

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 December 2017

Public Authority: Independent Police Complaints Commission
Address: 90 High Holborn
London
WC1V 6BH

Decision (including any steps ordered)

1. The complainant has requested a copy of an investigation report into the use of procurement cards by former senior staff at the Association of Chief Police Officers' Criminal Records Office ("ACRO"). The IPCC refused the request, citing the non-disclosure exemption at section 40(2) (personal information) of the FOIA.
2. The Commissioner's decision is that the IPCC was entitled to rely on section 40(2) to refuse the request.
3. The Commissioner requires no steps to be taken.

Background

4. The complainant, a journalist, had previously submitted a request for information to ACRO about expenditure by senior staff. He has advised the Commissioner as follows:

"The information discovered as a result of the FOI request resulted in an investigation. [Names of senior staff redacted] worked for ACRO but are technically employed by Hampshire Police. The force referred the matter to the IPCC who said the force were taking the matter seriously and could take on the investigation themselves. The IPCC also told Hampshire Police to forward the investigation findings to the IPCC."

5. The complainant has also submitted a related request for information to Hampshire Constabulary, which the Commissioner has considered under reference FS50702372.

Request and response

6. On 24 March 2017, referring to the investigation that had been initiated as a result of his earlier request for information, the complainant wrote to the IPCC and requested information in the following terms:

"I am seeking some information on an investigation into [names of senior ACRO staff redacted].

...

In the FOI response attached, the IPCC told Hampshire Police it expected the final report to be sent to the IPCC.

The investigation has now concluded and I would therefore like to ask the IPCC for the final report."

7. The IPCC responded to the complainant on 21 April 2017, stating:

"The IPCC did not hold the report to which you refer at the time we received your request. Prompted by your request, however, we contacted Hampshire Constabulary and received the report from them on 5 April 2017.

The 20 working day period for complying with your request expires on 25 April. As we did not hold the relevant information when you made your request, we have decided that instead of asking you to make a further request, we will aim to respond by 8 May 2017, this being 20 working days after the day on which we obtained the information."

8. The complainant agreed to this approach. The Commissioner therefore considers that the date of the request should be taken as being 5 April 2017.
9. The IPCC responded to the request on 8 May 2017, and refused to disclose the requested information, citing the exemption at section 40(2) (personal information) of the FOIA.
10. The complainant requested an internal review the same day but received no response, despite twice chasing it up. Following intervention by the Commissioner, the IPCC notified the complainant of the outcome of the review on 1 September 2017. It upheld its application of section 40(2) of the FOIA.

Scope of the case

11. The complainant contacted the Commissioner on 13 June 2017 to complain about the IPCC's failure to conduct an internal review. At that point he had not received the outcome of the internal review.
12. Following the provision of the internal review, the complainant wrote to the Commissioner again on 1 September 2017, explaining that he wished to challenge the application of section 40(2) to withhold the requested information.
13. The Commissioner has therefore considered in this decision notice the IPCC's application of section 40(2) of the FOIA.
14. The Commissioner has commented on the delays surrounding the internal review in the "Other matters" section, below.

Reasons for decision

Section 40 personal information

15. The FOIA exists to place official information into the public domain. Once access to information is granted to one person under the FOIA, it is then considered 'public' information which can be communicated to any individual should a request be received. As an exemption, section 40 therefore operates to protect the rights of individuals in respect of their personal data.
16. 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 the disclosure of that personal data would be in breach of any of the data protection principles.
17. The IPCC has cited section 40(2) to withhold a copy of an investigation report it holds. The report was written by Hampshire Constabulary, which also conducted the related investigation. The IPCC had asked Hampshire Constabulary to provide it with a copy of the report once the investigation had concluded, although it told the Commissioner this was "*outside of our statutory responsibility*", as it had determined that the matter could be handled via local police investigation, without IPCC involvement.

18. The IPCC consulted Hampshire Constabulary, as the originator of the information, when reaching its decision regarding the application of section 40(2). It was entitled to do so under part IV of the code of practice established under section 45 of the FOIA¹.

Is the requested information personal data?

19. In order to rely on section 40(2) the requested information must constitute personal data as defined in section 1 of the Data Protection Act 1998 ("DPA"). For information to constitute personal data, it must relate to an individual, and that individual must be identifiable from that information, or from that information and other information in the possession of the data controller.
20. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
21. The IPCC applied section 40(2) to withhold the investigation report in its entirety. It said that it constituted the personal data of the individual who was the subject of the investigation, and other individuals named in the report.
22. The Commissioner has had sight of an un-redacted copy of the investigation report. It includes information about work-related travel and activities, both within work hours and outside of work hours, including restaurants visited, meals eaten, company kept and other biographical information. As such, the Commissioner agrees that it constitutes the personal data of the individuals named in the report within the meaning of section 1 of the DPA, as the information clearly relates to identifiable individuals.
23. The IPCC has confirmed to the Commissioner that it does not consider any of the withheld information to constitute sensitive personal data within the meaning of section 2 of the DPA. The Commissioner understands that this is also Hampshire Constabulary's position.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235286/0033.pdf

Would the disclosure of the personal data contravene any of the data protection principles?

24. The IPCC argued that disclosure of the information would breach the first data protection principle, in that disclosure of the requested information would be unfair to the data subjects. The Commissioner agrees that the first data protection principle is relevant in this case.
25. The first principle deals with the privacy rights of individuals and the balance between those rights and other legitimate interests in processing personal data. In relation to non-sensitive personal data, it states:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met..."

26. In the case of an FOIA request, 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 fair, lawful and would meet one of the conditions in schedule 2 of the DPA. If the disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

Would it be fair to disclose the personal data?

27. Under the first principle, the disclosure of the information must be fair to the data subject. Assessing fairness involves balancing the data subject's rights and freedoms against the legitimate interest in disclosure to the public.
28. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:
 - the individual's reasonable expectations of what would happen to their information;
 - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned); and
 - the balance between the rights and freedoms of the data subject and the legitimate interests of the public.

Reasonable expectations

29. In the Commissioner's view, a key issue to consider in assessing fairness 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.
30. The IPCC confirmed that the data subject identified in the report had refused consent for his personal data to be disclosed in response to the request. Therefore, if the report was to be disclosed, it would be against the data subject's express wishes.
31. The Commissioner understands that the data subject held a senior, civilian post within ACRO. As a civilian, the investigation was dealt with as a private and confidential matter relating to conduct matters.
32. Because of its scope, the report included information about a member of the data subject's family, as well as those of his colleagues, about whom there were no allegations of wrongdoing. The IPCC considered it would be reasonable for them to expect that their personal data would be held confidentially and not shared for purposes not directly connected with, and required by, the investigation.
33. The IPCC said that the data subject was never publicly named by ACRO or Hampshire Constabulary as being under investigation in connection with the allegations. This is borne out by the complainant's own comments to the Commissioner that "*Hampshire Police have released a very short public statement stating there was 'management action' (no official was identified).*"
34. The IPCC noted that prior to making this request, the complainant had written an article for a national newspaper which identified the data subject as being under investigation regarding his expenses claims. The IPCC believed that the complainant had simply inferred the identity of the person who was under investigation from the response to an earlier FOIA request he had submitted to ACRO (referred to in "Background", above). It reiterated that neither Hampshire Constabulary nor ACRO had ever placed the data subject's identity in the public domain.
35. Following on from this, the Commissioner has examined the extent to which there is information in the public domain which identifies the data subject as the subject of the investigation. To that end, she has conducted a number of internet searches. The only information she has been able to locate in which the data subject is identified as being the subject of the investigation, is the complainant's own newspaper article, and a FOIA request on *Whatdotheyknow* (an online facility for

submitting and archiving FOIA requests), which cites that newspaper article as its source. She is therefore satisfied that disclosure of the report would involve the disclosure of detailed and sensitive information about the data subject's work and personal life, which is not currently in the public domain.

36. The Commissioner considers that information about an individual's employment record, including the treatment of disciplinary-related allegations against them, will usually be inherently 'private' in nature and she recognises that former and current civilian police workers will have a high expectation that any information about such matters which relate to them, if not classified as "gross misconduct" or above, will not be placed in the public domain; they would expect that their privacy will be respected. She recognises that due to the seniority of the data subject, he should expect scrutiny of his work-related duties. However, Hampshire Constabulary has said that the matter was dealt with confidentially, as an employment-related conduct matter.
37. The report also contains a significant amount of information about the complainant's private life while travelling for work, including details of expenditure on personal credit cards, and references to rest days.
38. As such, the Commissioner considers that the data subject's reasonable expectation would be that such information would not be disclosed.

Consequences of disclosure

39. As to the consequences of disclosure upon the data subject, the question – in respect of fairness - is whether disclosure would be likely to result in unwarranted damage or distress to that individual.
40. The IPCC provided the Commissioner with some information on this point which, due to its confidential nature regarding the data subject's personal circumstances, cannot be discussed in the main body of this decision notice. Its arguments, and the Commissioner's assessment of them, are reproduced in a confidential annex to this decision notice, which has been provided only to the public authority.
41. From the information provided to her, the Commissioner is satisfied that disclosure would be likely to have adverse consequences for the data subject.

Balancing rights and freedoms with legitimate interests

42. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling, legitimate interest in its disclosure.

43. In considering 'legitimate interests', in order to establish if there is a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sake, as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach.
44. In this case the complainant considers that the seniority of the data subject and the nature of the allegations against him mean that it is in the public interest that information about the investigation be placed in the public domain.
45. The Commissioner accepts that there is a legitimate interest in transparency regarding the scrutiny of expenses claimed by senior members of staff in public bodies, and that this interest would be served by the disclosure of the report.
46. In its submission to the Commissioner the IPCC confirmed that it had approached the complainant's request for an internal review very much from that perspective, considering there to be persuasive public interest arguments for promoting transparency by disclosing the report, even if this went against the data subject's wishes.
47. However, the IPCC changed its view as a result of consulting with Hampshire Constabulary, as the force informed it of factors of which it was previously unaware. It considers that several factors carry significant weight in favour of the data subject's right to privacy. Due to their confidential nature, they cannot be discussed in the main body of this decision notice. They are reproduced, together with the Commissioner's assessment of them, in the confidential annex.
48. As set out in paragraph 43, above, when determining whether the legitimate interests in disclosure are capable of outweighing the data subject's right to privacy, the Commissioner is mindful of the need to be proportionate in her approach. In this case, while she accepts the public interest in transparency that would be served by disclosure, she is satisfied that there would very likely be serious consequences for the data subject.
49. Having considered both sets of arguments, the Commissioner considers that the legitimate interests in disclosure, although strong, do not outweigh the data subject's right to privacy.

Conclusion

50. Having carefully weighed the competing arguments against each other, the Commissioner's decision is that the IPCC was entitled to rely on section 40(2) to refuse to disclose the requested information.
51. She is satisfied that disclosure would not be within the data subject's reasonable expectations, that it would be likely to have detrimental consequences for him and that the legitimate interests that would be served by disclosure are not capable of outweighing the data subject's expectation of, and right to, privacy. The Commissioner therefore accepts that it would be unfair to the data subject to disclose the requested information and that to do so would breach the first data protection principle.
52. Since the Commissioner has determined that disclosure would be unfair, it is not necessary to go on to consider the application of schedule 2. However, given the particular circumstances of this case, the Commissioner considers it unlikely that any of the schedule 2 conditions would permit the disclosure of the investigation report.

Other matters

53. The Commissioner wrote to the IPCC on 5 July 2017 and asked it to conduct an internal review by 2 August 2017. She did not receive a response to that letter and the complainant subsequently confirmed that he had not received the internal review. The Commissioner therefore exercised her discretion to accept the complaint about IPCC's decision to apply section 40(2), without waiting for it to complete an internal review.
54. The Commissioner wrote to the IPCC on 8 August 2017, asking it to set out its position in respect of section 40(2). The case officer at the IPCC telephoned the Commissioner's case officer the same day and said that the internal review was in the process of being conducted, but the volume of information that was being reviewed, and the need to consult with third parties, had delayed the process. The IPCC asked to be allowed a further week to complete the internal review. The IPCC also said it would forward the Commissioner full arguments in support of section 40, with a copy of the internal review. The Commissioner agreed to its proposal.
55. The IPCC issued the internal review on 1 September 2017, upholding its application of section 40(2) of the FOIA.
56. The code of practice established under section 45 of the FOIA states that internal reviews should be conducted promptly and within reasonable

timescales. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances

57. The Commissioner understands that during the internal review process, the IPCC consulted with Hampshire Constabulary and the report had to be reviewed again, both of which led to delays in completing the internal review. Nevertheless, the Commissioner would remind the IPCC of the importance of completing internal reviews within the above timescales.

Right of appeal

58. 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: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

59. 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.

60. 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

Samantha Bracegirdle
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