

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

### **Decision notice**

**Date:** 12 October 2015

**Public Authority:** Chief Constable of Devon and Cornwall Police

**Address:** Police Headquarters  
Middlemoor  
Exeter  
Devon  
EX2 7HQ

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

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1. The complainant has requested information about a police investigation that was conducted into an allegation of corruption against a former local councillor. Devon and Cornwall Police ("the Constabulary") refused the request on the grounds that the requested information was exempt under section 40(2) (personal information) and section 30(1) (investigations and proceedings).
2. The Commissioner's decision is that the Constabulary was entitled to rely upon section 40(2) to withhold the requested information. However, he found that the Constabulary did not comply with the requirements at 17(2) (refusal of request) and that it did not act in accordance with the code at section 45 (internal reviews).
3. The Commissioner requires no steps to be taken.

#### **Background**

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4. A former local councillor was the subject of a national newspaper article about remarks he allegedly made about obtaining planning permission. The Council referred the councillor's comments to the police, under the Bribery Act 2010, and its own policy on fraud, theft and anti-corruption. It asked the Constabulary to investigate whether the councillor had committed a criminal offence. The existence of the Constabulary's investigation was reported by local media. At the end of the investigation the Constabulary decided to take no action against the councillor and it issued a press release confirming this.

## Request and response

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5. On 14 November 2014, the complainant submitted the following request for information to the Constabulary:

*"Now that the police investigation is officially complete, can you please provide copies of all correspondence relating to [name of subject of investigation] between Devon and Cornwall Police and East Devon District Council."*

6. The Constabulary issued a refusal notice on 12 December 2014. It stated that a qualified exemption was engaged (although it did not identify which one) and that in accordance with section 17(2) of the FOIA it was extending the deadline for responding by 20 working days, pending the completion of a public interest test.
7. The Constabulary issued a final refusal notice on 14 January 2015. It stated that the requested information was exempt under section 40(2) (personal information) and section 30(1) (investigations and proceedings). It found that for section 30(1), the public interest in maintaining the exemption outweighed that in disclosing the information.
8. The complainant requested an internal review of the Constabulary's decision on 14 January 2015, but he did not receive a valid response until 15 April 2015. The internal review upheld the decision communicated on 14 January 2015.

## Scope of the case

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9. The complainant originally contacted the Commissioner on 13 March 2015 to complain about the Constabulary's failure to conduct an internal review. He subsequently asked the Commissioner to consider the Constabulary's decision to withhold the requested information, and the delays in dealing with his request.
10. The complainant said that he was particularly concerned that the Constabulary appeared to have disclosed to the Council information about the assistance that a named individual and a campaign group (of which the complainant was a member) had provided to the police investigation. He felt that any such disclosure (if it took place) was highly improper, as the assistance had been provided in confidence. It was against this background that he asked to see what correspondence had passed between the Constabulary and the Council in relation to the criminal investigation.

11. From the complainant's submissions, the Commissioner understands his primary concerns to be:
  - whether the Constabulary disclosed information to the Council about the assistance the complainant's campaign group and the named individual had provided with the investigation;
  - what information was disclosed; and
  - why any information was disclosed, in view of the Constabulary's internal policies on data sharing which appeared to state that such information would be held in confidence.
12. However, when considering whether a request for information has been dealt with in compliance with the FOIA, the Commissioner must look at the actual wording of the request. In this case, the request asks for copies of all correspondence between the Constabulary and the Council relating to the criminal investigation of the former councillor, and it is the Constabulary's response to that specific request which must be considered.
13. The Commissioner therefore considers the scope of this decision notice to be the Constabulary's application of section 40(2) to withhold the correspondence between it and the Council about the criminal investigation, and elements of its procedural handling of the request.

## **Reasons for decision**

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### **Section 40(2) – personal data**

14. Section 40(2) of the FOIA provides an exemption in relation to information that constitutes the personal data of any individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles of the Data Protection Act 1998 ("the DPA").
15. Consideration of this exemption is a two-stage process: first, whether the information requested constitutes personal data; and secondly whether disclosure of that personal data would be in breach of any of the data protection principles.
16. Looking firstly at whether the information requested constitutes personal data, section 1(1) of the DPA defines personal data as follows:

*"personal data' means data which relate to a living individual who can be identified:*

*(a) from those data, or*

*(b) from those data and any other information which is in the possession of, or is likely to come into the possession of, the data controller".*

17. The information specified in the request is correspondence between the Constabulary and the Council relating to a criminal investigation into a named individual. The Constabulary has confirmed that the correspondence with the Council formed part of its investigation of the allegations against the individual.
18. The Commissioner considers that the wording of the request specifically identifies an individual (the former councillor who was the subject of the investigation) and that the requested information relates to him in his personal capacity. He is therefore satisfied that it constitutes personal data about him.
19. Section 2 of the DPA sets out categories of personal data that are classed as 'sensitive' for the purposes of that Act. Based on the wording of the request, the Commissioner is satisfied that the personal data in question here would constitute sensitive personal data as defined by section 2(g) of the DPA (information about the commission or alleged commission of an offence, by the data subject).
20. When determining whether sensitive personal data may be disclosed it is necessary to consider whether the disclosure would be fair, before turning to whether schedule 2 (processing of any personal data) and schedule 3 (processing of sensitive personal data) conditions also exist which would permit the disclosure.
21. In assessing fairness, it is necessary to consider the likely consequences of disclosure in each particular case. Personal data must be processed fairly and not used in ways that have unjustified adverse effects on the individuals concerned.
22. As noted above, the withheld information in question comprises sensitive personal data. Sensitive personal data has, by its very nature, been deemed by the DPA to be the most private information about identifiable individuals and in most cases the very nature of sensitive personal data means it is highly likely that disclosing it will be unfair.
23. In this case, the sensitive personal data comprises information about allegations of the commission of a criminal offence by the councillor and the Constabulary's investigation of him. The Commissioner notes that the evidence in support of the allegations was never tested in court,

because the Constabulary decided to take no action. The allegations therefore remain unsubstantiated.

24. In his exchanges with the Constabulary, the complainant has indicated that he would be prepared for the Constabulary to redact operationally sensitive material, if this means that information which addresses the concerns outlined in paragraphs 10 – 11, above, could be disclosed to him. However, these concerns were not part of the actual wording of the FOIA request which the Commissioner is considering. Furthermore, the Commissioner is mindful that whilst a requester may be aware that information does or does not exist because of their involvement in particular events, it does not follow that the wider public is also aware of the existence of that information. It must be borne in mind that disclosure under the FOIA is disclosure to the world at large and not to interested parties only.
25. Taking all the above into account, the Commissioner is satisfied that in this case disclosure of the sensitive personal data could be highly detrimental and distressing to the councillor. He considers that since no charges were ever brought against him, the councillor would have a legitimate expectation that the precise details of the investigation carried out by the Constabulary would remain confidential. He would also have the reasonable expectation of being able to move on with his life without information about the allegations against him and their subsequent investigation being placed afresh in the public domain. Even partial disclosure, particularly in the context of the requester pursuing procedural concerns about the investigation which are unconnected to the councillor, would be invasive and unwarranted. The Commissioner is therefore satisfied that the disclosure of the sensitive personal data would be unfair and in breach of the first data protection principle of the DPA.
26. Because the Commissioner is satisfied that the disclosure would be unfair, it has not been necessary to go on to determine whether schedule 2 or 3 of the DPA provides a basis for processing the sensitive personal data. Nevertheless, even without resorting to a detailed analysis, he considers it highly unlikely that a condition for processing personal data of this kind would be available.
27. Because section 40(2) is engaged, the Commissioner has not deemed it necessary to go on to consider the Constabulary's application of section 30(1).

### **Section 17: refusal notice**

28. Where a public authority determines that a qualified exemption is engaged, section 17(2) of the FOIA permits it to extend the time for

compliance to consider whether the public interest favours maintenance of the exemption or disclosure of the information. However, it is required to issue a refusal notice that complies with the requirements of section 17(1) and which explains this to the complainant.

29. Section 17(1)(b) states that a refusal notice must specify the exemption in question. The Constabulary's refusal notice dated 12 December 2014 did not specify the exemption which it considered to be engaged and therefore it was not in accordance with section 17(2) of the FOIA.

#### **Section 45: internal review**

30. There is no obligation under the FOIA for a public authority to provide an internal review process. However, it is good practice to do so, and where an authority chooses to offer one the section 45 code of practice sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
31. In this case the complainant requested an internal review on 14 January 2015, but did not receive a response. He contacted the Commissioner and on 18 March 2015 the Commissioner asked the Constabulary to complete the review. The Constabulary responded to the complainant on 24 March 2015. However, its letter appeared to be a partially completed, draft document, and it did not clarify what the outcome of the internal review was. The Constabulary later explained to the Commissioner that the letter had been sent in error. Following further intervention from the Commissioner, the Constabulary issued an internal review on 15 April 2015, more than 60 working days after it was first requested.
32. The Commissioner considers that in failing to conduct an internal review within the timescales set out above, the Council has not conformed with the section 45 code.

## **Other Matters**

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33. The Commissioner notes that the complainant's primary concern in making the request was to ascertain whether the Constabulary had acted improperly by disclosing information about his campaign group's involvement in the investigation, and that of another individual, to the Council (if indeed it had).
34. Any complaint that the Constabulary had improperly disclosed the personal data of an individual would need to be made to the Commissioner by the individual concerned and would fall to be considered under the DPA. However, the Commissioner is not aware that any such complaint has been received by his office.
35. As noted in paragraph 11 above, the Commissioner's consideration of this complaint is restricted to whether the Constabulary complied with the FOIA in the way it dealt with the request. He cannot look at wider questions of the Constabulary's compliance with its own internal policies and procedures on how it conducts investigations. If the complainant remains concerned that the Constabulary acted improperly by disclosing to the Council confidential information obtained in the course of a criminal investigation, such concerns should be directed either to the Constabulary's professional standards department or the Independent Police Complaints Commission for consideration.

## Right of appeal

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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: 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)

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 .....**

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