

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 August 2018

Public Authority: Chief Constable of Staffordshire Police

Address: Police Headquarters

PO Box 3167

Stafford

ST16 9JZ

Decision (including any steps ordered)

1. The complainant requested information about commendations awarded to police officers and civilian staff in 2007 for their work on a high profile criminal investigation. Staffordshire Police disclosed some information, but refused to disclose the names and job roles of all but one of the recipients, citing the exemptions at section 31 (law enforcement), section 38 (health and safety) and section 40 (personal information) of the FOIA.
2. The Commissioner's decision is that Staffordshire Police was entitled to rely on section 40 to withhold most of the information and on section 38 to withhold the remainder.

Request and response

3. On 12 January 2018, the complainant wrote to Staffordshire Police via the "WhatDoTheyKnow"¹ website and requested information in the following terms:
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¹ <https://www.whatdotheyknow.com/>

"In 2004 Staffordshire Police launched a major investigation into the desecration of a grave. Following the investigation a number of officers were given commendations for their part in the investigation. Could you please provide the following information.

- 1. A copy of the Citations in respect of each commendation awarded.*
- 2. Copies of any press release, or press briefing given in respect of the commendation awards.*
- 3. The date the commendation was given, together with the name and rank of the officer(s) giving the awards."*

4. Staffordshire Police responded on 12 February 2018. It disclosed the information requested in points (1) and (2), but redacted the names and job roles of the recipients. It cited the exemptions at section 31(1)(a)(b) (law enforcement), section 38(1)(a)(b) (health and safety) and section 40(2) (personal information). While it disclosed some of the information at point (3), it failed to provide the name of the officer giving the awards, who was merely identified in the disclosed information as "the Chief Constable".
5. The complainant requested an internal review and Staffordshire Police provided the outcome on 12 March 2018. While it disclosed the Chief Constable's name, and also the name of one commendation recipient (the then Deputy Chief Constable, who had publicised his own involvement in the case), it maintained its position in respect of the remaining redactions.

Scope of the case

6. The complainant contacted the Commissioner on 20 March 2018 to complain about the way his request for information had been handled. He challenged Staffordshire Police's continued application of sections 31, 38 and 40 of the FOIA to withhold the names and roles of the other individuals who had received commendations.
7. The Commissioner has considered whether section 38 and section 40 of the FOIA could be relied on to withhold the requested information. In view of her decision that they could, it has not been necessary to go on to also consider Staffordshire Police's application of section 31.

Reasons for decision

Section 40 – personal information

8. 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.

9. 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.
10. The first step for the Commissioner to determine is whether the requested information constitutes personal data, as defined by the Data Protection Act 1998 ("the DPA" – the legislation in force at the time the request was processed by Staffordshire Police). If it is not personal data, then section 40 cannot apply.
11. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

Is the requested information personal data?

12. In order to rely on section 40(2) the requested information must constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as:

"...data which relate to a living individual who can be identified

a) From those data, or

b) From those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the 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. 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 or has them as its main focus.
14. The Commissioner understands from the complainant that one of the individuals in receipt of a commendation died some time ago. Since personal data must relate to a living individual, information in respect of the deceased individual does not constitute personal data and section 40 cannot apply to it. Redactions made to conceal the identity of the

deceased individual have instead been considered under section 38 of the FOIA, below.

15. With regard to the surviving recipients of the commendations, the redactions in question are their names and job role or rank. This is information which relates to them and which identifies them. The Commissioner is therefore satisfied that it constitutes personal data within the definition at section 1 of the DPA.
16. The Commissioner must then go on to consider whether disclosure would breach any of the data protection principles. It was Staffordshire Police's position that disclosure would breach the first data protection principle.

Would disclosure contravene the first data protection principle?

17. The first data protection principle of the DPA states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in DPA schedule 2 is met.
18. In the case of a 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 fair, lawful and meet one of the DPA schedule 2 conditions. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.
19. The Commissioner has first considered whether disclosure would be fair. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
 - the data subject'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 data subject); and
 - the balance between the rights and freedoms of the data subject and the legitimate interests of the public.

Reasonable expectations

20. In the Commissioner's view, a key issue to consider in assessing fairness is whether the data subject has a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as a data subject's general expectation of privacy, whether the information relates to them in a private or professional capacity and the circumstances in which the personal data were obtained.

21. The Commissioner has published guidance on requests for personal data about public authority employees². In that guidance, she recognises that while it is reasonable to expect that a public authority should disclose information relating to its senior employees, information relating to junior employees will attract a greater degree of protection. It is also necessary to consider the nature of the information and the responsibilities of the employees in question, when considering requests for information about them.
22. A number of police officers and civilian staff were given commendations for their parts in the apprehension and successful prosecution of four animal rights extremists for the sustained harassment of the owners and wider family of a guinea pig farm used by the medical research industry. The harassment, which took place over a period of years, included protests, criminal damage, threats of violence and, in 2004, the removal of the body of a deceased family member, from her grave.
23. Staffordshire Police described the case as a very high profile enquiry which attracted a lot of media attention and was, at the time, shocking to both the public and the police. It said the use of animals in research is a very emotive subject and the tactics used by the extremists were varied and severe, culminating in the desecration of a grave and theft of a body. Commenting on the severity of the tactics employed by the animal rights extremists, Staffordshire Police said:

"...at the time the Independent reporting on the grave desecration indicated that the Home Office regarded it as "the most extreme campaign of its kind" and the Church of England also indicated their disgust at the crime."
24. The then Home Secretary, John Reid, commented that the investigation was: *"One of the most robust and determined investigations ever undertaken by the police service into animal rights extremists"*.³
25. Staffordshire Police told the Commissioner that it believed it had a duty to protect the identities of current and former employees where they had been involved in sensitive and controversial investigations. It said that in composing its response to the Commissioner it had contacted several data subjects who were current employees to gauge their views

²https://ico.org.uk/media/fororganisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

³ <https://www.birminghammail.co.uk/news/local-news/from-the-archives-the-animal-rights-case-that-shocked-128703>

on the disclosure of their identities in connection with the investigation, and they had expressed the expectation that this would not be done.

26. The complainant disputed that the data subjects could have such an expectation. He said that at the time the commendations were awarded in 2007, Staffordshire Police issued a press release which contained their names and job roles, and that only now was this information being redacted. He said that it was Staffordshire Police's policy to obtain consent prior to disclosing the identities of the recipients of commendations into the public domain, and so the data subjects would have consented to their involvement in the investigation being made public at the time the commendations were awarded.
27. The Commissioner understands from Staffordshire Police that some data subjects consented to the disclosure of their identities in the commendation press release, and that some did not, and that their wishes were respected.
28. Where consent was given, the Commissioner notes that consent to disclosure in 2007 would have involved a rather different set of considerations to consent given in 2018. The long shadows cast by information that can exist forever on the internet could not have been guessed at by most people in 2007. It is unlikely that data subjects consenting to their identities being revealed in a press release in 2007 would have envisaged themselves to be contributing to a digital footprint which could be accessed with ease, many years later, by anyone with a passing interest in the criminal investigation which prompted the commendations.
29. There is also the question of the effect that the passage of time has on a data subject's expectations of how their data may be treated. The Commissioner has conducted searches and has been unable to locate an un-redacted copy of the commendation press release online. Its disclosure in response to this request would therefore place in the public domain information about the data subjects which is not currently readily accessible.
30. The European Court of Justice's 2014 "right to be forgotten" ruling⁴ recognised the principle that people should be able to get on with their lives without being affected by information on the internet about them which is irrelevant or out of date. In this case, both the criminal investigation and the commendations awarded are more than a decade

⁴https://www.inforights.im/media/1186/cl_eu_commission_factsheet_right_to_be-forgotten.pdf

old and there is no suggestion of wrong-doing by the data subjects. Staffordshire Police has also identified that not all the data subjects are still in its employ.

31. Taking into account all of the above, the Commissioner considers that the data subjects would be likely to have an expectation that they would not be publicly linked by Staffordshire Police to events which occurred more than a decade ago. Furthermore, she finds such an expectation to be a reasonable one.

Consequences of disclosure

32. As to the consequences of disclosure upon the data subjects, the question here is whether disclosure would be likely to result in damage and distress to them. On this point, Staffordshire Police's concern was that disclosure now, more than a decade after the criminal investigation was concluded with the successful prosecution and jailing of the extremists involved, may lead to revived interest in the case and to the data subjects and their families being the target of animal rights extremists. It said these concerns were also expressed by the data subjects it had been in touch with.
33. Staffordshire Police said that some of the data subjects who received commendations are no longer working for Staffordshire Police. Of those who are still employed, some work in sensitive or covert roles and it is necessary to withhold their names to protect both them, and the success of any work that they are undertaking. All had been asked, and had refused to consent to the disclosure of their identities as recipients of the commendations.
34. Staffordshire Police explained that, at the time of the criminal investigation, the home addresses of the data subjects had been obtained by animal rights extremists, and they and their families were themselves subject to intimidation, criminal damage and harassment as a result.
35. It said that these data subjects:

"...still have a sense of fear that should their names be released they and their families or friends could be targeted. The offenders involved received lengthy sentences of up to 12 years imprisonment and so at the time of the commendations the release of any names with consent did not carry significant risk. At the time of the commendations some individuals indicated that they did not give their consent to their details being released so there could not be any reasonable expectation that SP would release them now."
36. Staffordshire Police provided the Commissioner with testimonies from several data subjects, expressing serious concerns at the repercussions

of being identified in connection with the investigation. The Commissioner also notes that fear of being targeted by animal rights extremists was reported in the inquest into the unfortunate death of an individual who was involved in the investigation.

37. The complainant argued that the risk to the data subjects was being overplayed to justify non-disclosure. He said that the criminal case from which the commendations emanated is over ten years old. Any risk to the data subjects of being associated with it would have been at its greatest immediately following the trial and conviction of the defendants, and would then be likely to have diminished over time. In any case, he said that the then Deputy Chief Constable had been quite open about his involvement in the case, and that the force was fully prepared to identify the recipients at the time the commendations were awarded. In light of this, he felt it was not credible to argue that there was somehow a risk of harm now.
38. The Commissioner has not seen any information to suggest that animal rights extremists have an ongoing interest in the case, and so she is not in a position to assess the likelihood of the data subjects becoming the target of extremists as a result of their involvement in the investigation being disclosed. However, she considers their perception that they and their families would be at heightened risk of attack to be reasonably held, and one which would be likely to cause them and their families, genuine and significant distress.

The legitimate public interest

39. Assessing fairness also involves balancing the data subjects' rights and freedoms against the legitimate interest in disclosure to the public. Despite the reasonable expectations of data subjects 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 public interest in its disclosure.
40. The interest in disclosure must be a public interest, not the private interest of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest: the Commissioner must consider whether or not it is appropriate for the requested information to be released to the general public.
41. While the complainant did not point to any wider legitimate interest which would be served by the information being disclosed, the Commissioner accepts that legitimate interests will include the general public interest in transparency and accountability. Public confidence in the integrity of the police service will be enhanced by it routinely disclosing information about its officers and civilian staff. Disclosing instances of them being commended for good work is also likely to

enhance public confidence in the police. However, the Commissioner notes that these interests are served, to a large extent, by Staffordshire Police having disclosed the reasons for the commendations; it is only the identities of the individual recipients which continue to be withheld.

42. In reaching a decision in this case, the Commissioner is mindful of the circumstances surrounding the criminal investigation from which the commendations emanated, the roles of the data subjects and the time that has passed since the commendations were awarded. She has also taken into account her guidance with regard to balancing rights and freedoms with legitimate interests when dealing with a request for personal data about public authority employees, which states:

"Under the DPA, the exercise of balancing the rights and freedoms of the employees against the legitimate interest in disclosure is different to the public interest test that is required for the qualified exemptions listed in section 2(3) FOIA. In the public interest test, there is an assumption in favour of disclosure because the public authority must disclose the information unless the public interest in maintaining the exemption outweighs the public interest in disclosure. In the case of section 40(2) the interaction with the DPA means the assumption is reversed; a justification is needed for disclosure".

43. The Commissioner considers it most unfortunate that information which only exists by virtue of the data subjects having excelled in the performance of their duties, should become a source of distress and anxiety for them and their families, many years later.
44. In light of her assessment of the nature of the information, the reasonable expectations of the data subjects and the consequences of disclosure, the Commissioner is satisfied that disclosing the withheld information would be an intrusion of privacy and would be likely to cause unnecessary and unjustified distress to the data subjects and their families. She considers these arguments outweigh any legitimate interest in disclosure. She has therefore concluded that it would be unfair to disclose the withheld information - in other words, disclosure would breach the first data protection principle - and that Staffordshire Police was entitled to rely on section 40(2) of the FOIA to withhold the redacted information.

Section 38 – health and safety

45. The complainant said that one of the individuals who had received a commendation died some years ago. Since section 40 only applies in respect of the personal data of living individuals, the Commissioner has considered whether Staffordshire Police was entitled to rely on section 38 to withhold information about the identity of the deceased individual.

46. Due to the sensitivity of the information involved, some parts of the Commissioner's section 38 analysis are contained in a confidential annex to this decision notice, which has been disclosed only to the public authority.
47. Section 38(1)(a) of the FOIA states that information is exempt information if its disclosure under the legislation would, or would be likely to, endanger the physical or mental health of any individual.
48. For the exemption to be engaged it must be at least likely that the endangerment identified would occur. Even if the exemption is engaged, the information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
49. The Commissioner considers that the term 'endanger' in section 38(1) should be interpreted in the same way as the term 'prejudice' in other FOIA exemptions. In order to accept that the exemption is engaged, the Commissioner must be persuaded that the nature of the endangerment and the likelihood of it occurring as a result of the disclosure of the information in question is "*real, actual and of substance*", rather than trivial or insignificant. As part of this she must be satisfied that some causal relationship exists between the potential disclosure and the stated endangerment.
50. This means that three conditions must be satisfied for the exemption to be engaged. First, the harm that is envisaged would, or would be likely to occur must relate to the applicable interests described in the exemption. Secondly, there must be a causal relationship between the potential disclosure of the withheld information and the endangerment that the exemption is designed to protect against. Thirdly, there must be a real risk of the endangerment arising through disclosure. In this regard, a public authority is required to demonstrate that either disclosure "*would be likely*" to result in endangerment or disclosure "*would*" result in endangerment (with "*would*" imposing a stronger evidential burden than the lower threshold of "*would be likely*").

The applicable interest

51. As section 38(1)(a) of FOIA provides that information relating to the endangerment of the physical or mental health of an individual may be withheld, the endangerment involved in the disclosure of the requested information must therefore relate specifically to the physical or mental health of one or more individuals.
52. In this case the requested information consists of the name and job role of a deceased individual who received a commendation for their part in the investigation described in paragraph 22. The applicable interests in this case are the physical or mental health of members of the

deceased's family, although the Commissioner would accept this may also cover close friends and colleagues of the deceased.

Nature of the endangerment

53. Staffordshire Police provided to the Commissioner information about the nature of the endangerment, which, due to its sensitive and personal nature, is reproduced and considered in the confidential annex to this decision notice.
54. The Commissioner is satisfied that the level and nature of the endangerment identified would be likely to go beyond stress or worry and constitute an endangerment to the mental health of the parties identified above.

Likelihood of endangerment

55. The Commissioner's duty is to consider whether disclosure of the requested information "would", or "would be likely to", pose a risk to the mental or physical health of the parties identified.
56. The Commissioner acknowledges that the physical or mental health of family members needs to be considered when disclosure 'to the world at large' is being made under the FOIA. For reasons set out in the confidential annex, in the Commissioner's view, there would be a substantial likelihood of endangering, in particular, their mental wellbeing.
57. Staffordshire Police relied on the first limb of the exemption: that mental endangerment (the likelihood of causing significant upset or distress) "would" occur. Having considered the arguments put forward by Staffordshire Police, which are expanded on in the confidential annex, the Commissioner is satisfied that section 38(1)(a) is engaged on that basis.
58. As section 38 is a qualified exemption, consideration must next be given to the balance of the public interest in disclosure.

Public interest factors in favour of disclosure

59. The complainant did not explain how he thought disclosure might benefit the public interest, beyond ensuring (what he considered to be) Staffordshire Police's proper compliance with the FOIA.
60. Staffordshire Police said that the disclosure of the requested information would demonstrate openness and transparency.

Public interest factors in favour of maintaining the exemption

61. Staffordshire Police said it has a duty of care to those who have worked for it, and to their families. They should be able to go about their personal lives freely and in the knowledge that sensitive and potentially damaging information about them or their loved ones will not be placed in the public domain. To disclose into the public domain the names and roles of any individuals connected to the investigation would be inappropriate and may put people in danger of retribution. Given the extreme tactics previously employed by the animal rights extremists in this case, family members have a legitimate fear of being targeted themselves. It is not in the public interest to put at risk their physical or mental health.

Balance of the public interest

62. Staffordshire Police has demonstrated that, in addition to experiencing, quite understandably, distress as a result of the matter being revived for the purposes of dealing with this request, the deceased's surviving relatives would have credible grounds for fearing that they themselves might be targeted by animal rights extremists, and that this would have a detrimental impact on their mental wellbeing.
63. The Commissioner will invariably place significant weight on protecting individuals from risk to their physical and mental well-being. The natural consequence of this is that disclosure will only be justified where a compelling reason can be provided to support such a decision.
64. The complainant has not offered any reason for requiring the identities of the commendation recipients to be disclosed. His arguments have largely centered on Staffordshire Police's current decision being inconsistent with its previous treatment of the information.
65. The Commissioner has been unable to identify public interest arguments which favour disclosure of any significant weight, beyond the general public interest in public authorities being open and transparent. She therefore considers that the arguments for disclosure in this case are clearly outweighed by the public interest in maintaining the exemption in order to safeguard the mental health of the deceased's surviving family. Therefore, taking into account all circumstances of the case, the Commissioner has decided that the balance of the public interest favours maintaining the exemption at section 38(1)(a) in respect of information about the deceased individual.

Right of appeal

66. 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

67. 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.

68. 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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Wycliffe House
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