

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 December 2023

Public Authority: Chief Constable of Thames Valley Police
Address: Headquarters
Oxford Road
Kidlington
OX5 2MX

Decision (including any steps ordered)

1. The complainant has requested copies of testimonies, provided by police officers and staff, to a named officer's misconduct hearing. The Chief Constable of Thames Valley Police ('TVP') relied on section 40(2) of FOIA (third party personal information) to withhold the information.
2. The Commissioner's decision is that TVP has correctly relied on section 40(2) of FOIA to withhold the information.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 31 July 2023, the complainant wrote to TVP and requested information in the following terms:

"Following the misconduct hearing for [badge number and name redacted] between 19 and 21 June, all the testimonials from serving police officer or police staff as referenced in the outcome (attached).

In the document, it is stated: 'The Panel has received several testimonials on behalf of the officer. They show that he is a respected and professional officer who is liked by his peers.'"

5. TVP responded on 9 August 2023. It stated that the information was being withheld under section 40(2).
6. Following an internal review, TVP wrote to the complainant on 8 September 2023. It stated that it was maintaining its original position.

Scope of the case

7. The complainant contacted the Commissioner on 8 September 2023 to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of his investigation is to establish whether TVP is entitled to withhold the requested information under section 40(2) of the FOIA

Reasons for decision

Section 40 - personal information

9. Section 40(2) of the 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.
10. In this case the relevant condition is contained in section 40(3A)(a). 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').
11. 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.
12. 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?

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

“any information relating to an identified or identifiable living individual”.

14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. 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.
16. 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.
17. The named officer is clearly the subject of any of the statements so it is their person data. Furthermore, it is the personal data of each of those parties who provided a personal statement about the officer concerned.
18. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
19. The Commissioner will now consider whether or not any of the statements could be anonymised and disclosed.

Motivated Intruder

20. A test used by both the Commissioner and the First-tier tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if they were intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of reidentification of an individual from information which, on the face of it, appears truly anonymised.
21. The ICO's Code of Practice on Anonymisation¹ notes that:

"The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA".
22. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to

¹ <https://ico.org.uk/media/fororganisations/documents/1061/anonymisation-code.pdf>

the dismissed officer in their entirety. Furthermore, each individual statement relates to the officer who provided their personal character statement. The Commissioner notes that, even if TVP were to remove the names and collar numbers of those concerned, colleagues may recognise each other from the descriptors given, along with the time frame of the complaint. Furthermore, friends or family may also recognise the staff from the more detailed events described. The Commissioner is therefore satisfied that the risk of identification is reasonably likely. He finds that the information both relates to, and identifies, those concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

23. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
24. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

25. Article 5(1)(a) of the GDPR states that:

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

26. In the case of an 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 if to do so would be lawful, fair and transparent.
27. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

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

28. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) 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"².

² Article 6(1) goes on to state that:-

29. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the 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 disclosure of the information 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.
30. 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

31. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
32. 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.
33. The complainant advised that they were a journalist who wrote about the police, and that this is why they had requested the withheld information.
34. The Commissioner also acknowledges that there may be a wider legitimate interest in the requested information which may evidence the

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

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) 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".

behaviour of the individual in question. There may also be a wider public interest in knowing the personal views of the officer's colleagues.

Is disclosure necessary?

35. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
36. Having reviewed the request for information and withheld information, the Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

37. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the 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.
38. 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.
39. 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.
40. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

41. TVP advised the Commissioner:

"These testimonials have never been made public nor read out at the Gross Misconduct hearing. They were purely provided in private to the panel when they were considering what sanction to impose".

42. The individuals who provided the testimonials would therefore have no expectation that their personal statements would be released into the public domain. Furthermore, the officer concerned will be unaware of their content and would not expect this information to be disclosed to the world at large via FOIA after the hearing has been completed.
43. TVP explained that disclosure would impose an unjustified level of anxiety and distress for those who provided the statements and would also undermine the confidence that was afforded to them when providing the statements. The Commissioner understands that, whilst police officers may generally expect their professional statements to be considered in line with their policing duties, these testimonials were given as personal opinions and were shared only with a limited, necessary audience.
44. TVP concluded that it strongly believes these officers are entitled to privacy. The reasons why these statements were drafted and provided, and their intended use, supports this assessment. The statements were not written with the intention that they would be made public.
45. The gross misconduct hearing has taken place and the outcome was put into the public domain, as per The Police (Conduct) Regulations 2020³. The officer was dismissed and the Commissioner therefore considers that there is only a limited legitimate interest in disclosing the officers' views about their ex-colleague. The public interest has been met by the publishing of the outcome of the hearing itself and the findings of the misconduct panel.
46. The Commissioner acknowledges that the release of the requested information would demonstrate that TVP are being open and transparent regarding the information considered by panel when deciding whether a sanction would be imposed. Had the testimonials been influential in reducing the outcome of the hearing or in exonerating the officer concerned then the Commissioner accepts that there may be a reasonable argument for their content to be disclosed. However, in the circumstances of this case, where the officer has nevertheless been

³ <https://www.legislation.gov.uk/uksi/2020/4/regulation/43/made>

dismissed, he can find little justification to require their disclosure under FOIA.

47. 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.
48. 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.

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: 0203 936 8963

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

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