkshire on 22 November 2012.

Request and response

5. On 13 August 2012, the complainant wrote to the public authority and requested information in the following terms:

'I have noted that the NYPA website indicates that within the private Business section of the Policy and Planning Board meeting on the 8th June 2012 that there was a report marked "circulated to member only" which related to a paper "Review of injury on duty". The report had been prepared by the Chief Officer of Resources. I would be grateful if you could, whether under the provisions of the Freedom of Information Act or otherwise, provide me with a copy of the report and any other associated documents. If you say that the report is exempt from publication under the LGA, please provide me with the full legal basis and arguments upon which any exemption is relied upon by NYPA to withhold publication....'

6. The public authority responded on 13 August 2012. It explained that the information requested (i.e. the report entitled 'Review of injury on duty') was exempt information as defined in paragraph 3 Part 1 of Schedule 12A to the Local Government Act 1972 (LGA 1972). However, it did not consequently apply any FOIA exemptions as it is statutorily required to if withholding information from disclosure under FOIA.
7. Following an internal review, the public authority wrote to the complainant on 24 August 2012. It maintained the decision to withhold the report on the basis of the LGA 1972.

Scope of the case

8. On 27 August 2012, the complainant contacted the Commissioner to complain about the way his request for information had been handled. However, the complaint was not deemed eligible for investigation until 12 November 2012 after the complainant had provided the documents required.
9. The complainant argued that a number of public interest factors favour the disclosure of the report under the LGA 1972.

10. However, although the public authority withheld the disputed information under the LGA 1972, the Commissioner requested detailed submissions in support of the decision not to disclose the report under FOIA.²
11. In response, the public authority claimed that the report was exempt from disclosure on the basis of section 36(2)(c) FOIA. It additionally claimed that part of the report was exempt on the basis of section 40(2) FOIA.
12. Therefore, the scope of the investigation was to determine whether the public authority was entitled to withhold the report from disclosure on the basis of the exemptions at sections 36(2)(c) and/or 40(2) for the specific information in the report withheld on the basis of that exemption.

Reasons for decision

Section 36(2)(c)

13. Information is exempt from disclosure on the basis of section 36(2)(c) if, in the reasonable opinion of a qualified person, disclosure of the information would prejudice, or would be likely to prejudice, the effective conduct of public affairs.
14. The public authority claimed that its reasons for withholding the report on the basis of the LGA 1972 are effectively mirrored by the exemption at section 36(2)(c).
15. However, the decision to engage section 36(2)(c) must be made by a *qualified person*. Section 36(5) FOIA describes a qualified person for the purposes of FOIA. The public authority explained that at the time of the request, North Yorkshire Police Authority had not authorised a qualified person within the meaning of FOIA. It also suggested that the office of the Police and Crime Commissioner did not have a qualified person.

² The Commissioner's remit which is set out in section 50 FOIA is to investigate whether a request has been dealt with in accordance with the requirements of Part I FOIA. Unless the request for information was made under the terms of FOIA, the Commissioner cannot consider relevant provisions of the LGA 1972.

16. In view of the above, the Commissioner finds that the public authority was not entitled to rely on the exemption at section 36(2)(c). The exemption was clearly not engaged on the basis of the reasonable opinion of a qualified person within the meaning of FOIA.

Section 40(2)

17. As mentioned, the public authority relied on the exemption at section 40(2) to withhold a small portion of the report. The relevant information consists of information relating to a specific number of retired police officers. The report relates to the re-assessment of injury pensions paid out by North Yorkshire Police Authority to retired police officers.
18. Although the retired police officers are not mentioned in the report, the public authority claimed that the complainant could easily identify them given that he is also a retired police officer and has campaigned against the decision by North Yorkshire Police Authority to re-assess injury pensions. The public authority specifically identified the information at paragraphs 2.6, 2.7 and 3.2 of the report as exempt on the basis of section 40(2).
19. Information is exempt from disclosure on the basis of section 40(2) if it constitutes third party personal data (i.e. the personal data of an individual other than the person making the request) and either the first or second condition at section 40(3) is satisfied.
20. The first task for the Commissioner therefore is to determine whether the information at paragraphs 2.6, 2.7 and 3.2 constitutes the *personal data* of the relevant retired police officers.
21. Personal data is defined in section 1 of the Data Protection Act 1998 (DPA) as:

'.....data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual.'
22. The total number of retired police officers in question is within the range of 1 to 10. The complainant is also a retired police officer who had previously worked for North Yorkshire Police. He has also campaigned against the re-assessment of injury pensions by North Yorkshire Police Authority.

23. The public authority confirmed that the names of the retired police officers referred to in the report had not been made public at the time of the request.
24. The Commissioner accepts that the retired police officers could be easily identified from the information at paragraphs 2.6, 2.7 and 3.2 of the report. Given the very small number of retired police officers involved, it is very likely that other retired police officers (including the complainant) affected by the re-assessment of injury pensions could easily identify them from the relevant information. It is also conceivable that serving police officers at North Yorkshire Police could identify them from the same information.
25. The Commissioner therefore finds that the information at paragraphs 2.6, 2.7 and 3.2 constitutes the personal data of the retired police officers because it is information which relates to them and from which, in the circumstances of this case, he believes they could be identified from.

Would the disclosure of the information at paragraphs 2.6, 2.7 and 3.2 contravene any of the data protection principles?

26. As mentioned, for section 40(2) to apply, either the first or second condition in section 40(3) must be satisfied. The first condition in section 40(3) states that disclosure of personal data would contravene any of the data protection principles or section 10 of the DPA.
27. The public authority claimed that the disclosure would be unfair and would further expose it to a 'potential breach' of the second, sixth and seventh data protection principles. However, it did not go on to fully explain why it considered disclosure would be unfair or contravene any of the other data protection principles mentioned.³
28. The Commissioner first considered whether disclosure would be unfair and consequently contravene the first data protection principle.
29. The first data protection principle states:

'Personal data shall be processed fairly and lawfully and, in particular shall not be processed unless-

³ The Commissioner has produced detailed guidance on the application of section 40 and the public authority was provided with the relevant web links to view the guidance.

At least one of the conditions in schedule 2 [DPA] is met..'

30. In considering whether a disclosure is fair under the first principle of the DPA for the purposes of section 40 FOIA, it is useful to consider the reasonable expectations of the data subjects (in this case, the retired police officers referred to in the report) in light of the circumstances in which their personal data was obtained.
31. It is clear that disclosure is highly likely to lead to the identification of the retired police officers. Given that it is information which relates to both their financial and medical records, the data subjects would reasonably expect it not to be shared with the wider public. The information also relates to details of a process (i.e. re-assessment of injury pensions) which the data subjects would have reasonably assumed was confidential.
32. Therefore, disclosure would have been unfair to the data subjects given the nature of the information and their reasonable expectations in light of the circumstances in which the information was produced.
33. The Commissioner finds that disclosure would have contravened the first principle of the DPA, and consequently section 40(2) was correctly engaged.

Procedural Breaches

34. By virtue of section 17(1) FOIA, a public authority claiming that information is exempt information must, within 20 working days, issue a refusal notice to that effect specifying the exemption in question and if not otherwise apparent, also state why the exemption applies.
35. The Commissioner finds the public authority in breach of section 17(1) for failing to inform the complainant at the time of the request that it considered the report exempt from disclosure on the basis of the FOIA, in this case sections 36(2)(c) and 40(2), rather than Schedule 12A to the LGA 1972.

Right of appeal

36. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

37. 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.
38. 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

Alexander Ganotis
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