

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

### **Decision notice**

**Date:** 22 August 2017

**Public Authority:** Police & Crime Commissioner for West Yorkshire

**Address:** Ploughland House  
62 George Street  
Wakefield  
WF1 1DL

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

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1. The complainant has requested the report of an investigation conducted by Lancashire Constabulary at the request of the West Yorkshire Police and Crime Commissioner into certain allegations made against a former Chief Constable of West Yorkshire Police; he also requested associated emails.
2. The Information Commissioner decided that the West Yorkshire Police and Crime Commissioner has applied the section 31(1)(c) FOIA (law enforcement) exemption correctly. In the light of her findings in relation to section 31 FOIA, the Commissioner did not proceed to consider the application by the West Yorkshire Police and Crime Commissioner of other FOIA exemptions cited.
3. The Information Commissioner decided that in delaying a substantive response the West Yorkshire Police and Crime Commissioner had breached section 10(1) FOIA (time for compliance) and section 17(1) FOIA (refusal of request). She further decided that the West Yorkshire Police and Crime Commissioner had not breached the section 45(1) FOIA code of practice in carrying out its internal review of the matter.
4. The Commissioner does not require the public authority to take any further steps to comply with the legislation.

## Request and response

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5. Operation Barium was the operational name given to an investigation conducted by Lancashire Constabulary at the request of the West Yorkshire Police and Crime Commissioner (the PCC) into certain allegations made against the then Chief Constable of West Yorkshire Police. The information request was for a written report, produced by Lancashire Constabulary for the PCC (the report), together with emails generated in connection with the commissioning and conduct of the Lancashire Constabulary investigation.
6. On 21 September 2016, the complainant wrote to the PCC through the What Do They Know website (WDTK) and requested information in the following terms:

*"Please provide:*

  1. *A copy of the Operation Barium investigation report.*
  2. *Copies of emails between Lancashire Police and WYOPCC where the subject was*

*either:*

  - (a) [name redacted]
  - (b) *Operation Barium".*
7. On 19 October 2016 the PCC responded to say that it was unable to confirm or deny whether the requested information was held and that it needed more time to conduct a public interest test. However, the PCC did not say which FOIA exemption(s) it intended to rely upon and did not refer to its previous public statements which had said that it intended to publish as much of the Operation Barium report as it could. Following a review, the PCC confirmed on 10 November 2016 that it needed more time to consider the public interest test given the complexity of the information and necessary legal considerations. The PCC reaffirmed its position again on 17 and 30 November 2016 and 13 January 2017.
8. The PCC did not respond substantively until 11 May 2017 when, following intervention by the Information Commissioner, it confirmed that information within the scope of the request was held and apologised to the complainant for the long delay in responding substantively. The PCC said that the requested information was exempt from disclosure by virtue of the exemptions at section 31(1) (law enforcement), section 40(2) (personal information), section 30(2) (investigations and

proceedings conducted by public authorities) and section 42(1) (legal professional privilege) FOIA.

9. Also on 11 May 2017 the PCC said that the matter had been complicated since November 2016 by objections to disclosure of the report which it had received from third parties who had intimated that connected civil proceedings might be issued against the PCC. The PCC added that civil proceedings had now been issued in which the question of publication of the report was an issue. The PCC said that this development had engaged the section 31(1)(c) FOIA exemption, prejudice to the administration of justice. The PCC indicated that, following conclusion of the relevant court proceedings, a different decision might be arrived at with regard to disclosure.
10. Following an internal review by two independent members of the PCC's Joint Independent Audit and Ethics Committee the PCC wrote to the complainant on 16 June 2017 saying that, after due consideration, the members had agreed not to uphold his appeal. The PCC said that the reviewers had been assured that the request was being progressed and, had it not been for a legal challenge, the request for disclosure of the investigation report would in all likelihood have been finalised earlier this year. The reviewers had noted that, on conclusion of the civil proceedings, the risk of prejudice might have changed and a different decision might then be taken. By association, the reviewing members also agreed that the relevant emails between the PCC and Lancashire Constabulary should not be disclosed at this stage.

## Scope of the case

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11. The complainant contacted the Commissioner on 10 January 2017 to complain about the way his request for information had been handled. He complained of delay and of an alleged failure by the PCC to address adequately the heads of his complaint.
12. The complainant made representations to the Commissioner about the application of the section 31 FOIA exemption. He also made representations about the exemptions in sections 30, 40 and 42 FOIA and about the PCC's internal review procedure.
13. The Commissioner, in her investigation, has considered the representations received from the complainant and the PCC in relation to the section 31(1)(c) FOIA exemption. She has had regard for some relevant information that emerged during her own researches, also for WDTK entries which the complainant drew to her attention. In the light of her analysis, the Commissioner did not consider it necessary to follow her normal practice of reviewing the withheld information on this

occasion. She has also considered the PCC's compliance with sections 10(1) (time for compliance), 17(1) (refusal of request) and 45(1) (code of practice) FOIA.

## Reasons for decision

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### Section 31 – law enforcement

14. Section 31(1)(c) FOIA provides an exemption where disclosure of the relevant information would, or would be likely to, prejudice the administration of justice.
15. For this exemption to be engaged, disclosure must be at least likely to prejudice the administration of justice. The exemption is qualified by the public interest which means that, if the public interest in maintenance of the exemption does not outweigh the public interest in disclosure, the information must be disclosed.
16. The exemption applies where disclosure *"would or would be likely"* to cause prejudice. The approach of the Commissioner is that she will accept that prejudice *would* occur where that outcome is more probable than not. That is the test that she has applied here.
17. The complainant, in his evidence to the Commissioner, said that it was not apparent to him that disclosure of the requested information would prejudice the administration of justice. He said that the exemption could not reasonably be engaged; a Judicial Review application was, in almost every case, dealt with on the papers by a single judge. Raising issues of prejudice, or the ability of the parties to consider the relevant matters in the event of the report being disclosed under FOIA were "red herrings".
18. The complainant added that connected civil proceedings would take their judicial course with, or without, FOIA disclosure; the two were not inter-dependent. He added that the pleadings in the civil proceedings would be public documents; they would be available upon request and after payment of the requisite fee. The pleadings would, he inferred, contain sufficient references to the contentious parts of the report for the remainder to be pieced together from other information that was already in the public domain.
19. In this case the PCC said that prejudice *would* result through disclosure. In explaining its position that prejudice would occur, the PCC told the Commissioner that the Administrative Court was now fully seized of a matter which arose from an application being brought by a third party against the PCC for Judicial Review. The application had been made in April 2017, and the claimant had been given permission to proceed with

his application in full. The PCC said that the Court should not be fettered in its ability to consider the application by the claimant and the remedies sought by him. The Court had given permission for all of the issues raised to be heard, including an application to stay publication until the relevant issues have been resolved which included restrictions on publication of the report. If, by the time the matter came before the Court, the report had already been disclosed then the ability of the Court to determine the issue of publication would have been undermined, and the Court's jurisdiction on that aspect rendered redundant. The PCC said that disclosure manifestly *would* prejudice the administration of justice.

20. The PCC added that the Court had listed the claimant's application for hearing on 1 and 2 November 2017. On conclusion of these proceedings, the PCC proposed to review the issue of publication in light of such rulings as may by then have been made by the Court.
18. The PCC added that the difficulty which had arisen for it in this case was essentially a matter of timing. The PCC said it had already indicated that it proposed to publish so much of the report as would be proper. The PCC had also told the complainant on 11 May 2017 that if an application for disclosure of the report and accompanying documentation were to be made following conclusion of these proceedings, a different decision might result.
21. The Commissioner has seen that the application for Judicial Review proceedings was made in April 2017. This was well after the date of the information request but before the PCC issued a valid refusal notice on 11 May 2017. She has seen that the application was still pending on 16 June 2017 when the outcome of the PCC's internal review was confirmed to the complainant.
22. The Commissioner has had regard for the complainant's arguments that publication of the report at the relevant dates of 11 May and 16 June 2017 would not interfere with the administration of justice. However she has also noted the PCC's concerns that premature publication would fetter the discretion of the Court hearing the Judicial Review application by restricting the remedies available to it. She accepted that premature publication of the report would interfere with the administration of justice and so decided that the section 31(1)(c) FOIA exemption was engaged.

### **Balance of the public interest**

23. The section 31 FOIA exemption is qualified and the Commissioner considered whether or not the balance of the public interest favoured maintaining the exemption.

24. The complainant said that the balance of the public interest favoured disclosure because there was plausible suspicion of wrongdoing. He said that the then Chief Constable had retired from the force shortly after the report was finalised and, from that point on, had placed himself beyond the scope of any misconduct proceedings. This served only to heighten the public interest in the findings of the report and underlined what he regarded as the need to shine light upon that which the PCC was seeking to conceal.
25. The PCC said that it did intend to publish the report at a time when it would be proper to do so but invited the Commissioner to conclude that the exemption contained in section 31(1)(c) FOIA should be maintained for the duration of the Judicial Review proceedings.
26. The Commissioner has considered the evidence from the complainant of allegations of wrong doing and the strong public interest in disclosing the report if that would aid the understanding of the general public about an important matter.
27. She has also noted the clear commitment by the PCC to disclose the report, redacted as necessary, when the Judicial Review proceedings had been concluded. There is therefore considerable common ground between the parties about the desirability of disclosure, the issue dividing them is largely one of what can be disclosed when.
28. The Commissioner noted the PCC evidence that prejudice to the administration of justice “would” result from premature disclosure. She considered that this strengthens the case for maintaining the exemption.
29. The Commissioner recognised that there is a very strong public interest in ensuring that the Court is able to administer justice without being constrained in the remedies available to it by premature publication of the report and the associated correspondence. This led her to decide that the public interest in the administration of justice would be best served by maintaining the section 31(1)(c) FOIA exemption.

### **Section 17 – refusal of a request**

30. Section 17(1) FOIA provides that if a public authority is going to withhold requested information, it must inform the applicant of its reasons and specify the exemption(s) in question within the statutory time limit.
31. In its initial responses to the complainant, the PCC refused the 21 September 2016 request saying it intended to carry out a public interest test. However the PCC did not specify which qualified FOIA exemption(s) it proposed to rely on. This was not done until, following intervention by the Commissioner, the PCC eventually issued a refusal notice on 11 May 2017 which, aside from its timing, did meet the requirements of section 17(1)

FOIA. The Commissioner therefore decided that the PCC had breached section 17(1) FOIA.

### **Section 10 – Time for compliance**

32. Section 10(1) FOIA requires a public authority to respond to a request for information and comply with section 1(1) FOIA within 20 working days following the receipt of the request.
33. In this case the request was submitted on 21 September 2016 but the PCC did not provide a refusal notice, which complied with the requirements of section 17(1) FOIA, until 11 May 2017 and only then following intervention from the Commissioner. This was far outside the statutory 20 working day timeframe required by section 10(1) FOIA. The Commissioner therefore found that the PCC had breached section 10(1) FOIA.

### **Section 45 – code of practice**

34. 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 a public authority chooses to offer one, the section 45(1) FOIA code of practice (the code) sets out, in general terms, the procedure that should be followed.
35. The code states that reviews should be conducted promptly and within reasonable timescales. There should be a fair and thorough review of handling issues and of decisions taken pursuant to FOIA. There should be a fresh decision taken on a reconsideration of the relevant factors. The review should be undertaken by someone who did not deal with the request and preferably by someone senior to the person who took the original decision where this is reasonably practicable. There should be a full re-evaluation of the matter, taking into account the matters raised by investigation of the complaint. The code does not specify any qualifications that the reviewers should hold.
36. On 10 January 2017 and again on 19 June 2017, the complainant raised with the Commissioner his concerns about the adequacy of the PCC's internal review process. In the opinion of the complainant the members reviewing his complaint were not information or data practitioners and were not, he said, capable of dealing with an issue of this nature. Their review could, he said, "be characterised as a 'whitewash' in the best [former] West Yorkshire Policing Authority traditions".
37. The PCC said that its review had been conducted by two independent members of its Joint Independent Audit and Ethics Committee on 12 June 2017. The members had not had previous involvement in this matter.

38. The Commissioner considered the representations from the complainant about what he regarded as deficiencies in the internal review process but did not see in them evidence that the guidelines set out in the code had not been followed. The internal review process, including the choice of reviewers and their qualifications, is a matter for the PCC alone. Accordingly she did not find that the PCC had breached the code of practice and did not uphold that aspect of the complaint.

### **Other matters**

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39. As well as issuing this notice, the Commissioner has made a separate record of the failure by the PCC to respond to the complainant's request within the statutory timescale. This issue may be revisited should evidence from other cases suggest that this is necessary.



## Right of appeal

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40. 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)

41. 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.
42. 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**  
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