

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 May 2022

Public Authority: Hampshire Constabulary
Address: Chief Constable of Hampshire Constabulary
Mottisfont Court
Tower Street
Winchester
SO23 8ZD

Decision (including any steps ordered)

1. The complainant requested from the Hampshire Constabulary ("the Constabulary") information relating to body camera footage and recordings of a police officer during an alleged incident in October 2021 with an individual who had subsequently died. Initially the Constabulary refused the request citing section 40(2)(personal data) of FOIA. However, following their internal review the Constabulary altered its position and stated that it is refusing to confirm or deny whether the requested information is held in accordance with section 40(5) of FOIA.
2. The Commissioner's decision is that the Constabulary is entitled to rely on section 40(5) to refuse to confirm or deny that it holds the information.
3. The Commissioner does not require the Constabulary to take any further steps as a result of this decision.

Request and response

4. On 13 June 2021 the complainant, wrote to the Constabulary to request information in the following terms:

"Under the Freedom of Information Act 2000, please can you provide me with responses to the following:

Footage of an incident from 22nd October 2017 where the body-worn camera of [name redacted] (officer name is sometimes spelt differently in documentation but officer number is [number redacted]) was turned off. The incident involved [name redacted] who later died. The death led to an IOPC investigation but also a separate investigation into the turning off the body worn camera. Please also provide written notes documenting happenings in the footage and any transcript of the audio from the footage detailing officer comments, in addition to the findings of the force's investigation into this specific incident where the camera being turned off."

5. The Constabulary responded to the request on 13 August 2021 and refused to provide the information. They cited section 40(2) and indicated the full unredacted footage would contain personal information, section 30(1)(a) as the information requested also contained information related to investigations, and section 38(1) as the information was exempt due to concerns related to Health and Safety. The Constabulary indicated concern for harm to the victim's family.
6. On 13 August 2021, the complainant advised he wished to appeal the response and requested an internal review.
7. The Constabulary provided the internal review on 13 September 2021. They advised they had reviewed the request and noted it related to a matter of police conduct, and now considered exemption under section 40(5b)(a) to be appropriate. They advised:

"Your request identifies the information you require by reference to a named police officer who you say is, or was, the subject of a police misconduct investigation. We are satisfied, therefore, that stating whether or not the information is held would itself be a disclosure of personal data that would be allowed only if doing so would not contravene the data protection principles."

Scope of the case

8. The complainant contacted the Commissioner on 17 September 2021 to complain about the way the request for information had been handled. The complainant advised of their concern for the non-disclosure of the use of body worn video.

"It is a poorly scrutinised police tool and this footage records an officer's camera being turned off by a senior officer. This is obviously of significant public interest and of enormous value in providing greater scrutiny of the tool."

9. The Commissioner considers that the matter to be decided is whether the Constabulary is entitled to rely on section 40(5B)(a)(i) FOIA to refuse to either confirm or deny it holds the requested information.

Reasons for decision

Section 40(5) - neither confirm nor deny

10. Section 1(1)(a) of FOIA provides that where a public authority receives a request for information, it is obliged to tell the applicant whether it holds that information. This is commonly known as 'the duty to confirm or deny.'
11. Section 40(5B)(a)(i) of FOIA provides that 'the duty to confirm or deny' whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.
12. The decision to use a 'neither confirm nor deny' response will not be affected by whether a public authority does or does not in fact hold the requested information. The starting point, and main focus for a 'neither confirm nor deny' response in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not particular information is held. The Commissioner's guidance explains that there may be circumstances in which merely confirming or denying whether or not a public authority holds information about an individual can itself reveal something about that individual.
13. The Constabulary has taken the position of neither confirming nor denying whether it holds any of the requested information in its entirety, citing section 40(5) of FOIA. The issue that the Commissioner has to consider is not one of the disclosure of any requested information that may be held, it is solely the issue of whether or not the constabulary is entitled to 'neither confirm nor deny' whether it holds any information of the type requested by the complainant.
14. Therefore, for the Constabulary to be entitled to rely on section 40(5B)(a)(i) of FOIA to refuse to confirm or deny it holds information falling within the scope of the request the following two criteria must be met:

- Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
- Providing this confirmation or denial would contravene one of the data protection principles

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

15. Section 3(2) of the DPA 2018 defines personal data as:

"any information relating to an identified or identifiable living individual."

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
18. In this case a police officer is specifically named in the request. As the complainant is already aware of the identity of the individual named in the request, confirmation, or denial as to whether the Constabulary held information specific to this individual would reveal information that is about them, linked to them, has biographical significance for them or has them as its main focus.
19. The Commissioner is satisfied that if the Constabulary were to either confirm or deny it held the information, it would involve the disclosure of personal data of a third party i.e. it would reveal something about that named police officer and whether the officer was the subject of any disciplinary procedures or hearings. This clearly relates to the officer, and they could be identified from this.
20. As far as the Commissioner is aware, there is nothing available in the public domain which reveals any of the more detailed information being sought here.
21. The first criterion set out is therefore met.
22. While the Commissioner accepts that the complainant may have specific reasons for wanting to access the requested information – relating to their views about scrutiny of the use of body worn camera's, the Commissioner has to take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public. He must

therefore consider the wider public interest issues and fairness to the named police officer when deciding whether or not the information is suitable for disclosure.

Would confirming whether or not the requested information is held contravene one of the data protection principles?

23. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent the Constabulary refusing to confirm whether it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles. The Commissioner considers that the most relevant data protection principle is set out at Article 5(1)(a) of the GDPR (principal (a)).

24. Article 5(1)(a) GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."

25. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed – or as in this case, the public authority can only confirm whether or not it holds the requested information – if to do so would be lawful (i.e., it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), be fair and be transparent.

Lawful processing: Article 6(1)(f) GDPR

26. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in the Article applies.

27. The Commissioner considers that the condition most applicable on the facts of this case is contained in Article 6(1)(f) GDPR which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"¹.

¹ Article 6(1) goes on to state that:

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

28. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under FOIA it is necessary to consider the following three-part test:
- (i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - (ii) **Necessity test:** Whether confirming or denying that the requested information is held is necessary to meet the legitimate interest in question;
 - (iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject(s).
29. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

30. In considering any legitimate interests in confirming whether or not the requested information is held in response to a FOIA request, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sake as well as case specific interests.
31. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
32. In this case, it is clear the complainant is concerned about the use of body worn camera footage which they believed has been turned off during an alleged incident with a police officer where an individual later died. It is clear the complainant considers that this is a matter of public interest in terms of scrutiny relating to public safety when police

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA 2018) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

intervention is involved. The complainant also requests written records and audio recordings of the incident for scrutiny.

33. The Commissioner accepts there may be wider public interest relating to the transparency of the police in alleged incidents as described including any use of body camera footage. There would also be a wider public interest in the safety of the general public as well as how the police investigate such alleged matters.
34. However, the Constabulary can see no legitimate interest as they advise there is no record of any such incident in the public domain. They further argue that if there had been such an incident it would be investigated through the Independent Office of Police Conduct ("IOPC") and would be placed in the public domain through that process.
35. The Constabulary also point out the IOPC have a published policy in relation to naming of police officers in such matters and their refusal is also consistent with that policy as below.
 - <https://policeconduct.gov.uk/sites/default/files/Documents/Who-we-are/Our-Policies/naming-of-police-officers-and-police-staff-IOPC.pdf>
36. The Commissioner agrees with the complainant that confirming or denying whether information is held in this case would go some way towards informing the public about the Constabulary's accountability in public safety issues. There would also be wider public interest in knowing if an alleged investigation occurred, if it had indeed taken place. Therefore, there is a legitimate interest in the confirmation or denial in this instance.

Is confirming whether or not the requested information is held necessary?

37. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA that the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
38. In this instance, the Commissioner appreciates that the welfare and safety of the public is of paramount interest.
39. The Commissioner agrees with the Constabulary, that if such an incident took place, it would have been referred to the IOPC and be investigated

through their independent processes. The outcome would include a published report of any investigation when completed.

40. It would be a police force conduct or disciplinary matter which are usually conducted confidentially before an outcome is published by the IOPC.
41. The Commissioner is satisfied there are other less intrusive means of achieving the legitimate aims identified. It therefore does not meet the requirements of principle (a).

Conclusion

42. The Commissioner has decided that the Constabulary correctly engaged section 40(5B)(a)(i) of the FOIA to refuse to confirm whether or not it held the requested information.

Right of appeal

43. 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: 0203 936 8963.

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

44. 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.
45. 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

**Phillip Angell
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