

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

### **Decision notice**

**Date:** 31 January 2024

**Public Authority:** Chief Constable of Cumbria Constabulary  
**Address:** Cumbria Constabulary Headquarters  
Carleton Hall  
Penrith  
Cumbria  
CA10 2AU

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

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1. The complainant has requested information regarding misconduct hearing outcomes from Cumbria Constabulary. Cumbria Constabulary relied on section 40(2) of FOIA (third party personal information) to withhold the information.
2. The Commissioner's decision is that Cumbria Constabulary was entitled to rely on section 40(2) to withhold the requested information.
3. The Commissioner does not require further steps.

#### **Request and response**

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4. On 13 August 2023, the complainant wrote to Cumbria Constabulary and requested information in the following terms:

"Please send me a copy of the outcome notice of misconduct proceedings for officer [name redacted] who [according] to ITV News was "sacked after falsifying records."...

PC [name redacted]

According to the NWE Mail, PC [name redacted] was dismissed [date redacted] for disclosing sensitive information between [dates redacted]:...

Please provide recorded information regarding the number of times you found PC [name redacted] to have accessed STORM, UNIFI and the PNC without a proper policing purpose. If no exact number exists, please provide recorded information regarding the number of times you estimated that he accessed the three systems mentioned without a proper policing purpose.”

5. Cumbria Constabulary responded on 11 September 2023. It stated that the information was exempt from disclosure under section 40(2).

## **Scope of the case**

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6. The complainant contacted the Commissioner on 18 November 2023 to complain about the way their request for information had been handled.
7. The Commissioner considers that the scope of his investigation is to establish whether Cumbria Constabulary is entitled to withhold the requested information under section 40(2) of the FOIA.

## **Reasons for decision**

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### **Section 40 –personal information**

8. 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.
9. 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').
10. 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.
11. 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?**

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

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

13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
14. 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.
15. 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.
16. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information withheld in this case includes specific personal details about named individuals and their personal life in connection with misconduct hearings. The personal data relates to the data subjects who can be identified as they are named within the request.
17. The Commissioner is also satisfied that any information regarding how many occasions one of the officer in question accessed STORM, UNIFI and the PNC without cause, would also constitute their personal data as it relates directly to the misconduct that they were personally subject to.
18. Having considered the nature of the withheld information, the Commissioner is satisfied that it both relates to and identifies the individuals concerned. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.
19. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.

**Would disclosure contravene principle (a)?**

20. Article 5(1)(a) of the UK GDPR states that: “Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.
21. 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.
22. 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.

23. In addition, if the requested data is criminal offence data, in order for disclosure to be lawful and compliant with principle (a), it must also meet the requirements of Article 10 of the UK GDPR.

**Lawful processing: Article 6(1)(f) UK GDPR.**

24. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" lawful bases for processing listed in the Article applies.
25. 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"<sup>1</sup> .
26. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under 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.
27. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.
28. The Commissioner has outlined his view in a similar request for information made by the same complainant in his Decision Notice IC-264178-D7D2<sup>2</sup>. In that case, the Commissioner upheld the public

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<sup>1</sup> Article 6(1) goes on to state that:- "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 UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (disapplying the legitimate interests gateway in relation to public authorities) were omitted"

<sup>2</sup> [ic-264178-d7d2.pdf \(ico.org.uk\)](https://ico.org.uk/decision-notice/264178-d7d2)

authority's position that the requested information was exempt from disclosure on the basis that it was third party personal data and the data subject's fundamental rights and freedoms overrode the legitimate interests in the requested information.

29. 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 disclosure of the information would not be lawful.
30. 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.

### **Other matters**

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31. The Commissioner would like to remind Cumbria Constabulary that whilst internal reviews are not a legal requirement under FOIA, they are still considered to be good practice.
32. In the circumstances of this case, Cumbria Constabulary did not complete an internal review, despite the complainant requesting one be undertaken.

## **Right of appeal**

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33. 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)

34. 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.
35. 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**