

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

### **Decision notice**

**Date:** 30 January 2024

**Public Authority:** Commissioner of the City of London Police  
**Address:** Police Headquarters  
Guildhall Yard East  
London EC2V 5AE

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

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1. The Commissioner's decision is that City of London Police (CoLP) is entitled to rely on section 30(1)(a) and section 40(2) of FOIA to withhold the requested information about a misconduct hearing. These exemptions concern investigations and personal data respectively.
2. It's not necessary for CoLP to take any corrective steps.

### **Request and response**

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3. The complainant made the following information request to CoLP on 8 June 2023:

"This request relates to the misconduct hearing into David Clark, which concluded on 9 May. Please can you provide me with an electronic copy of the following:

1. A copy of the panel's bundle containing the documentary evidence that was before them
2. A copy of the hearing transcript (or, if there is no transcript, a copy of the audio recording)"

4. CoLP issued a refusal notice on 1 August 2023. It withheld the requested information under section 40 of FOIA, which concerns personal data.
5. In their request for an internal review, the complainant noted a recent decision of the First-tier Tribunal (Information Rights) in which it had found that section 40(2) wasn't engaged in respect of information about a separate misconduct hearing.
6. Following its internal review, CoLP withdrew its reliance on section 40 and its final position was that the requested information was exempt from disclosure under section 30(2)(iii) of FOIA.
7. However, in its submission to the Commissioner CoLP confirmed that, having reconsidered the request as a result of the complaint to him, it considers that section 30(1)(a) and section 40(2) of FOIA are engaged. CoLP advised that it intends to send the complainant links to relevant published information and clarify the section 30 exemption on which it's now relying.

## **Reasons for decision**

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8. This reasoning covers the Police's application of both section 30(1)(a) and section 40(2) of FOIA to the complainant's request.

## **Section 30 - investigations**

9. Under section 30(1)(a) of FOIA information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of 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.
10. CoLP has provided the following context. The Independent Office for Police Conduct (IOPC) carried out an investigation into five allegations of a breach of the standards of professional behaviour by a senior City of London police officer. When the investigation concluded CoLP was directed to hold a hearing and the IOPC provided CoLP with a hearing bundle. The officer was found guilty of gross misconduct and would have been dismissed had they not retired prior to the hearing. They have also been placed on the College of Policing Barred List.
11. CoLP had told the Commissioner that an appeal was also lodged. In its submission to him, which he received on 28 January 2024, CoLP indicated that the appeal was yet to be heard. However, the Commissioner has noted that summary information about the hearing in

May 2023 is in the public domain<sup>1</sup> and this indicates that an appeal was heard on 3 November 2023.

12. CoLP has confirmed that it holds a copy of the hearing bundle, amounting to 1714 pages, and a copy of a recording of the hearing.
13. In its submission to the Commissioner CoLP has explained the necessary and legal basis on which it holds this information, as follows:
  - Complaints against police officers are regulated by Schedule 3 of the Police Reform Act 2002, the Police (Complaints and Misconduct) Regulation 2020 and the Police (Conduct) Regulations 2020.
  - Section 6(2) of Schedule 3 of the Police Reform Act 2002 places a duty on the Appropriate Authority to investigate complaints against police officers.
  - Section 29(1) of the Police Reform Act 2002 defines the Appropriate Authority as the Chief Officer under whose direction and control the officer complained of is. In the case of a complaint against a City of London police officer who is not a senior officer, the Appropriate Authority is the Commissioner for the City of London Police. In this case the IOPC became the Appropriate Authority for the purpose of the investigation, but it reverted to CoLP for the purpose of the hearing.
  - The hearing was necessary to establish if the officer subject of the IOPC investigation was guilty of the five offences with which he was charged, contrary to Schedule 2 of the Police (Conduct) Regulations 2020.
14. The Commissioner is satisfied that the terms of section 30(1)(a) are met and that CoLP holds the requested information for the purpose of an investigation ie a hearing. Section 30(1)(a) is therefore engaged, and the Commissioner has gone on to consider the associated public interest test.

### **Public interest test**

15. CoLP has acknowledged that disclosing the requested information would lead to a better-informed public. It would improve people's knowledge and understanding of how the police service and the CoLP undertake

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<sup>1</sup> <https://www.cityoflondon.police.uk/foi-ai/city-of-london-police/misconduct-outcomes/2023/david-clark/>

internal investigations and information used at a formal disciplinary hearing. The officer involved was of a high rank and the conduct of police officers continues to be in the public eye and interest, given recent high-profile cases in London. Disclosure would also satisfy the public at large as to the thoroughness and proper conduct of the investigation and hearing.

16. Against disclosure, CoLP says that although there's been a formal hearing and subsequent outcome to the hearing, the proceedings aren't complete. Any further investigation or legal proceedings regarding this matter would be prejudiced by disclosing such information to the world at large. The right to a fair and open appeal process would be undermined if disclosure took place at this time. Further, if the information were to be disclosed immediately after any proceedings, CoLP's capabilities and powers to enforce the outcome would be compromised. This may also lead to future investigations, disciplinaries and hearings failing, if the integrity of the process is questioned.
17. Finally, CoLP says that that if the requested information were to be made public, those involved with the forthcoming Appeal would be able to view some or all of the evidence and deliberations of the Appeal panel. This could seriously prejudice the conduct of the Appeal.

### **Balance of the public interest**

18. It's important for the public to have confidence in how CoLP carries out investigations and hearings in relation to its officers. However, the Commissioner considers that information that's in the public domain adequately addresses the public interest in transparency.
19. The Commissioner considers that there's stronger public interest in protecting public authorities' ability to carry out investigations and hearings. In this case, CoLP's ability to conduct investigations and hearings into its officers. This is especially so as the matter was live at time of the request as the hearing decision in question was subject to an appeal. At the time of the request the appeal hadn't been heard and so disclosing the information could have jeopardised that appeal.
20. The Commissioner finds that CoLP correctly applied section 30(1)(a) of FOIA to the requested information and that the public interest favoured withholding the information. This is in line with his decision in IC-253348-S9X8<sup>2</sup>.

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<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4027923/ic-253348-s9x8.pdf>

21. Although the Commissioner has found that section 30 is engaged, he's also considered CoLP's application of section 40(2).

### **Section 40 – personal data**

22. Under section 40(2) of FOIA information is exempt information if it's the personal data of another individual and a condition under section 40(3A) is satisfied.
23. In this case the relevant condition is contained in section 40(3A)(a). This applies where disclosing the information to any member of the public would contravene any of the principles relating to the processing of personal data as set out in Article 5 of the UK General Data Protection Regulation (GDPR).
24. As noted, the complainant has requested the bundle of documents presented to the panel of a particular hearing, and a recording or transcript of the hearing.
25. The complainant has noted the First-tier Tribunal (FTT) decision in EA/2021/0376.<sup>3</sup> That case concerned a decision the Commissioner had made about similar information in IC-86525-W2N9<sup>4</sup>; namely information associated with a police disciplinary hearing. The Commissioner had found that section 40(2) was engaged, that complainant appealed the decision and the FTT allowed it. The FTT considered that section 40(2) wasn't engaged because the hearing had taken place in public. However, the FTT's decision isn't binding.
26. CoLP has noted what it considers to be a difference between the two requests. CoLP says that in the request the FTT considered, the complainant had introduced their request by referring to "...a pdf of **the outcome of** this hearing...[Commissioner's italics]." In the current case, the complainant has introduced their request by referring to "...the misconduct hearing of David Clark..." and has requested "...the panel's bundle containing the documentary evidence that was before them." In the Commissioner's view however, the requests are substantially the same because in both requests the bundle presented to the hearing panel and the hearing transcript or recording were requested.

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<sup>3</sup> [https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i3232/Kanter-Webber,%20Gabriel%20\(EA-2021-0376\)%20Allowed.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i3232/Kanter-Webber,%20Gabriel%20(EA-2021-0376)%20Allowed.pdf)

<sup>4</sup> <https://ico.org.uk/media/action-weve-taken/decision-notice/2021/4019326/ic-86525-w2n9.pdf>

27. In the current case, the Commissioner is again satisfied that the withheld information is personal data – it relates to the officer in question and witnesses, and they can be identified from it.
28. The Commissioner has next considered whether disclosing the information would contravene one of the data protection principles, namely the principle set out under Article 5(1)(a) of the UK GDPR which says that personal data must be processed lawfully, fairly and in a transparent manner.
29. In order to be lawful one of the lawful bases under Article 6(1) of the UK GDPR must apply to the processing of the personal data. 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.”
30. The Commissioner considers that the complainant’s interest in this information is a legitimate interest for them to have.
31. As CoLP has noted there’s also a wider public interest in transparency about misconduct hearings involving serving police officers. However, CoLP considers that the degree of public interest is proportionate to the gravity of the offence being heard, and “its significance in respect of public issues subject to high profile media attention. For example, a disciplinary hearing relating to a sexual offence at the time of the David Carrick investigation and trial for multiple rapes would be of the most significant public interest. By contrast, a hearing relating to a low value theft would have a much more limited public interest.”
32. In this case, CoLP believes that the level of public interest is towards the more limited end of the spectrum. The officer concerned held the relatively senior rank of Chief Superintendent at the time of the incident but had left the police service at the time of the hearing. The case did attract the attention of the national media at the time, but CoLP says it has been unable to identify any media source that reported more than a summary of the case and no criminal trial followed the IOPC investigation. CoLP provided the Commissioner with links to news articles in the Evening Standard and The Sun, as examples.
33. In CoLP’s view, the legitimate interest in police disciplinary hearings being transparent is already served by virtue of the information already published by both CoLP and the local and national media.

34. The Commissioner largely agrees with CoLP. However, he will accept that to fully review and understand how the police disciplinary system works disclosing the requested information would be necessary.
35. The Commissioner must therefore balance the legitimate interests in disclosure against the interests or fundamental rights and freedoms of the data subjects – that is, the former police officer in this case and other witnesses.
36. In considering this balancing test, the Commissioner takes 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.
37. 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.
38. It's also important to consider whether disclosure would be likely to result in unwarranted damage or distress to the individual.
39. CoLP has told the Commissioner that it hasn't sought the consent from, nor has it been provided by, any of the witnesses and the summary of the case that CoLP published doesn't identify any witnesses or their testimony. CoLP acknowledges that the disciplinary hearing was held in public and in that respect, a member of the public who attended the hearing would have been able to report details of the proceedings to the public domain, including the personal data of those individuals who took part in the process. However, CoLP says, there is little evidence that witnesses are identified by the media in anything other than high profile cases. It's therefore CoLP's view that a witness would have a reasonable expectation that their identify wouldn't be identified in the national media in anything other than a high-profile case where they were an integral part of the case.
40. CoLP has concluded its submission by explaining that a public police disciplinary hearing shares the principle of open justice with a criminal court but the rules governing the conduct of each are different. In particular, it's not generally permitted for Court proceedings to be filmed, photographed or recorded. Providing an audio recording of a disciplinary hearing in response to a FOIA request which discloses the



personal data of the witnesses would represent a lower level of protection of the witnesses' personal data.

41. A request for the transcript of a Court hearing is subject to restrictions which may include a requirement to provide justification for such a request. Additionally, a request may be subject to a fee. By contrast, assuming the information can be retrieved within the cost threshold, a FOIA request is free and regarded as a public disclosure, again representing a lower level of protection of the witnesses' personal data.
42. CoLP says that the FTT decision to which the complainant refers relies on the Judgement of the Supreme Court in the case of *Khuja v Times newspaper*. CoLP points out that that case concerned the public identification of an individual arrested in connection with a high-profile criminal offence but who was never charged. The individual was referred to by name in the Court proceedings, but the Judgement didn't relate to the provision of an audio recording or transcript of the Court proceedings.
43. In the Commissioner's view, the data subjects in this case would have a reasonable expectation that **broad** information about the hearing would be placed in the public domain; on CoLP's website or through news articles. They might also have the expectation that, since members of the public could attend the hearing, any of those individuals could put information about the hearing into the public domain. They might expect too that an individual could request – and be provided with – relevant information in the limited circumstances that CoLP has described in paragraphs 40 and 41.
44. However, the Commissioner considers that the data subjects – the officer in question and witnesses - wouldn't expect that the full and detailed information presented to the panel hearing, or a transcript of the hearing or an audio recording of it, would be disclosed to the world at large under FOIA. Disclosing this information would therefore distress those individuals.
45. The Commissioner is therefore satisfied that the complainant's interest and the general interest in transparency about police disciplinary hearings, while legitimate, aren't sufficient to outweigh the data subjects' fundamental rights and freedoms. There may have been more public interest in the matter if the officer hadn't been found guilty of a breach of standards, but the officer had been found guilty of gross misconduct and would have been sacked if they hadn't already retired. This suggests that the police disciplinary process is working. In addition the Commissioner considers that the relevant information that's in the public domain adequately addresses the public interest in transparency about the matter.



46. The Commissioner therefore finds that there's no Article 6 basis for processing and so disclosing the information in question wouldn't be lawful. Given the above conclusion that disclosure would be unlawful, the Commissioner doesn't need to go on to consider separately whether disclosure would be fair or transparent.
47. The Commissioner has noted the FTT's decision in EA/2021/0376. However his decision in this case is that CoLP is entitled to withhold the requested information requested under section 40(2) of FOIA, by way of section 40(3A)(a).

## **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**

**Cressida Woodall**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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