

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 March 2020

Public Authority: Chief Constable of Leicestershire Police
Address: Force Headquarters
St Johns
Enderby
Leicester
LE19 2BX

Decision (including any steps ordered)

1. The complainant has requested a copy of a post mortem of the body of a fox found at a hunt meeting. Leicestershire Police refused the request on the grounds that the requested information was exempt from disclosure under sections 30(1)(a),(b) and (c) (investigations and proceedings) of the FOIA.
2. The Commissioner's decision is that section 30(1)(a)(i) of the FOIA is engaged and the public interest favours maintaining the exemption. However, by failing to respond to the request within the twenty working day statutory time for compliance, Leicestershire Police breached section 1 and section 10 of the FOIA.
3. The Commissioner requires no steps as a result of this decision.

Request and response

4. On 20 June 2019, the complainant wrote to Leicestershire Police and requested information in the following terms:

"I'm writing to request a copy of the post-mortem undertaken on behalf of or by Leicestershire Police for a fox handed to PC [name redacted] & PC [name redacted] on 16th February 2019. The body was retrieved by hunt saboteurs on this date near Owston Road at approximately SK 78265 09713.

Leicestershire Police subsequently confirmed that a post-mortem had been undertaken in a statement given to the Leicester Mercury on 20/06/2019: www.leicestermercury.co.uk/news/leicester-news/police-reveal-results-post-mortem-2998127."

5. Leicestershire Police responded on 24 July 2019. It confirmed that it held the requested information but said that it was exempt from disclosure under sections 30(1)(a),(b) and (c) of the FOIA, with the public interest favouring maintaining the exemption.
6. Following an internal review, Leicestershire Police wrote to the complainant on 30 December 2019. It upheld its decision to apply sections 30(1)(a),(b) and (c) of the FOIA to withhold the requested information.

Scope of the case

7. The complainant contacted the Commissioner on 7 January 2020 to complain about the way his request for information had been handled. He argued that the request was for environmental information and thus that the Environmental Information Regulations 2004 ('the EIR') were the applicable access regime, rather than the FOIA. He also disagreed with Leicestershire Police's application of section 30 of the FOIA to refuse the request.
8. The analysis below considers the question of the applicable access regime. Having concluded that the FOIA is the applicable regime, the Commissioner has then considered whether sections 30(1)(a),(b) and (c) of the FOIA have been applied appropriately. The Commissioner has also considered Leicestershire Police's compliance with section 10 (time for compliance) of the FOIA. She has commented on its handling of the internal review in the 'Other matters' section, at the end of this notice.
9. The Commissioner has viewed the withheld information when making her decisions in this matter.

Reasons for decision

Applicable access regime – FOIA or EIR

10. The complainant argued that the request fell to be dealt with under the EIR, and not the FOIA, referring the Commissioner to a previous decision notice in which he said information about fox hunting had been treated as falling under the EIR:

"Paragraph 13 of FER0587279, however, states that 'In the Commissioner's view, fox hunting would have an effect on biological diversity, as it would likely lead to a decrease in fox numbers which would have implications for the food-chain and flora.' so it follows, in my view, that information relating to the deaths of individual foxes should be considered environmental, even when the information is gathered as part of a criminal investigation as enforcement of the Hunting Act 2004 is a matter which can affect the numbers of foxes and thus affect other fauna & flora, as well as indicating patterns of the treatment of wild red foxes, which is the ICO's criteria for considering fox hunting to be environmental information in FER0587279. Individual red foxes themselves fauna/wild animals as well and so even without knock-on effects to the wider environment, information relating to them should be considered to be environmental information within reason."

11. The Commissioner does not agree with the complainant's assessment in this case. Information is 'environmental information' and must be considered for disclosure under the terms of the EIR rather than the FOIA if it meets the definition set out in regulations 2(1)(a) to 2(1)(f) of the EIR:

"environmental information' has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;*
- (d) reports on the implementation of environmental legislation;*
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c)".

12. The Commissioner notes that in the case referred to by the complainant, the request was specifically for details of discussions on the impact of hunting on the countryside. Its focus was therefore on the extent to which fox hunting impacted on the factors described in (at least) regulation 2(1)(a) of the EIR.
13. By contrast, the focus of the information requested in this case is the post mortem of a fox, following an allegation that it was caused by hounds used in illegal hunting. There is no focus, either in the request, or the information itself, on the state of the wider environment and the Commissioner therefore cannot identify any grounds under regulations 2(1)(a) to 2(1)(f) for the withheld information meeting the definition of "environmental information".
14. The Commissioner is therefore satisfied that the request fell to be considered under the FOIA.

Section 1 – general right of access

Section 10 - time for compliance

15. Section 1(1) of the FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.
16. Section 10(1) of the FOIA states that on receipt of a request for information, a public authority should respond to the applicant within 20 working days.
17. In this case, Leicestershire Police has breached sections 1(1) and 10(1) by responding to the request on the twenty fourth working day after the request was received.
18. The Commissioner uses intelligence gathered from individual cases to inform her insight and compliance function. This aligns with the goal in her draft "Openness by design"¹ strategy to improve standards of

¹ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"².

Section 30 - investigations and proceedings

19. Section 30(1) of the FOIA states 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,

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or

(c) any criminal proceedings which the authority has power to conduct."

20. The Commissioner considers that the phrase "at any time" means that information may be exempt under section 30(1) of the FOIA if it relates to an ongoing, closed or abandoned investigation. It extends to information that has been obtained prior to an investigation commencing, if it is subsequently held and used for this purpose.

21. Consideration of section 30(1) is a two-stage process. First, the exemption must be shown to be engaged. Secondly, as section 30 is a qualified exemption, it is subject to the public interest test. This involves determining whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

22. Furthermore, section 30 of the FOIA is a class-based exemption, which means that there is no need to demonstrate harm or prejudice in order for the exemption to be engaged.

² <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Is the exemption engaged?

23. In order for the exemption to be applicable, information must be held for a specific or particular investigation and not for investigations in general. The Commissioner is satisfied that in this case the withheld information relates to a specific investigation (the purpose of ascertaining whether the death of the fox was the result of a criminal act).
24. Section 30(1)(a)(i) may only be claimed by a public authority that has a duty to investigate offences. As a police force, Leicestershire Police clearly has a duty to investigate allegations of criminal offences by virtue of its core function of law enforcement. The Commissioner is therefore satisfied that it has a duty to carry out investigations of the type described in section 30(1)(a)(i) and that that limb of the exemption is therefore engaged.

Public interest test

25. Section 30(1)(a)(i) 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 the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
26. In accordance with her guidance, when considering the public interest in maintaining exemptions, the Commissioner considers that it is necessary to be clear what they are designed to protect.
27. The purpose of section 30 is to preserve the ability of the police (and other applicable public authorities) to carry out effective investigations. Key to the balance of the public interest in cases where this exemption is found to be engaged, is whether the disclosure of the requested information could have a harmful impact on the ability of the police to carry out effective investigations. Clearly, it is not in the public interest to jeopardise the ability of the police to investigate crime effectively.

Public interest in disclosing the information

28. The complainant explained that charges under the Hunting Act 2004 must be brought within six months. That being the case, he said that the latest date for charges to be brought in this case was 16 August 2019. He argued that since no charges were brought by that date, it could not be argued that disclosure now would undermine any subsequent trial.
29. Leicestershire Police told the complainant that, due to media reports about the referral of the matter to it, there was a public interest in

informing the public about the investigation, as this would enable the public to have confidence that the investigation was conducted properly.

Public interest in maintaining the exemption

30. Leicestershire Police told the complainant that current and/or future investigations could be compromised by the release into the wider public domain of information about the post mortem. It also said it would reveal information that could undermine its partnership approach to investigations.

"Disclosure of this information may inform individuals who have committed offences as to whether they have been reported to Leicestershire Police, this would severely impact any current investigations and impact on future investigations.

The criminal proceedings have not yet been completed I see no tangible benefit to the community at large if this information was released on this occasion."

31. It told the Commissioner that at the time the request was received, the withheld information went to the heart of a criminal investigation that was being pursued and that its contents, if revealed, would have directly impacted the ability for a fair trial, if a charging decision was reached. It said that, as a police force, it had a duty to protect the integrity of all the investigations it conducts and disclosure of the withheld information while it was still a live matter would have impacted on the investigation significantly.
32. Leicestershire Police also said that the withheld information contains detailed descriptions of a specific post-mortem and disclosure would allow the public to identify the manner in which these types of investigations are conducted. This information, if released into the public domain, could hinder any future investigations as it would reveal details on how such examinations are conducted and the areas explored whilst examining remains.

33. It said:

"Information released in the media confirms the overall findings of the post-mortem and as such the main detail that the public would require. The further detail of the post-mortem contains information specific to professionals trained in pathology and medicine, this information would to much of the general public be unintelligible and of a depth that exceeds that which is reasonable for release in the public domain."

Balance of the public interest

34. In reaching a conclusion on the balance of the public interest, the Commissioner has considered the public interest in Leicestershire Police disclosing the requested information. The Commissioner has also considered whether disclosure would be likely to harm any investigation, which would be counter to the public interest, and what weight to give to these competing public interest factors.
35. As set out above, the purpose of section 30 is to protect the effective investigation and prosecution of offences. Clearly, it is not in the public interest to jeopardise the ability of the police to investigate crime effectively.
36. Set against this, the Commissioner recognises the importance of the public having confidence in public authorities that are tasked with upholding the law. Confidence will be increased by allowing scrutiny of their performance and this may involve examining the decisions taken in particular cases. The Commissioner also accepts that there is a presumption running through the FOIA that openness is, in itself, to be regarded as something which is in the public interest.
37. On that point, the Commissioner notes that information about the central finding of the post mortem is already in the public domain, via confirmation provided by Leicestershire Police in the press report cited in the request. The post mortem concluded that the fox was not killed by an animal. This is significant, in that Leicestershire Police was asked to investigate the fox's death because of concerns that it may have been killed by hounds, which would be an offence under section 1 of the Hunting Act 2004³. The public interest in knowing whether this was the case is therefore satisfied by Leicestershire Police's confirmation that its cause of death was not another animal. Furthermore, the Commissioner notes that no charges were brought in respect of the fox's death.
38. Turning to the complainant's point that disclosure was being requested after the cut off point for any offence under the Hunting Act 2004 being charged, the Commissioner notes that while the original request was made, and a response provided, before 16 August 2019 (and thus while the potential remained for charges to be brought), the internal review was not conducted until several months after that date.
39. The Upper Tribunal in *APPGER v ICO and Foreign and Commonwealth Office* (UKUT 0377 (ACC), 2 July 2015) endorsed the view that "the

³ <http://www.legislation.gov.uk/ukpga/2004/37/contents>

public interest should be assessed by reference to the circumstances at or around the time when the request was considered by the public authority (including the time of any internal review)".

40. The Commissioner has therefore considered the situation at the time at which Leicestershire Police conducted the internal review (30 December 2019), since the charging window in respect of any offence identified had ended by then. Consequently, she has placed no weight on Leicestershire Police's claim that disclosure *at that time* would impact on criminal proceedings which might be brought with regard to the fox's death, because by then, no such proceedings could be brought.
41. However, the Commissioner considers that information collated in the post mortem could have a bearing on subsequent, similar investigations. It is reasonable to expect, should Leicestershire Police receive further allegations about illegal fox hunting in the area, that when investigating them it will refer to information obtained in previous investigations, including this one. The post mortem report goes into considerable detail about the state of the fox, and the areas of enquiry that Leicestershire Police explored with regard to its cause of death. Going forward, any information as to what Leicestershire Police does or does not know about the fox in this case would be of considerable interest to anyone intent in engaging in illegal hunting (or conversely, in giving the false impression that illegal hunting is taking place), and wanting to avoid detection. The Commissioner accepts that, when viewed in this context, the withheld information, if disclosed, clearly could undermine the ability of Leicestershire Police to carry out effective investigations in this area in the future.
42. Since the undermining of the police's ability to conduct effective investigations in this area is clearly not in the public interest, and it is not countered by any arguments in favour of disclosure of at least equal weight, the Commissioner has decided that section 30(1)(a)(i) of the FOIA has been applied appropriately in this case and that the public interest in maintaining the exemption outweighs the public interest in disclosure.
43. Since the Commissioner has determined that Leicestershire Police was entitled to rely on section 30(1)(a)(i) to refuse the request in full, it has not been necessary for the Commissioner to go on to consider the other exemptions cited by Leicestershire Police.

Other matters

44. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

Internal review

45. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather, they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA.
46. Part VI of the section 45 Code of Practice states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.
47. In this case, the complainant requested an internal review on 25 July 2019 and Leicestershire Police finally provided its response on 30 December 2019, following several chaser letters from the complainant and the Commissioner's intervention. It apologised to the complainant but did not offer any explanation for the delay.
48. The Commissioner is concerned that in this case, it took 109 working days for an internal review to be completed. The Commissioner has not been made aware that any exceptional circumstances existed to justify that delay, and she therefore considers that Leicestershire Police fell short of the standards of good practice by failing to complete its internal review within a reasonable timescale. She would refer Leicestershire Police to her comments in paragraph 18, above.

Right of appeal

49. 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@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

50. 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.
51. 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

Samantha Bracegirdle
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