

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

### **Decision notice**

**Date:** 20 April 2023

**Public Authority:** Chief Constable of Nottinghamshire Police  
**Address:** Nottinghamshire Police Headquarters  
Sherwood Lodge  
Arnold  
Nottingham  
NG5 8PP

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

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1. The complainant has requested a copy of a report relating to a review of its Information Management Unit ("IMU") from Nottingham Police. Nottinghamshire Police disclosed some information but refused to disclose the remainder, citing sections 40(2) (Personal information) and 31(1)(a)(b) (Law enforcement) of FOIA.
2. The Commissioner's decision is that, where cited, section 40 has been properly applied. However, he finds that section 31 is not engaged.
3. The Commissioner requires Nottinghamshire Police to take the following steps to ensure compliance with the legislation:
  - disclose any information which has been withheld under section 31 and which is not exempt under section 40(2).
4. Nottinghamshire Police must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 2 August 2022, the complainant wrote to Nottinghamshire Police and requested the following information:

“Under the Freedom of Information Act 2000 please provide me with a copy of the full report following the recent review of the information management department (2021-2022) including all recommendations made by the author [name redacted] (Process Evolution).”

6. On 17 August 2022, Nottinghamshire Police responded. It partially disclosed an Executive Summary of the report and advised that section 22 applied to the full report as it intended to publish it in March 2023.
7. The complainant requested an internal review on 18 August 2022. When doing so, along with other comments, they asked for confirmation that the whole report would be disclosed.
8. Nottinghamshire Police provided an internal review on 11 September 2022 in which it revised its position. It removed reliance on section 22. It disclosed some of the report and cited sections 40(2) (Personal information) and 31(1)(a)(b) (Law enforcement) of FOIA to withhold the remaining information.

## Scope of the case

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9. The complainant contacted the Commissioner on 1 November 2022 to complain about the way their request for information had been handled. They said:

“I wish to challenge the level of redactions applied to the report I received. I dont [sic] believe that entire pages would be subject to exemptions. There has obviously been a blanketing of exemptions used in this case with entire pages and sections being redacted instead of using redactions on a line by line basis. I also wish to object to the use of S31 in this case as the information I have requested does not fall under law enforcement processing as it does not relate to law enforcement at all. It relates to the management of the information disclosure team which is a civil unit facilitating disclosure under the FOI/DPA. The internal review letter itself outlines that the information would be of no use to anyone unless they had a specific interest in this area and therefore I question how they have justified the use of S31 in this case?”

10. The Commissioner required further information from them which was provided by 25 November 2022.
11. The Commissioner will consider the application of exemptions to the request. He has viewed the requested information, which has been marked up by Nottingham Police to identify where each exemption has been applied. His determination has been based on the redactions provided.

## **Reasons for decision**

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### **Withheld information**

12. The withheld information in this case is a 301 page report which contains various appendices. However, it is noted that the numbering is awry and does not run chronologically.
13. The internal review advised:

“The report was produced to assess the current Information Management Unit (IMU) operating model and future operating model requirements, and in doing so, make appropriate and evidence-based recommendations, with key focus on consideration of (i) compliance gaps and associated risks, (ii) Information Management Unit design (structure, business process and general modus operandi) to deliver the baseline compliance requirements, (iii) management and wider staff capability, capacity, and resilience, (iv) governance and accountability, (v) wider senior stakeholders engagement in IMU governance, (vi) IMU engagement in organisational decision-making processes.

Critical related context was the priority methodology for the review that was the use of staff engagement (IMU staff and wider stakeholders) through 1-2-1 interviews. All staff involved were given a commitment to absolute confidentiality and that no-one would be identifiable as a result of engaging in the review nor as a result of the review final report”.

### **Section 40 – Personal information**

14. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

15. In this case, the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
16. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
17. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

### **Is the information personal data?**

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

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

19. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
20. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
21. 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.
22. The Commissioner has had access to the full report. To a general member of the public, it would appear to be a report that has been written in an anonymised style without reference to any named individual other than the author. However, the Commissioner was invited to discuss the report with its author (and others) in order to have a better understanding regarding its background, which is of significance to his views in this case.

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

23. In its internal review, Nottinghamshire Police explained to the complainant: "it is clear that much of the report is made up of quotes and opinions from members of staff". It is here noted, and of direct relevance, that the complainant is personally very familiar with the staff concerned and will be aware of all of the individual staff who provided information to assist with the review.
24. Regarding the numbers of staff involved, the disclosed body of the report explains:
- "The key methodology for the review was:
- In person and Microsoft Teams on-line video 1-2-1 meetings with IMU staff, plus a range of Force identified strategic stakeholders from business areas with a range of business 'footprints' into IMU
  - This included:
    - 16 x IMU staff 1-2-1's
    - 20 x non-IMU strategic stakeholders 1-2-1's".
25. The report also explains that:
- "All IMU and wider strategic stakeholder staff were offered the opportunity to participate in a confidential 1-2-1 meeting with the assurance that nothing in the review report would be attributable to any individual(s)".
26. Nottinghamshire Police has said that assurances were made to staff that their contributions would be kept private. However, according to the complainant: "no such assurances of confidentiality were provided to staff in 1-1 interviews. Staff were told that their identity would be anonymous but it was clear that what staff said in their interviews would form part of the report and this was expected".
27. The complainant has explained to the Commissioner their reasons for believing this was the case, which the Commissioner finds to be credible. However, in both scenarios, it is clear to the Commissioner, that none of the parties who contributed would expect to be identifiable in the final report.
28. Nottinghamshire Police has redacted the comments and views of those consulted in an attempt to anonymise what each party contributed. It considered that, were these comments disclosed, even without their names, reidentification of contributors to those within the IMU would be possible. This is because staff would know, or be able to ascertain, that particular colleagues were in a position to comment on particular elements covered by the review.

29. Accordingly, Nottinghamshire Police found that, as a someone who is familiar with both the IMU and the wider contributors, the requester will personally know the staff who were consulted. (The Commissioner notes that they would also be aware of any commentary that has been used which is connected to, or has been provided by, them personally. Such content would relate to them personally and be absolutely exempt from disclosure under FOIA under section 40(1). The Commissioner has further commented on this in Other matters at the end of this notice.)
30. If it is possible for the complainant or other members of the staff at Nottinghamshire Police (including those who were interviewed for the review) to identify the relevant data subjects from the information then it will constitute their personal data.
31. The Commissioner agrees with Nottinghamshire Police that it cannot be disregarded that the complainant (and indeed others within the IMU and wider afield) will have access to other information which will enable them to ascertain who contributed what. The complainant (and other staff members) will be aware of the area of business each contributor works in, have some idea of the types of contribution they will have been in a position to make when interviewed and the sort of commentary they are likely to have been able to provide to the interviewer. The Commissioner considers that, with this sort of insight, and additional information known to those involved, it would be possible for individual contributors and their comments to be identified from the withheld information.
32. In the circumstances of this case, having considered the information withheld under section 40, the Commissioner is satisfied that the information relates to, and identifies, the staff concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
33. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focussed on principle (a), which states:

"personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
34. In the case of an FOIA request, personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
35. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

36. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider:
- whether a legitimate interest is being pursued in the request for information;
  - if so, whether disclosure is necessary to meet the legitimate interest in question; and
  - whether those interests override the rights and freedoms of the data subject.

### **Legitimate interests**

37. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern, unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
38. It is not known why the complainant has asked for a copy of the report and they have not stated this in their correspondence. As someone with 'inside knowledge' of the IMU, the Commissioner considers that there is likely to be a personal interest in disclosure, but any wider public interest is not obvious. However, having had access to the report, and therefore being aware of the content, the Commissioner accepts that there is some legitimate interest in understanding the issues which led to the review being undertaken in the first place. He is therefore satisfied that there is a legitimate interest, albeit limited, in the disclosure of the report.

### **Is disclosure necessary?**

39. The Commissioner has then considered whether disclosure is 'necessary' to meet that legitimate interest. The test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question. If less intrusive means are available, disclosure will not be 'necessary', and will be unlawful.
40. Some of the requested information has already been disclosed. Additionally, the complainant may be able to access more of the content of the report using the subject access provisions of the DPA. However,

the Commissioner cannot envisage any other way of them being able to access the remainder of the report other than through FOIA.

### **Balance between legitimate interests and the data subjects' interests or fundamental rights and freedoms**

41. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
42. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
43. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
44. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to those individuals.
45. From the comments provided by both Nottinghamshire Police and the complainant, the Commissioner finds that the data subjects in this case would have a reasonable expectation that their identities would not be released to the world at large by means of an FOIA request. As explained above, due to the small numbers involved and the proximity of both the requester and other staff to those interviewed, the Commissioner agrees that reidentification within the IMU would be possible and it is likely that contributions could be attributed to individuals who provided commentary.
46. Disclosure under FOIA is to the world at large. The Commissioner understands that data subjects have a clear and strong expectation that their personal data will be held in accordance with data protection laws.
47. Disclosure of this commentary would be an intrusion of privacy and could potentially cause unnecessary and unjustified distress to the data

subjects, who could recognise themselves and who would likely be recognisable to one another.

48. The Commissioner would like to comment that, if the number of staff interviewed had been greater, he may have reached a different view. His decision is based on the small number, the specific circumstances of this case and the need to consider any personal data and its potential disclosure very carefully.
49. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
50. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

### **Section 31 – Law enforcement**

51. Section 31 of FOIA creates an exemption from the right to know if disclosing the information would, or would be likely to, prejudice one or more of a range of law enforcement activities.
52. In this case, Nottinghamshire Police is relying on sections 31(1)(a) and (b) of FOIA in relation to some of the withheld information; the type of information is described at paragraph 13 above. Sections 31(1)(a) and (b) of FOIA state that information is exempt from disclosure if its disclosure would, or would be likely to, prejudice:
  - the prevention or detection of crime; or
  - the apprehension or prosecution of offenders.
53. In order to engage a prejudice based exemption such as section 31, there must be likelihood that disclosure would, or would be likely to, cause prejudice to the interests that the exemption protects. In the Commissioner's view, three criteria must be met in order to engage a prejudice based exemption:
  - Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
  - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant

prejudice which is alleged must be real, actual or of substance;  
and,

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

54. Consideration of the exemption at section 31 is a two-stage process: even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

### **The applicable interests**

55. The first step in considering whether this exemption is engaged is to address whether the prejudice predicted by the public authority is relevant to the law enforcement activities mentioned in sections 31(1)(a) and (b) - the prevention or detection or crime and the apprehension or prosecution of offenders.

56. Reliance on section 31 was introduced at internal review stage. However, the internal review did not explain how disclosure would prejudice the applicable interests cited. Nottinghamshire Police included the following rationale in its public interest test:

"The IMU Review and the related Final Report, which the applicant seeks access [sic], has been the most recent scrutiny / investigation relevant to this matter. The implementation of the review findings and related proposals for change within the department remain ongoing and at an early stage and with the most significant changes yet to be commenced. It is assessed that allowing this to continue without interference is important.

The Public Interest Test includes consideration of the age of the information with the general context that 'the public interest in maintaining an exemption will diminish over time'.

As set out immediately above, the information is derived from a very recent review and report (report delivered 5-months prior to the FOI request was received [sic]) and subject to a live change implementation process.

The Public Interest Test includes consideration of where disclosure 'would or would be likely to harm a particular interest'.

In this instance, and directly relevant to the above point, there is a significant risk that disclosure of the relevant information would be likely to harm the implementation process through (i) causing upset

to staff that have been delivering the processes in place at the time that have been subject to negative comment, and who the Force needs 'on-side' to successfully implement the changes and (ii) risk of recent former staff causing disaffection in current staff.

The Public Interest Test includes assessment of if the 'prejudice has a particularly severe impact on individuals or the authority or other public interests' and if the assessment is that it would, 'this will carry considerable weight in the public interest test.'

It is assessed that, should the above prejudice occur, there would be a significant impact on the Force's potential for improvement, which includes progress to deliver on mandated public service delivery requirements.

It is further assessed that there would therefore be a negative impact in terms of individuals and the authority (the Force) and other public interests, namely required service improvements to FOI, SAR [subject access requests], Court Order and Annex D service levels to the public.

The Public Interest Test requires consideration of 'how far disclosing the requested information would further the public interests identified. The information may be relevant to a subject of public interest, but it may not greatly add to public understanding'.

Other than the applicant, it is assessed that the relevant information would not add to wider public understanding, let alone 'add greatly', given that a specialist inside knowledge of how the Notts IMU system has operated and why would be required for the relevant information to enable understanding".

57. The complainant has argued:

"Although Notts Police is a law enforcement agency, not all data they hold relates to law enforcement activity. The Information Management Unit is a civilian disclosure unit dealing with information requests under civil legislation (DPA/FOIA). Although some of the information they have to disclose relates to crime investigation, this report is not one of them. The report was commissioned to review the efficiency of the information management unit and its structure. This has no bearing on law enforcement activity."

58. With respect to law enforcement activities, the Commissioner recognises, in his published guidance, that section 31(1)(a) will cover all

aspects of the prevention and detection of crime<sup>2</sup>. And, whilst there is clearly some overlap between the two sub-subsections, 31(1)(b) could potentially cover information on general procedures relating to the apprehension of offenders or the process for prosecuting offenders.

59. It is a public authority's responsibility to show the Commissioner why it should be allowed to refuse a request. It is not for the Commissioner to provide a public authority with arguments in support of withholding information.
60. The withheld information in this case does not appear to the Commissioner to have any direct bearing on law enforcement. From the information provided to him, the Commissioner is not satisfied that Nottinghamshire Police has demonstrated that either the prevention or detection of crime, or the apprehension or prosecution of offenders, would, or would be likely to be, harmed by the disclosure of the information which has been withheld under section 31.
61. His decision is therefore that Nottinghamshire Police has not shown that either section 31(1)(a) or (b) of FOIA is engaged in respect of the withheld information. In view of this decision, it is not necessary to consider the public interest test.
62. Nottinghamshire Police should therefore take the action set out in paragraph 3, above.

## **Other matters**

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### **Conduct of internal review**

63. The internal review in this case was passed to another force to conduct in an effort to maintain some independence, which the Commissioner considers to have been appropriate. However, the Commissioner notes that the complainant was dissatisfied, saying that the internal review cannot have been independent as: "the author has clearly only asked for further supporting information from Notts Police and not myself".
  64. However, in the circumstances of this case, the Commissioner finds that some degree of liaison between the forces was unavoidable, whereas liaison with the complainant was not necessary. The report would initially need to have been obtained from Nottinghamshire Police and the
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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

need to provide some background to the request was essential in order to establish the likelihood of reidentification; without some understanding regarding the parties involved it could appear that the report was properly anonymised.

65. Furthermore, it is likely that some assistance regarding the force systems in use may also have been necessary as police forces have a variety of systems which are often very different between forces.

**Personal data of complainant**

66. It is not known whether the complainant has submitted a subject access request under the terms of the DPA. If they were to do so, it is possible that some further information may be deemed appropriate for disclosure via this access regime. The Commissioner has not made any assessment as to the likelihood of such a disclosure.

## Right of appeal

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67. 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)

68. 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.

69. 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 .....**

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