

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

### **Decision notice**

**Date:** 10 July 2024

**Public Authority:** Chief Constable of Warwickshire Police  
**Address:** Police Headquarters  
Leek  
Wootton  
Warwick  
CV35 7QA

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

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1. The complainant has requested information about a court case involving Warwickshire Hunt, from Warwickshire Police. Warwickshire Police denied holding some of the information. It advised that some information was in the public domain so was exempt by virtue of section 21(1) (Information accessible to applicant by other means) of FOIA. It directed the complainant to the Office of the Police and Crime Commissioner (the "OPCC") for one part of the request. It advised that one part was exempt from disclosure, citing section 32(1) (Court records) of FOIA. It also withheld an email citing section 42(1) (Legal professional privilege) of FOI.
2. The Commissioner's decision is that Warwickshire Police was entitled to rely on the position taken regarding parts (2), (3) and (5) of the request. However, by failing to issue a timely response, Warwickshire Police breached sections 1(1) (General right of access) and 10(1) (Time for compliance) of FOIA.
3. He finds that part (4) of the request was not responded to adequately. The Commissioner requires Warwickshire Police to take the following steps to ensure compliance with the legislation:
  - issue a fresh response advising the complainant whether or not it holds any relevant information. If any information is held, this

should either be disclosed or Warwickshire Police should issue a valid refusal notice explaining why it is exempt from disclosure.

4. Warwickshire Police must take these steps within 30 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.

## Background

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5. At the time of the request, Warwickshire Police had a statement on its website, which has since been removed. The Commissioner is advised that this statement was as follows:

"A spokesperson for Warwickshire Police said:

'Earlier this year we took civil action following concerns raised by the community over road safety while hunt activity took place.

This came in the form of a Community Protection Notice [CPN], which we issued.

The CPN outlined several steps that Warwickshire Hunt must take to ensure that both they and any members of the public using the roads are safe.

This civil order concerned only safety around the roads. It had no bearing on the hunt's legal right to trail hunt.

Warwickshire Hunt exercised their right to appeal the CPN and this meant the CPN was suspended awaiting appeal. During this process we met with them to discuss a proposal for a different agreement.

During these discussions, the Hunt agreed to a protocol that will see the introduction of safety and monitoring measures that are far wider-reaching than anything the CPN originally stipulated.

Given that this is a civil matter, and Warwickshire Hunt have accepted and understood the community's concerns over road safety and are keen to work with all parties to manage this going forward, we have taken the decision to withdraw the CPN'."

6. Warwickshire Police also explained to the Commissioner:

"The decision to enter into the Protocol was a different decision to withdrawing the court proceedings; this is because the Court

proceedings were not instigated by Warwickshire Police and therefore were not ours to withdraw.

The position is, as was explained in our statement issued by the Force in August 2023 to which a link was provided in response to this question, –

- In December 2022 Warwickshire Police issued a Community Protection Notice (CPN) against Warwickshire Hunt which sought to address concerns raised in relation to road safety.
- Warwickshire Hunt lodged an appeal against the CPN through the courts. The effect of lodging the appeal was to suspend the CPN whilst the appeal was determined.
- The Protocol was explored as a resolution of those court proceedings and was entered into in order to settle and resolve those proceedings – it was, in effect, a settlement agreement.
- As a result of the Protocol being agreed, the Warwickshire Hunt withdrew their appeal and the Police withdrew the CPN.

Therefore, it is correct and consistent to advise that a Chief Officer signed the Protocol but that it was not our decision to withdraw the court proceedings – that decision was exercised by Warwickshire Hunt”.

## **Request and response**

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7. On 20 August 2023, the complainant wrote to Warwickshire Police and requested the following information:

“Q1. Who was the Officer that got the Community Protection Notice [CPN] against Warwickshire Hunt ‘pulled’ from going to Court?

Q2. How many hours were spent by officers collecting the evidence to go to court, and how much did that cost. (Happy with rounded estimated hours and costs).

Q3. Why was the decision made to ‘pull’ the court case?

Q4. Did the Police Commissioner, Philip Seccombe have any involvement?

Q5. What is the protocol that has been agreed with Warwickshire Hunt that replaced the CPN?”.

8. On 13 October 2023, Warwickshire Police responded. It denied holding the information requested in parts (1) and (2) of the request. It advised that information about part (3) was in the public domain, so was exempt by virtue of section 21 of FOIA (it provided a link to this information – see “Background” above). It directed the complainant to the Office of the Police and Crime Commissioner (“OPCC”) for part (4) of the request. It refused to provide the information at part (5), advising that it was exempt from disclosure by virtue of section 32(1)(b) of FOIA.
9. The complainant requested an internal review of parts 2-5 of his request on 15 October 2023.
10. Warwickshire Police provided an internal review on 7 November 2023. It gave a further explanation, but maintained its overall position.
11. During the Commissioner’s investigation, Warwickshire Police added reliance on section 42(1) of FOIA.

### **Scope of the case**

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12. The complainant contacted the Commissioner on 14 November 2023 to complain about the way his request for information had been handled. He complained about timeliness and also said:

“In order of importance - Q4 of attached request and internal review - I asked for a YES or NO answer and they keep referring me elsewhere - I suspect that they don't want to lie or 'drop the PCC in it'. Q1 - their original response stated that the case was pulled at Chief Officer level, their internal review states that the decision was not made by Warks Police. Q3 is not adequately responded to. Q2 I only wanted an estimate of of [sic] the order of costs - is it £50, £1,000, £5,000, £10,000. Q5 Written by a solicitor and I don't understand why they can't provide the information, I suspect it is a smokescreen”.

13. Although mentioned in his grounds above, the complainant did not refer to part (1) of his request when asking for an internal review; the Commissioner will therefore not further consider this part of the request.
14. The Commissioner will consider timeliness and the responses to parts (2) to (5) of the request. The parts have been considered in turn as they have required different analyses.
15. At a late stage in the investigation, Warwickshire Police provided the Commissioner with a redacted copy of an email which involved a solicitor. Whilst the redactions were unhelpful, and it should have been provided in full to the Commissioner in compliance with an information

notice that was issued (see Procedural section below), the Commissioner is satisfied that this email would fall within the scope of part (3) of the request. It will be considered below.

16. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of FOIA. FOIA is concerned with transparency of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held by public authorities. FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.

## **Reasons for decision**

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### **Part 2 of the request**

#### **Section 1 – General right of access to information**

17. In this case, the complainant suspects that Warwickshire Police holds information from which it could answer part (2) of the request. Warwickshire Police's position is that it does not.
18. Section 1 of FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds that information and, if so, to have that information communicated to them.
19. In cases where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner – following the lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.
20. The Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the public authority to check whether the information is held and any other reasons offered by the public authority to explain why the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.

21. It is initially noted that the complainant has suggested that he would be satisfied with 'an estimate' of costs from Warwickshire Police. However, as explained in paragraph 14 above, FOIA only requires a public authority to disclose recorded information that it **already** holds. FOIA does not provide an obligation to create information, provide explanations or to put thoughts into recorded form in response to a request. Therefore, unless such an estimate was already held at the time of the request, then Warwickshire Police cannot be required to create one.
22. Accordingly, the Commissioner has sought to determine whether, on the balance of probabilities, Warwickshire Police holds any recorded information concerning the hours and costs of dealing with the subject matter. Therefore, he asked Warwickshire Police to explain what enquiries it had made in order to reach the view that it did not hold the information.
23. Warwickshire Police explained:

"Police Officers are not required to record the time they spend on each individual case or investigation during each shift. Officers can and do deal with enquiries and duties on a number of different matters during each shift. Further, there are no systems or processes in place for them to record time spent on individual cases. As such, there is no mechanism through which anyone could undertake even an approximate estimation of the time spent on this case by all officers who may have been involved".

### **The Commissioner's conclusion**

24. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in the paragraphs, above, the Commissioner is required to make a finding on the balance of probabilities.
25. When dealing with a complaint to him under the FOIA, it is not the Commissioner's role to make a ruling on how a public authority deploys its resources, on how it chooses to hold its information, or the decisions it makes to hold some, but not other, information. Rather, in a case such as this, the Commissioner's role is simply to decide whether or not, on the balance of probabilities, the public authority holds the requested information.
26. While appreciating the complainant's frustration that Warwickshire Police does not hold this information, the Commissioner is mindful of the

comments made by the Information Tribunal in the case of Johnson / MoJ (EA2006/0085)<sup>1</sup> which explained that FOIA:

“... does not extend to what information the public authority should be collecting nor how they should be using the technical tools at their disposal, but rather it is concerned with the disclosure of the information they do hold”.

27. Based on the explanation provided, and also his experience of dealing with cost- and time-related information held by police forces, the Commissioner accepts that this type of information would not be recorded in these circumstances. He is therefore satisfied that, on the balance of probabilities, no recorded information within the scope of part (2) of the request is held. He is therefore satisfied that Warwickshire Police complied with the requirements of section 1 of FOIA.

### **Part 3 of the request**

#### **Section 21 – Information accessible to applicant**

28. Section 21 of FOIA provides that information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
29. When relying on section 21(1) to refuse a request on the basis that the information is publicly available, a public authority must show that:
- the information in the public domain matches what the applicant asked for;
  - precise directions have been given to the applicant to enable them to find it without difficulty and without a great deal of searching necessary to locate it; and
  - the particular circumstances of the applicant and whether they can reasonably access the information, are satisfied.
30. In its refusal notice, Warwickshire Police provided the complainant with a link to a statement on its website which it considered to cover the decision as to why the court case had been “pulled”.

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<sup>1</sup><http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i90/Johnson.pdf>

31. However, when requesting an internal review, the complainant indicated that the published statement did not include sufficient rationale to satisfy his request. He said:

"I am trying to ascertain the benefit of 'pulling' the CPN court case which could have been enforced with a private protocol that does not carry the same weight. The way that Warwickshire Hunt has continued to ignore road safety concerns demonstrates their contempt for the agreement. Would Warks Police enter into a private agreement with a group of other criminals such as burglars or paedophiles in order for them to improve their behaviour? I know the answer is No, so why do this for Warks hunt?"

32. The information that was originally available on the website is as reproduced in the "Background" section above. The Commissioner is satisfied that it provides some information relevant to this part of the request. Furthermore, the complainant has communicated with the Commissioner via email. Therefore, it is a reasonable assumption that he has access to the internet and can access this information via the link that was previously provided.

## **Conclusion**

33. The Commissioner is satisfied that section 21 is engaged in respect of some of part (3) of the request. As this is an absolute exemption there is no requirement to consider the public interest in this matter.
34. He will now consider whether there is any **further** information held in respect of part (3) of the request.

## **Part 3 of the request**

### **Section 42 – Legal professional privilege**

35. On 3 July 2024, at a late stage of the investigation, Warwickshire Police provided the Commissioner with a copy of an email which it had located. The Commissioner considers this email would fall within the remit of this part of the request.
36. Warwickshire Police was reluctant to provide the Commissioner with an unredacted copy of the withheld email. The Commissioner reminds Warwickshire Police that if he considers it necessary to see the withheld information in a complaint case, then a public authority should provide it, particularly when it has already been necessary to issue an information notice formally requiring all withheld information to be provided in full.
37. However, from the submission provided, given the circumstances leading to the request being made and for expediency, the



Commissioner didn't consider viewing the withheld information in full to be necessary in order for him to make a decision.

38. Section 42 of FOIA states that a public authority may refuse to disclose information which is subject to legal professional privilege (LPP).
39. There are two types of LPP – litigation privilege and advice privilege. Warwickshire Police has claimed that the withheld information is subject to litigation privilege as it applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation.
40. From what he has seen, the Commissioner is satisfied that the withheld information comprises confidential communications between client and legal adviser for the dominant purpose of seeking and giving legal advice. It falls within the definition of litigation privilege and is therefore subject to LPP. Accordingly, the Commissioner finds that the exemption is engaged in respect of the withheld information.
41. Section 42 is a class-based exemption, so there is no need for a public authority to demonstrate any prejudice or adverse effect. It is however qualified by the public interest test.

### **Public interest test**

#### **Arguments in favour of disclosure**

42. The complainant is unaware of the late application of section 42 and, for expediency in what has become a protracted case, the Commissioner has used his discretion to proceed without these.
43. Warwickshire Police argued:

“There is a public interest in transparency and accountability around how Warwickshire Police has used public funds to aid their decision making, such as the decision to withdraw the CPN. Transparency around decision making promotes public confidence in the force”.

#### **Arguments in favour of maintaining the exemption**

44. Warwickshire Police argued:

“Disclosure under the Freedom of Information Act is a release of information to ‘the world’ in general and not just to the applicant.

There is a public interest in protecting the confidentiality of free and frank communications between Warwickshire Police and its legal advisors, in the same way that there is when considering the confidentiality of communication between lawyers and clients. Should the force be unable to seek advice in a candid and open

way, and legal advisors be unable to respond without concern that the correspondence will be subject to public scrutiny, there would be a significant reluctance to request and provide legal advice. This in turn could severely prejudice the quality of decision making and could impact on the effective conduct of policing processes”.

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

45. The Commissioner recognises the public interest in promoting accountability and transparency, particularly around the actions of public bodies. He also recognises the importance of maintaining openness in communications between client and lawyer to ensure full and frank legal advice.
46. The Commissioner notes that the circumstances surrounding the request and requirement for legal advice relates to a situation which gives rise to many strong feelings within the public arena.
47. The public interest inherent in section 42 will generally be extremely strong, owing to the importance of the principle behind LPP: safeguarding confidential communications between client and lawyer to ensure access to full and frank legal advice. A weakening of the confidence that parties have that legal advice will remain confidential undermines the ability of parties to seek advice and conduct litigation appropriately. This erodes the rule of law and the individual rights it guarantees.
48. The Commissioner accepts that there will always be a public interest in transparency, accountability and in the public having access to information to enable them to understand more clearly why particular law enforcement decisions have been made and certain processes followed.
49. The Commissioner has attached appropriate weight to the public interest in disclosure as set out above. However, he does not consider that they are strong enough to outweigh or override the substantial public interest in protecting the principle of LPP in this particular case. The public was kept apprised of the situation and the Commissioner considers this to have gone a long way to satisfying the public interest in transparency.
50. Having considered the relevant factors, the Commissioner is satisfied that the public interest in maintaining the exemption in this case outweighs the public interest in disclosure. He considers that the limited public benefits in disclosure would not offset the resulting detriment to Warwickshire Police’s ability to obtain legal advice.
51. The Commissioner’s decision, therefore, is that Warwickshire Police is entitled to withhold the related email under section 42 of FOIA.

### **Part 3 of the request**

#### **Section 1 – General right of access to information**

52. The complainant suspects that Warwickshire Police holds further information from which it could answer part (3) of the request. Warwickshire Police's position is that it does not.
53. The complainant wishes to know why the decision was made to "pull" the court case" and, in his grounds of complaint, he adds that he wishes to establish any benefit of doing so.
54. In this respect, as explained in the Background section above, it should be noted that the decision to 'pull' the court case was **not** made by Warwickshire Police. Warwickshire Police has explained that the court proceedings were not instigated by it and, therefore, the proceedings were not its to 'pull', ie these matters relate directly to the Hunt itself.
55. On this basis, Warwickshire Police has advised that the information is not held; presumably any relevant details would be held by the Hunt as this was an action initiated by them.
56. Based on the explanation provided, the Commissioner accepts that there would be no reason for Warwickshire Police to hold this information. He is therefore satisfied that, on the balance of probabilities, no further recorded information within the scope of part (3) of the request is held. He is therefore satisfied that Warwickshire Police complied with the requirements of section 1 of FOIA.

### **Part 4 of the request**

#### **Section 1 – General right of access to information**

57. In respect of part (4) the complainant specified that he has: "asked for a YES or NO answer and they keep referring me elsewhere"; the "elsewhere" being in reference to Warwickshire Police referring him to the OPCC, as this is a separate public authority for the purposes of FOIA.
58. In responding to the Commissioner's enquiries, Warwickshire Police said:

"This query was referred to the Office of the Police and Crime Commissioner (PCC) as the PCC is an entirely separate legal entity from the Chief Constable and the force and therefore it was felt appropriate for his office to respond to this question.

However, the legal position is clear that PCCs are not able to interfere in any operational policing matters, and the issuing of any CPN is an operational decision.

Given the level of subsequent media and social media coverage of this matter, the PCC and his office were briefed by Chief Officers as to the history of the matter and chronology of issuing the CPN and resolving the appeal proceedings by way of the Protocol”.

59. FOIA doesn't require a public authority to give opinions or explanations or to answer general queries. FOIA concerns solely recorded information an authority holds at the time of a request. Therefore, Warwickshire Police cannot be required to give a "YES or NO" answer.
60. However, if Warwickshire Police were to hold any relevant recorded information from which it could answer this part of the request, then this would need to be considered for disclosure under FOIA.
61. It is noted that Warwickshire Police has suggested to the complainant that he contact the PCC directly, and it provided an appropriate point of contact for him to do so. However, whilst this is a possible way to deal with the request, it is clear that the complainant wishes to know whether Warwickshire Police itself holds any information.
62. Warwickshire Police has not itself stated whether or not it holds relevant information. In view of the considerable delays the Commissioner will not enter into further correspondence regarding this point so Warwickshire Police should take the step ordered in paragraph 3.

## **Part 5 of the request**

### **Section 32 – Court records**

63. Warwickshire Police have cited section 32(1)(b) of FOIA in respect of the requested protocol.
64. Section 32(1) of FOIA states that information is exempt from disclosure if it's held only by virtue of being contained in:
  - “(b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter”.
65. Courts and inquiries are not subject to FOIA, so the public authorities most likely to use this exemption are those whose functions involve regular interaction with the courts system, or who are party to court, inquiry or arbitration proceedings.

66. Section 32 is an absolute exemption and is therefore not subject to any public interest considerations.
67. The Commissioner has published guidance on section 32 of FOIA<sup>2</sup> which sets out his interpretation of the section 32 exemption.
68. The Commissioner understands that section 32 FOIA was drafted to allow the courts to maintain judicial control over access to information about court proceedings. This includes giving courts control to decide what information can be disclosed without prejudicing those proceedings. In effect, section 32 ensures that FOIA cannot be used to circumvent existing court access and discovery regimes. In addition, public authorities are not obliged to disclose any information in connection with court, inquiry or arbitration proceedings outside of those proceedings.
69. In its refusal notice, Warwickshire Police advised the complainant that: "the exemption is engaged as the details of the protocol exists only by virtue of being created to resolve litigation proceedings of which Warwickshire Police were a party". It added no further rationale at internal review.
70. In explaining its position to the Commissioner, Warwickshire Police said:

"The Protocol is an agreement which was entered into by the Warwickshire Hunt and Warwickshire Police – being the 2 parties to ongoing appeal proceedings – for the purpose of resolving those proceedings in a way which provided a workable framework between the parties. As was made clear in the Force's statement at the time, its requirements go further than the terms of the CPN. As a result of agreeing the Protocol, the court proceedings were settled through the appeal being withdrawn and the CPN also being withdrawn".
71. As explained in the Commissioner's guidance:

"Section 32 covers information held 'only by virtue' of being contained in documents that are created or held for the purposes of court, inquiry or arbitration proceedings".
72. Having considered the arguments provided, and the associated legal correspondence, the Commissioner is satisfied that the protocol was

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/2021/2619028/s32-court-inquiry-and-arbitration-records.pdf>

originally created for the purposes of proceedings, and not acquired by any other route, therefore it is held 'only by virtue' of being for the purpose of proceedings in a particular cause or matter.

73. As the protocol engages the exemption, it is exempt from disclosure under FOIA.

## **Procedural matters**

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### **Section 1 – General right of access**

#### **Section 10 - Time for compliance**

74. Section 1(1)(a) of FOIA states that a person who asks for information is entitled to be informed whether the information is held. If it is held, section 1(1)(b) states that the person is entitled to have that information communicated to them.
75. Section 10(1) of FOIA states that on receipt of a request for information a public authority should respond within 20 working days.
76. By failing to respond to the request within the 20 working day time for compliance, Warwickshire Police breached sections 1(1)(a) and (b), and 10(1) of FOIA.

#### **Information Notice**

77. As Warwickshire Police failed to adequately respond to the Commissioner's enquiries it was necessary for him to issue an Information Notice in this case, formally requiring a response. The Information Notice will be published on the Commissioner's website.

#### **Engagement with the Commissioner**

78. The Commissioner also wishes to note poor engagement from Warwickshire Police. Responses to queries have been prolonged and have had to be chased on several occasions.
79. This behaviour has been logged for monitoring purposes.

## **Right of appeal**

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81. 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)

82. 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.
83. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Carolyn Howes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
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**Wilmslow**  
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