

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 31 January 2022

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

### Decision (including any steps ordered)

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1. The complainant has requested evidence considered in a police misconduct investigation which had been reported in the media. Hampshire Constabulary withheld the information, citing section 30(1) (Investigations and proceedings) and 40(2) (Personal information) of the FOIA.
2. The Commissioner's decision is that Hampshire Constabulary was entitled to rely on section 30(1)(a)(i) to withhold the information.
3. However, by failing to respond to the request within the statutory time for compliance, Hampshire Constabulary breached section 1 (General right of access) and section 10 (Time for compliance) of the FOIA.
4. The Commissioner requires no steps as a result of this decision.

### Request and response

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5. On 11 January 2021, the complainant wrote to Hampshire Constabulary and requested information in the following terms:

*"Background*

*<https://www.independent.co.uk/news/uk/cr...>*

*Request*

*Please provide the transcript or alternatively the recordings of all*

*racist or other language which constituted improper conduct. I am particulary [sic] interested in the following:*

*"They were heard comparing a black police officer to a mixed-breed dog, referring to women as "sugar t\*ts" and "sl\*ts", saying Albanian nationals should be shot and that "illegal immigrants deserve the death penalty".*

*Provide the IOPC [Independent Office for Police Conduct] reports."*

6. Hampshire Constabulary responded on 19 February 2021. It said that there was already information about the misconduct case in the public domain and that any information covered by the request which had not been made public was exempt from disclosure under section 31(1)(g) (Law enforcement) of the FOIA. It said that it did not hold IOPC data and advised the complainant to apply directly to the IOPC if he required copies of their reports.
7. The complainant requested an internal review on 19 February 2021, on the following grounds:

*"The exemption was wrongly applied. Disclosure would not harm any current of [sic] future investigation into improper conduct or failure to comply with the law. The decision fails to say if the info is held."*
8. Hampshire Constabulary responded on 19 March 2021. It maintained that the position outlined in the refusal notice was correct, and it provided a further explanation of its reasons. To assist the complainant, it also provided a link to the misconduct hearing outcome, dated 3 February 2021, which was in the public domain.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 21 March 2021 to complain about the way his request for information had been handled. He disagreed with Hampshire Constabulary's decision to apply section 31, saying that it did not apply.
10. The complainant did not challenge Hampshire Constabulary's claim not to hold a relevant IOPC report, either in his request for an internal review or in his complaint to the Commissioner. However, during the Commissioner's investigation, he asked the Commissioner to ascertain whether Hampshire Constabulary had ever held an IOPC report on the matter.
11. Since the complainant has not challenged Hampshire Constabulary's assertion that it does not currently hold such a report (if, indeed, one

exists), the Commissioner did not find it necessary to establish this point as part of his investigation into the aspects of the response the complainant did dispute, and it has not been considered in this decision notice. The complainant is free to submit a fresh request for that information if he chooses.

12. During the Commissioner's investigation, Hampshire Constabulary withdrew reliance on section 31, and substituted section 30 (Investigations and proceedings) and section 40(2) (Personal information) of the FOIA instead. This late revision has not been put to the complainant, to forego any further delay in the investigation.
13. Following the combined cases of the *Home Office v Information Commissioner* (GIA/2098/2010) and *DEFRA v Information Commissioner* (GIA/1694/2010) in the Upper Tribunal, a public authority is able to claim a new exemption or exception either before the Commissioner or the First-tier Tribunal and both must consider any such new claims.
14. The analysis below considers Hampshire Constabulary's reliance on section 30 of the FOIA. If the Commissioner considers that it has been incorrectly cited, he will then consider whether section 40(2) applies.
15. The Commissioner has viewed the withheld information.

## Reasons for decision

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### Section 30 – investigations and proceedings

16. Section 30(1)(a)(i) of the FOIA states:

*"Information held by a public authority is exempt information if it has at any time been held by the authority for the purpose 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..."*

17. The Commissioner considers that the phrase "at any time" means that information can be exempt under section 30(1)(a) of the FOIA if it relates to a specific ongoing, closed or abandoned investigation.
18. Consideration of section 30(1)(a)(i) 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.

*Is the exemption engaged?*

19. The first step is to address whether the requested information falls within the class specified in section 30(1)(a)(i) of the FOIA.
20. The Commissioner has issued guidance on section 30<sup>1</sup> which states that section 30(1)(a) can only be claimed by public authorities that have a duty to investigate whether someone should be charged with an offence.
21. The Commissioner's guidance describes the circumstances in which the subsections of section 30(1) might apply. With respect to section 30(1)(a), the guidance says:

*"The exemption applies to both investigations leading up to the decision whether to charge someone and investigations that take place after someone has been charged. Any investigation must be, or have been, conducted with a view to ascertaining whether a person should be charged with an offence, or if they have been charged, whether they are guilty of it. It is not necessary that the investigation leads to someone being charged with, or being convicted of an offence..."*

22. Hampshire Constabulary explained that the withheld information was obtained for the purposes of its investigation into whether the officers had committed misconduct in public office<sup>2</sup>, which is a common law offence. The information was also considered in the accompanying criminal investigation, which Hampshire Constabulary conducted to ascertain whether any statutory offences had been committed. It said that the investigations were completed prior to the request being received.
23. As a police force, Hampshire Constabulary has a duty to investigate allegations of criminal offences by virtue of its core function of law enforcement. It therefore has the power to carry out investigations of the type described in section 30(1)(a)(i) of the FOIA.
24. The Commissioner is satisfied that the withheld information was held in relation to specific investigations conducted by Hampshire Constabulary of the type described in section 30(1)(a)(i) of the FOIA. He is therefore satisfied that the exemption provided by section 30(1)(a)(i) is engaged.

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1205/investigations-and-proceedings-foi-section-30.pdf>

<sup>2</sup> <https://www.cps.gov.uk/legal-guidance/misconduct-public-office>

### **The 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 his 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 arguments in favour of disclosure*

28. In his complaint to the Commissioner, the complainant said that transparency was in the public interest. While this comment was made in respect of the application of section 31 (subsequently withdrawn by Hampshire Constabulary), the Commissioner has considered it instead in the context of section 30.
29. In its submissions to the Commissioner, Hampshire Constabulary acknowledged the public interest in promoting transparency, accountability and openness, with regard to its investigation of allegations of misconduct and criminal offending against its own officers.

#### *Public interest arguments in favour of maintaining the exemption*

30. Hampshire Constabulary offered the following arguments in favour of maintaining the exemption:

*"There is an obvious and weighty public interest in an effective and efficient police investigation being protected from public scrutiny when no formal prosecution goes into the Criminal Justice Court Process. If disclosure would cause real, actual or substantial prejudice to the effective and efficient operation of the investigation process, it is our view that the public interest in its disclosure would need to be extremely compelling to outweigh it.*

*There is strong public interest in safeguarding the police investigation process in this case as it did not result in any criminal action. In general policing terms there is an expectation that data*

*obtained during an investigation could routinely be disclosed outside of the criminal justice regime this could have an inhibiting effect on policing.*

*We also have general concerns that disclosing the material requested which was not disclosed under any other regime could create a perception among the wider public that sensitive information obtained during a criminal investigations may be disclosed to the world at large, where it has not resulted in a prosecution. We believe that there is a real chance the broader position on disclosure of investigation material may deter people from coming forward and cooperating with prosecuting authorities, particularly where criminal offences have been alleged. There is a very significant public interest in avoiding that outcome."*

### *Balance of the public interest*

31. In reaching a conclusion on the balance of the public interest, the Commissioner has considered the public interest in Hampshire Constabulary 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.
32. 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.
33. 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.
34. The Commissioner also recognises the public interest in transparency and accountability with regard to the conduct of police officers who are subject to criminal allegations, and in the public being able to reach an informed view as to whether they have been investigated appropriately by the police. The information under consideration here relates to allegations of racist, sexist and homophobic behaviour by officers who would themselves be responsible for investigating similar allegations if made against members of the general public.
35. Hampshire Constabulary's investigation into the allegations did not result in criminal charges. However, a misconduct hearing was held and all but one of the officers who were still in Hampshire Constabulary's employ, were dismissed. In light of this, the Commissioner considers

that the officers, and the witnesses and other third parties identified in the withheld information, would not expect investigation material about, and which identifies them, to be disclosed to the general public under the FOIA; they would consider the matter to have been formally dealt with.

36. The Commissioner has also looked at the significance of the withheld information in respect of both the subject of the investigation itself and what the withheld information reveals about the probity or integrity of the criminal justice system, particularly whether it would shed light on whether the investigation had been properly conducted. If the withheld information reveals some faults with the investigation – for example, that it was demonstrably flawed or inadequate - this will increase the weight of the public interest in disclosure.
37. The withheld information here comprises transcripts of language and behaviour which Hampshire Constabulary considered constituted improper conduct. It does not include any information about the conduct of the investigation itself or any charging decisions taken, as these were not within the scope of the request. The Commissioner is therefore satisfied that it is not possible to infer from the withheld information in isolation whether or not there were faults in Hampshire Constabulary's criminal investigation, as the request only seeks (certain) 'evidence' which was considered.
38. The Commissioner further notes that a misconduct hearing was held, which examined the allegations and that the media reported the gist of some of the comments made by the officers. Hampshire Constabulary also released a statement acknowledging the hearing's findings and the shortcomings it had revealed. The Commissioner considers that the public interest in external scrutiny of the officers' conduct is served by these factors and that disclosure of the actual content of the transcripts is not necessary, as the outcome is known.
39. With regard to Hampshire Constabulary's argument that it was necessary to protect "*an effective and efficient police investigation... from public scrutiny when no formal prosecution goes into the Criminal Justice Court Process*", the Commissioner accepts that this argument may be relevant while an investigation is still 'live'. However, in this case the investigation had concluded by the time the request was submitted and so the risk identified by Hampshire Constabulary had largely passed. In line with his guidance on section 30, the Commissioner has therefore accorded limited weight to this argument in favour of withholding the information.
40. However, the Commissioner does have concerns that disclosing evidence considered as part of a criminal investigation, which identifies individuals and attributes particular statements to them, could create a perception

among the wider public that sensitive information about criminal investigations may be disclosed to the world at large, even where the evidence has not resulted in a prosecution. He considers that there is a real chance this may deter people (including witnesses, complainants and suspects) from coming forward and cooperating with prosecuting authorities, particularly where criminal offences have been alleged. There is a very significant public interest in avoiding that outcome and it is a factor of some weight in favour of maintaining the exemption in this case.

41. Taking all the above into account, and having given due consideration to the arguments on both sides, whilst the Commissioner accepts that disclosing the withheld information would be likely to promote transparency, he considers that the public interest in disclosure is outweighed by the public interest in ensuring that the investigation and prosecution of offences is not undermined. The withheld information does not reveal anything about how the investigation was conducted, and the gist of the comments has been reported. There would be little added value in disclosing them verbatim and this further strengthens the public interest in maintaining the exemption in this case.
42. The Commissioner is therefore satisfied that Hampshire Constabulary was entitled to rely on section 30(1)(a)(i) of the FOIA to refuse the request and that the public interest in maintaining the exemption outweighs the public interest in disclosure.
43. As the Commissioner has concluded that this exemption is properly engaged in respect of the withheld information in its entirety, he has not considered the other exemption cited.

**Section 1 – General right of access**  
**Section 10 – Time for compliance**

44. Section 1(1) of the FOIA provides that –

*"Any person making a request for information to a public authority is entitled – (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him."*

45. Section 10(1) provides that –

*"... a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."*

46. The complainant submitted his request for information on 11 January 2021 and Hampshire Constabulary responded on 19 February 2021, 29



working days later. By failing to respond within 20 working days, Hampshire Constabulary breached sections 1 and 10 of the FOIA.

47. The Commissioner uses intelligence gathered from individual cases to inform his insight and compliance function. This aligns with the goal in his draft "Openness by design"<sup>3</sup> strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting systemic non-compliance, consistent with the approaches set out in his "Regulatory Action Policy"<sup>4</sup>.

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<sup>3</sup> <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

<sup>4</sup> <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

## Right of appeal

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48. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

49. 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.

50. 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**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**