

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 August 2019

Public Authority: Chief Constable of Greater Manchester Police
Address: Openshaw Complex
Lawton Street
Openshaw
Manchester
M11 2NS

Decision (including any steps ordered)

1. The complainant has requested information about the appointment of a new Assistant Chief Constable (ACC). Greater Manchester Police (GMP) disclosed some information, but the complainant believed that GMP had not disclosed to him all the information it held which fell within the scope of his request.
2. The Commissioner's decision is that, in failing to disclose some information it holds which it acknowledged was not exempt from disclosure, GMP breached sections 1(1) and 10(1) of the FOIA. GMP also breached sections 1(1) and 10(1) by failing to respond to the request within the statutory time for compliance.
3. The Commissioner requires GMP to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant the information described in the internal review as "*guidance for vetting levels*".
4. GMP must take these steps within 35 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

5. On 9 September 2018, the complainant wrote to GMP and requested information in the following terms:

"A post on social media by Chief Constable Hopkins was made on Tuesday 4th September, 2018 to the effect that C/Supt Mabs Hussain of West Yorkshire Police (WYP) had been appointed as an Assistant Chief Constable (ACC) with GMP.

Please disclose the following information:

- 1. The date upon which it was decided to recruit an ACC that ultimately led to this appointment.*
- 2. The section of any meeting minutes or briefing note that records the information at Q1.*
- 3. Copies of media advertisements that were placed to announce the recruitment of an ACC.*
- 4. Rationale supporting choice of media.*
- 5. Cost of such advertisements.*
- 6. If other methods were used to 'advertise' the post, please disclose. For example, circulation to other chief officers.*
- 6. [sic] How many applicants responded to the advertisements or other methods of circulation, notification.*
- 7. How many applicants were (a) shortlisted (b) interviewed.*
- 8. Blank copy of forms candidates were required to complete in support of their application, plus any other materials that would inform the wider public as to how this crucial policing role was filled. For example, a tick list of required competencies, experience.*
- 9. Copies of email, letter correspondence, briefing notes, meeting notes relating to the subject appointment between any, or all, of the following:*

GMP: Ian Hopkins, Ian Pilling, Annette Anderson (or their secretary/PA).

WYP: Dee Collins, John Robins, Julie Sykes, Osman (Oz) Khan, Mabs Hussain (or their secretary/PA).

College of Policing (CoP): Mike Cunningham (or his delegate).

National Police Chiefs Council (NPCC): Sara Thornton (or her delegate).

For the avoidance of doubt, this includes internal communications between those GMP officers named. A separate request under the Act has been made to WYP to capture their internal communications and those with CoP and/or NPCC.

Information requested under Q9 should cover period up to and including the date upon which this request is acknowledged by GMP."

6. GMP responded on 6 November 2018. It answered each part of the request, apart from point 2 (information not held) and point 6 (not applicable). For point 9 of the request, it explained that it was not obliged to disclose all the information it held as some of it was exempt under sections 31(1)(a)(b) (law enforcement) and 40(2) (personal information) of the FOIA. It disclosed a series of email exchanges with redactions made under those sections.
7. The complainant requested an internal review on 7 November 2018. He set out a number of concerns about the general handling of the request, which GMP responded to by return. He also stated that he did not believe that GMP had disclosed all the information it held which fell within the scope of point 9 of the request, a point which GMP took considerably longer respond to.
8. GMP provided the outcome of the internal review to the complainant on 2 April 2019. With regard to the complainant's claim that it had not disclosed all the information it held in respect of point 9, it said that it had explained in the refusal notice that some information was being withheld under sections 31 and 40 of the FOIA. However, it invited the complainant to provide further information which might inform further searches for any information he believed it held.
9. GMP also said that it had identified some information which had previously been withheld and which was not exempt, stating:

"...the information identified as not being exempt from duties under Section 1b of the FOIA relates to guidance for vetting levels should this be of interest to you, please inform me in response to this email and arrangements will be made for its disclosure to you."
10. GMP also wrote to the Commissioner on 2 April 2019, attaching a copy of the internal review and stating:

"...additional documents will be disclosed to [the complainant] should he require them, and I have requested further searches to ensure there were no omissions in the initial reply to him".
11. On 16 April 2019, GMP wrote again to the complainant, confirming that additional searches had not located any more information and concluding that all relevant information had indeed been disclosed in response to the request. Nevertheless, it repeated its invitation to the complainant to let it know of any information which might help it to identify and locate any specific information he believed it might hold.

Scope of the case

12. The complainant initially wrote to the Commissioner on 5 November 2018, to complain that he had not received a response to the request. He wrote again on 22 February 2019 to complain about GMP's failure to conduct an internal review.
13. In his internal review request, referring to point 9 of the request, the complainant told GMP that he was concerned that it had not disclosed to him all the information it held which fell within its scope.
14. During the course of the Commissioner's investigation, GMP provided the outcome of the internal review, as set out in paragraphs 8-11, above.
15. The Commissioner notes the discrepancy between the complainant's view and that of GMP with regard to point 9 of the request.
16. The Commissioner knows the complainant to be conversant with the FOIA and with the ICO complaints procedure. Although GMP cited the exemptions at sections 31 and 40 of the FOIA in its refusal notice, neither the complainant's request for an internal review nor his subsequent complaint to the Commissioner challenged GMP's application of those exemptions or expressed concern that they had been interpreted incorrectly.
17. Since the complainant had not challenged the application of the exemptions at sections 31 and 40 of the FOIA to withhold information, the Commissioner did not consider it necessary to consider their application in her initial assessment of the complaint.
18. The Commissioner wrote to the complainant, setting out the proposed scope of her investigation as follows:
 - The timeliness of the response.
 - The conduct of the internal review.
 - Whether, on the balance of probabilities, GMP had disclosed all the information it held in response to point 9 of the request.
19. As is her practice, the Commissioner asked the complainant to contact her, within a specified timeframe, if there were other matters that he considered should also be addressed by the investigation.
20. In the absence of a response from the complainant, the Commissioner progressed her investigation on the basis set out in her correspondence and the analysis below reflects this.

21. The Commissioner has commented on the conduct of the internal review in the "Other matters" section of this decision notice.
22. The Commissioner has viewed an unredacted copy of the withheld information, when making her decision in this case.

Reasons for decision

Section 1 – general right of access

Section 10 – time for compliance

23. Section 1(1) of the FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.
24. Section 10(1) of the FOIA states that on receipt of a request for information a public authority should respond to the applicant within 20 working days.
25. The complainant submitted his request on 9 September 2018 and received the response on 6 November 2018, 41 working days later.
26. GMP therefore breached sections 1(1) and 10(1) by failing to respond to the request within 20 working days.

Section 1 – general right of access

27. As set out in paragraph 23, above, section 1 of the 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.
28. In this case, the complainant believes that GMP holds information in respect of point 9 of the request which it has not disclosed. GMP's position is that the only information which has not been disclosed is that which it has notified the complainant as being exempt under section 31 and section 40 of the FOIA.
29. 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.

30. The Commissioner will consider the complainant's evidence and arguments. She 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. She 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, she is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.

The complainant's position

31. In his internal review request, the complainant said that he was concerned that not all relevant information had been disclosed to him.

"It would be readily apparent to any independent reviewer that not all disclosure of the emails has been made. There are glaring deficiencies. Some by plain, and obvious, inference. Others within my certain knowledge. That may be down to oversight, but that would be a generous characterisation given the already vexed history of ACC Hussain's appointment, just over one month ago...The officer carrying out the review is, accordingly, invited to concern themselves, particularly, with the type of searches that were made, and by whom."

GMP's position

32. GMP provided the Commissioner with a copy of the withheld information. It comprised email exchanges to do with the administrative arrangements for appointing the ACC and managing his entry into the force, application documents and a letter of offer. Some of these items had been disclosed to the complainant with partial redactions, and some had been withheld in their entirety.
33. GMP's position is that it has identified all the information it holds which falls within the scope of the request, and that only information which is exempt under section 31 and section 40 has been withheld. It has explained to the complainant in the refusal notice and in the internal review that information has been withheld under these exemptions and the complainant has not challenged their application.
34. GMP has also invited the complainant to provide information which might assist it to identify and locate any particular items of information he believes are missing. However, it says he has not done so.
35. The Commissioner asked GMP to describe the searches it conducted for information falling within the scope of point 9 of the request, and the search terms used. She also asked other questions, as is her usual

practice, regarding how GMP established that it had located all the information it held.

36. GMP explained that a great deal of the process surrounding the decision to recruit a new ACC took place via face-to-face and telephone conversations in which the Chief Constable and Deputy Chief Constable discussed general requirements and the procedures for starting the recruitment process. However, GMP said that although they were specifically named in the request, these officers did not administer the recruitment process.
37. GMP described to the Commissioner the searches that it carried out for information falling within the scope of point 9 of the request, and its reasons for searching in specific areas.
38. It said that the hard copy and electronic day books, email accounts and SharePoint folders of the Chief Constable, the Deputy Chief Constable and existing Assistant Chief Constable, and those of their respective personal assistants, were each searched as these were the only likely places that information regarding the recruitment would be held in the Command Team. The notes sections of the Chief Constable's tablet was also searched as this is how he keeps his day book records.
39. The search terms used were "Mabs", "Maboob", "Hussain" and "ACC Recruitment". It was satisfied that these searches returned all the information it held which fell within the scope of point 9 of the request.
40. With regard to GMP's retention and disposal policy for recruitment paperwork, it said that this was one year from the final entry. It said that application forms are retained for the period of employment, vetting information is reviewed annually (and also in accordance with the vetting level), and general correspondence is reviewed after two years.

The Commissioner's conclusion

41. 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 paragraphs 29 and 30, above, the Commissioner is required to make a finding on the balance of probabilities.
42. GMP's responses to the Commissioner suggest to her that it has conducted methodical searches capable of locating all the information it holds in respect of point 9 of the request. However, the complainant maintains that GMP has not disclosed to him all the information it holds. He says that he knows that some information is held which was not disclosed to him. GMP has twice asked him to provide information which

would help it to identify what this information is and to establish whether it holds it, but it says he has not done so.

43. On receiving a copy of the withheld information, the Commissioner noted that, while some information had been disclosed to the complainant with redactions, a number of documents had been withheld in their entirety, under the exemptions at sections 31 and 40 of the FOIA. The complainant was told in the refusal notice that information was being withheld under sections 31 and 40 of the FOIA and the point was reiterated in the internal review.
44. As the complainant has not explained to GMP what information he considers to have been omitted from its response, it is not clear whether it forms part of the information being withheld under section 31 and section 40, or whether GMP does or does not hold the information. However, on that point, section 1(3) of the FOIA states:

"Where a public authority-

 - (a) reasonably requires further information in order to identify and locate the information requested, and*
 - (b) has informed the applicant of that requirement,*

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information."
45. In view of the provisions of section 1(3), and as GMP has asked the complainant to provide further information in relation to the information he believes it has not disclosed and he has not done so, the Commissioner finds no breach of section 1(1) of the FOIA in that regard.
46. However, the Commissioner notes that one of the outcomes of the internal review was that GMP determined that information about vetting levels, which had previously been withheld, was not exempt under the exemptions cited. At that point, GMP invited the complainant to let it know if he wished to have that information disclosed to him, but it says it heard nothing further from him.
47. In view of the fact that GMP had said that this information was not exempt, the Commissioner asked GMP to disclose the vetting level information to the complainant. In response, GMP told the Commissioner that as the complainant had not responded to its earlier request to know if he wanted the information, *"...no further communication has been made in respect of the said information"*.
48. The Commissioner's decision is therefore that, on the balance of probabilities, GMP does hold information falling within the scope of point

9 of the request which it has not disclosed, specifically, the vetting level information referred to in its internal review response.

49. By failing to disclose information it holds which fell within the scope of the request and which was not exempt from disclosure, GMP breached section 1(1) of the FOIA. It also committed a further breach of section 10(1) by failing to disclose this information within the statutory time for compliance. GMP is now required to take the action set out in paragraph 3, above, to rectify this.
50. The Commissioner is concerned by GMP's failure to disclose this information, both when it first ascertained that it was not exempt, and later, when asked to do so by the Commissioner.
51. The Commissioner uses intelligence gathered from individual cases to inform her insight and compliance function. This aligns with the goal in her draft "Openness by design"¹ strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"².

¹ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

² <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Other matters

Section 45 – internal review

52. There is no obligation under the FOIA for a public authority to provide an internal review process. However, it is good practice to do so, and where an authority chooses to offer one the section 45 code of practice sets out, in general terms, the procedure that should be followed. The code states that 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.
53. The complainant requested an internal review on 7 November 2018. He set out a number of concerns, among them that the emails he had been sent did not represent the entirety of the information that GMP held on the matter.
54. GMP responded the same day. It apologised for the delay in responding to the request, clarified some confusion as to whether all questions had been answered and promised that an internal review would be conducted. However, the complainant heard nothing further.
55. The Commissioner wrote to GMP on 14 March 2019 and asked it to complete the internal review within the next 10 working days.
56. On 29 March 2019 the complainant notified the Commissioner that he had still not received the outcome of the internal review. The Commissioner wrote to GMP on the same day, to notify it that the ICO had now accepted the complainant's complaint for investigation.
57. GMP immediately wrote to the complainant, assuring him that an internal review was underway and that it would "...endeavour to provide a response on Monday 1st March [sic]".
58. GMP sent the complainant the outcome of the internal review on 2 April 2019, 101 working days after he had requested it.
59. The Commissioner considers that in failing to conduct an internal review within the timescales set out above, GMP has not acted in accordance with the section 45 code.
60. The Commissioner has asked GMP to provide an explanation for the delay. It stated:

"Initially owed to resource depletion, the compliance function has experienced further attrition and staff indisposition that has impacted overall capacity to meet unprecedented demands resulting in the need

for risk based prioritisation. To clarify further, ICO enquiries/investigations have in all cases been afforded priority alongside work carrying the potential for monetary consequence such as data protection related work; naturally this has a consequential impact."

61. The Commissioner is concerned by the delays that have characterised the overall handling of this request and would refer GMP to her comments in paragraph 51, above.

Right of Appeal

62. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

63. 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.
64. 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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