

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

### **Decision notice**

**Date:** 20 May 2024

**Public Authority:** Chief Constable of Essex Police  
**Address:** PO Box 2  
Springfield  
Chelmsford  
Essex  
CM2 6DA

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

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1. The complainant has requested information connected to a misconduct hearing from Essex Police. Essex Police refused to provide the requested information citing sections 21(1) (Information accessible to applicant by other means) and 32(1) (Court records) of FOIA.
2. The citing of section 21(1) was not queried. Regarding the citing of section 32(1), the Commissioner's decision is that it is not engaged.
3. The Commissioner requires Essex Police to take the following steps to ensure compliance with the legislation:
  - Issue a fresh response which does not rely on section 32 of FOIA. Appropriate regard must be taken in respect of any personal information that is identified.
4. Essex 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.

## Request and response

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5. On 24 August 2023, the complainant wrote to Essex Police and requested the following information:

"On November 30, 2022, the results of a misconduct hearing on [officer's name redacted] of Essex Police were published. The hearing was held in October with the results published 27 working days later.

It was decided by independent Legally Qualified Chair [name redacted] that [officer's name redacted] misconduct hearing should be held in private.

In a press release published by the force, Deputy Chief Constable Andy Prophet said: 'The actions of this officer were utterly unacceptable and they have been sacked. His behaviour didn't live up to the values of the overwhelming majority of our colleagues who are proud to serve our communities.'

Under the Freedom of Information act, could you please provide me with:

- The allegation and category of complaint/s put against [officer's name redacted].
  - A full copy of the final report of the hearing, which will be held by the force for its own purposes under FOIA.
  - A written copy of the grounds provided by [name redacted] as to why the hearing should be in private.
  - A copy of any request from [officer's name redacted] or someone on his behalf asking for the hearing to be held in private.
  - A copy of any requests from Essex Police or people acting on behalf of Essex Police requesting the hearing be held in private".
6. On 25 September 2023, Essex Police responded. It refused to provide the requested information citing sections 30(1) and 40(2) of FOIA.
7. The complainant requested an internal review on 25 September 2023.
8. Following the commencement of the Commissioner's investigation, Essex Police provided an internal review on 22 January 2024. It revised its position, instead relying on sections 21(1) and 32(1)(c)(i) of FOIA.

## Scope of the case

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9. The complainant initially contacted the Commissioner on 21 November 2023, to complain about the lack of internal review. Following late provision of this, the complainant sent in revised grounds of complaint on 19 February 2024. His grounds were as follows:

“Firstly, the misconduct proceedings are now complete in this case, and harm of disclosure now is likely to be limited. To my knowledge, no charge has been brought, so there are no active proceedings, and given the misconduct has been proven, disclosure of such established details is highly unlikely to have any material negative impact on any linked investigations.

Secondly, there is a very clear public interest in the public understanding what complaints against [officer’s name redacted] were upheld, which is currently not known. As per the media lines issued by the force, former [officer’s name redacted] was found to have breached ‘standards of honesty and integrity, authority, respect and courtesy, and conduct’, he was dismissed without notice. The case was of such severity that Essex Police felt it met the criteria for a voluntary referral to the IOPC. The Deputy Chief Constable described his actions as ‘utterly unacceptable’.

Clearly [officer’s name redacted] has committed a serious infraction in public office. Police officers have the highest degree of public trust placed in them, given the powers, including a monopoly on the use of force, granted to them. There is therefore a very strong public interest in knowing what misconduct has occurred, when officers breach that crucial trust. Such transparency could also assist with ensuring any other misconduct completed by the officer comes to light, as others unaware of the case may then come forward. This would clearly serve the public interest in justice.

Thirdly, the regulation sets out that the panel chair may ask to redact a report if certain tests are met, such as to protect national security. However, the grounds on which this redaction has been completed in this case have not been stated. For that decision to be sustainable, it must be demonstrated that a ground in the regulation is met, which your force has not done. Redaction also does not require the withholding of the entire document. For example, parts relating to agreed media lines have already been disclosed and cannot be withheld from the document requested.

Fourthly, unnecessary secrecy does not serve the public interest. Such secrecy has allowed bad officers to avoid scrutiny for their

actions, arguably contributing to the ability of officers like Wayne Cousins [sic] and David Carrick to act with impunity for so many years. This appears to be a clear case of unnecessary secrecy, which could undermine trust in your police force if continued.

As such, it is clear that this material must be disclosed under FOIA, and I respectfully request you do so”.

10. The Commissioner notes that there is no reference to the citing of section 21 so he has not further considered this. He will consider the citing of section 32 below.

## Reasons for decision

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### Section 32 – Court records

11. Section 32(1)(c)(i) of FOIA states that information held by a public authority is exempt information if it’s held only by virtue of being contained in any document created by a court.
12. Section 32(1) is a class based exemption. This means that any information falling within the category described is exempt from disclosure, regardless of whether or not disclosure would, or would be likely to, cause any prejudice or harm. It’s also an absolute exemption. This means there is no requirement to conduct the public interest test.
13. There is a two part test that will determine whether information falls within this exemption:
  - Is the requested information contained within a relevant document created by a court, and
  - Is this information held by the Police only by virtue of being held in such a document?
14. The Commissioner has considered the definition of ‘court’ in relation to section 32(1)(c). Section 32(4) specifically explains that “court” includes any tribunal or body exercising the judicial power of the State.’

15. Essex Police has relied on previous decision notice IC-246277-R1P1<sup>1</sup> in which the Commissioner determined that the Metropolitan Police Service was entitled to rely on section 32(1)(c)(i) of FOIA to withhold a copy of the audio recording of a misconduct hearing. This position has been appealed and is awaiting consideration by the First-tier Tribunal (FTT)<sup>2</sup>.
16. However, each case is considered on its own merits and, in any event, a FTT decision is not binding on the Commissioner.
17. Prior to the case cited by Essex Police, the FTT considered the status of a Police Misconduct Panel (PMP) in EA/2022/0100<sup>3</sup>. It went on to determine that it was a court for the purposes of section 32 of FOIA when constituted with a legally qualified person as its chair. In reaching its decision it placed significant weight on two factors. These were firstly the relevance of the chair being a legally qualified person and secondly that a PMP could remove a constable's coercive powers of the state, for example the power of arrest.
18. Although at the time of the misconduct hearing in question it was a requirement for the PMP to be chaired by a legally qualified person, this requirement has not been constant. Previously the chair was a senior police officer or HR professional and under the Police (Conduct) (Amendment) Regulations 2024 (which came into force on 7 May 2024), it is now the force's chief officer. The Commissioner considers this lack of consistency as to who can act as the chair undermines the weight that can be attributed to this factor.
19. Furthermore, at times when the chair has had to be a legally qualified person, it is noted that the chairs appear to be appointed on an ad hoc basis and therefore do not appear to have the standing nature or protections expected of someone holding judicial office.
20. While the requirements for chair has changed, the Commissioner considers that the role of the PMP has remained constant, that being the

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4027914/ic-246277-r1p1.pdf>

<sup>2</sup>EA/2024/0004

<sup>3</sup><https://caselaw.nationalarchives.gov.uk/ukftt/grc/2024/90?query=EA%2F2022%2F0100>

means by which a police force manages the performance and behaviour of its officers. This is essentially an internal HR issue.

21. In respect of the removal of a constable's coercive powers of the State, the Commissioner recognises that a police officer will lose those powers if dismissed. However this is simply the consequence of the individual ceasing to be a police officer in much the same way as an individual would relinquish those powers if they retired from the force. The Commissioner does not accept that the removal of those powers supports an argument that a PMP must be exercising the judicial powers of the State when dismissing an officer.
22. The FTT also concluded that the key difference between a PMP and professional regulators like the GMC was the transparency of a PMP's functions and the control over its own procedures and fairness. However, the Commissioner considers that the FTT overstated any differences that exist.
23. Having reconsidered his position and having taken a holistic approach to the issue, the Commissioner has concluded that a PMP does not exercise the judicial powers of the State and therefore section 32 is not engaged as a PMP is not a court for the purposes of section 32 of FOIA.

## Right of appeal

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24. 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)

25. 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.
26. 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**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**