

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 October 2014

Public Authority: Hampshire Constabulary
Address: Police Headquarters
West Hill
Winchester
SO22 5DB

Decision (including any steps ordered)

1. The complainant has requested information about the out of court disposal, by way of a conditional caution, of an alleged offence relating to the laying of poison near an identified group of badger setts.
2. The Commissioner's decision is that Hampshire Constabulary (the police) had applied section 1(1) FOIA correctly in saying that part of the requested information was not held. He also decided that the police had correctly withheld information about the alleged offender and his offending relying on section 40(2) FOIA on the grounds that disclosure would be unfair.
3. The Commissioner did not require the police to take any steps to ensure compliance with the legislation.

Request and response

4. On 6 March 2014, the police reported that a 65-year old man had admitted laying poison near badger setts in an identified location and that he had been given a conditional caution. The police explained that the individual had admitted the offence and had been ordered to reimburse the RSPCA for the cost of clearing up contaminated soil at the site. The police said that while the implications for the colony of badgers

of laying poison at the badger setts could not easily be fully assessed; it was hoped that the speed with which the incident was reported and the contaminated soil cleaned up had minimised its impact.

5. On about 22 April 2014, the complainant wrote to the police and requested information in the following terms:

This is a request for information relating to the poisoning of a badger sett near Niton, IOW, in January 2014. The offender was apparently granted a conditional caution and anonymity.

- 1. What were the reasons for the decision not to prosecute what seems to be a serious offence?*
- 2. What are the exceptional circumstances which allowed anonymity to be granted in this case?*
- 3. What was the amount of the compensation payment?*
- 4. What was the rank of the most senior officer who approved the outcome of this.*

6. On 6 May 2014 the police answered part 4 of the request.

7. On 9 June 2014, following a review of the matter and of their own earlier response, the police provided further information which answered part 3 of the request.

- For part 2 the police said that no information was held.
- For part 1 the police confirmed that information was held but withheld it relying the section 40(2) FOIA exemption together with section 40(3)(a)(i) of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 10 June 2014 to complain about the way his request for information had been handled. He said that he was concerned that the police were misapplying the Data Protection Act (he later confirmed to the Commissioner that FOIA had been intended) to justify the withholding of embarrassing information.
9. As regards part 1 of the information request, the Commissioner considered the application of the personal information exemption at section 40(2) FOIA. He received representations from the complainant and the police and examined the withheld information which outlined the context and reasons for the conditional caution.

10. The Commissioner also considered whether or not the police were complying with section 1(1)(a) of FOIA in saying that they did not hold information within the scope of part 2 of the request.

Reasons for decision

Section 1(1) – Right of access to information

11. Section 1(1) of FOIA states that:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

12. The police said that they did not hold information falling within the scope of part 2 of the request. The Commissioner investigated whether the police held the information requested, applying the civil test of the balance of probabilities, which is the approach taken by the Information Rights Tribunal in past cases.
13. The police said that a conditional caution was an appropriate disposal in certain circumstances and showed the Commissioner the guidelines which they apply when considering if that is the correct disposal for a matter. It is not for the Information Commissioner to determine whether or not the police have followed their guidelines in any given matter and he took no view as to whether, as a matter of fact, the guidelines had been correctly followed by the police.
14. The police told the Commissioner that information about "exceptional circumstances" was not held. The police explained that by this they meant that there had been no exceptional circumstances in existence; the guidelines for issuing conditional cautions had been followed when they decided to issue this conditional caution and no exceptions had been made in this matter. Following his examination of the withheld information, the Commissioner decided that the information requested at part two of the information request was not held.

Section 40(2) – Requests for third party personal information

15. Section 40(2) of FOIA specifies that the personal information of a third party must not be disclosed if doing so would contravene any of the data protection principles.

16. 'Personal data' is defined under section 1(1) of the Data Protection Act 1998 (DPA) as data which relates to a living individual who can be identified from that data, or from that data and other information which is in the possession of the data controller or is likely to come into the possession of the data controller.

Personal data

17. 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, has them as its main focus, or impacts on them in any way.
18. Personal data is exempt if either of the conditions set out in sections 40(3) and 40(4) of the FOIA are met. The relevant condition in this case is section 40(3)(a)(i), where disclosure would breach any of the DPA principles. In this case the Commissioner has considered whether disclosure of the personal data would breach the first DPA principle. This states that "Personal data shall be processed fairly and lawfully". Furthermore at least one of the conditions in schedule 2 should be met and (in circumstances involving the processing of sensitive personal data) at least one of the conditions of schedule 3 should be met.
19. In this case the police withheld information (the withheld information) they had entered onto their blank conditional caution form, all of which relates to the offender in this matter or his admitted offending, or both, and is therefore his personal information. The Commissioner has reviewed the withheld information. He considered whether any of the information might not relate to the offender or his admitted offending and therefore be disclosable but he found as fact that it did all relate to the individual or his offending or both.
20. In his representations, the complainant told the Commissioner that in his view section 40 FOIA had been used as an excuse not to release information which did not contain any personal information; it was irrelevant in this matter. He said that other complainants had received the same misleading reply. He said he did not understand how either the sum of money paid or the reasons for not prosecuting the offender could be considered personal information; if the offender had an unusual mental problem which would allow him to be identified, a caution would not be appropriate. He added that if there were other reasons it was important that the police should say what they were. The penalties handed down by courts dealing with similar cases made the offender's payment look derisory which, he presumed, was why there was a wish to keep it secret. He said that treating the sum of money paid as

personal information was clearly ridiculous; this case looked very like somebody doing a favour for a friend, a suspicion that would remain unless the police were willing to be open about the matter. He said that there was supposed to be an assumption in favour of disclosure which had been ignored.

21. As the Commissioner is satisfied that the withheld information is all personal data he has gone on to consider whether disclosure would contravene the first data protection principle. In assessing whether disclosure would be unfair, and thus contravene the first principle, the Commissioner takes into account a number of factors such as:
 - What reasonable expectations does the individual have about what will happen to their personal data?
 - Has the individual named been asked whether they are willing to consent to the disclosure of their personal data?
 - What are the consequences of disclosure?
22. The police told the Commissioner that it was their standard practice not to release the names of individuals who had been cautioned and that any confirmation of facts should only be in general terms, which is what had been done in this matter.
23. The police said that, in their opinion, any disclosure of information about this offending and the offender would result in the offender becoming increasingly concerned that he was going to be identified. The police told the Commissioner, and he accepted, that they were very concerned for the privacy of the individual and ultimately for his health and wellbeing.
24. The Commissioner saw that, in accepting the police offer of a conditional caution, the reasonable expectation of the offender were that, having admitted his guilt and made reparation, the police would take reasonable steps to protect his identity. That is, they would not disclose further information that might lead to other members of his community becoming more likely to be able to deduce his identity.
25. The Commissioner notes that part 1 of the information request had described the offending as 'serious'. The police confirmed to the Commissioner that the relevant offences were summary offences, which are triable only in a Magistrates' Court, unlike the more serious Crown Court only and 'either way' offences.
26. The Commissioner has seen that the admitted offending took place within the setting of a very small insular rural community whose members are generally well known to each other. In this context he acknowledged the police advice that disclosure of any further details

about the matter, added to what they had already published, significantly increased the risk of identifying the offender and of adverse consequences to him, and those associated with him, if suspected by others in the community of having been the perpetrator.

27. The Commissioner considered, and his staff discussed with the police, whether partial disclosures of the withheld information could reasonably be made but decided they could not. The police explained that the offender was extremely concerned for the welfare of himself and his family lest his identity became more widely known. The police said they believed that the only sure way of exercising their duty of care towards him and his family was to withhold all of the relevant information as: any partial disclosure risked a 'mosaic' effect whereby that information, combined with other information already in the public domain or known to other individual members of that very small and stable community would point to his identity; and, if the offender became aware that the police were making any further disclosures, against his reasonable expectations, that would put his health and well-being at risk.
28. In reaching his decision the Commissioner saw that, as the complainant made clear, the offending was a matter of local and public interest. He saw too that the police had already made public the basic details of the offence, including the geographical location of the affected badger setts, together with the age and gender of the offender, and decided that the official disclosures already made by the police satisfied the reasonable public interest.
29. The Commissioner noted that the offences for which the conditional caution had been issued were summary only offences and were regarded therefore as of lesser seriousness.
30. The Commissioner also noted that the police had decided, as they were entitled to do, that the relevant criteria for an out of court disposal had been met and that a conditional caution was an appropriate and proportionate disposal in all the circumstances. This had involved the offender admitting his guilt by way of a letter of apology and making reparation, in this case by paying for the damage he had caused to be rectified as far as possible but remaining anonymous.
31. The Commissioner accepted the advice he had received from the police about the risks to the offender of his becoming identifiable from any further disclosures of information relating to the offender and his admitted offending. He took into account the police concerns for the offender's health and well-being, and that of others closely associated with him, and decided that any further disclosures would be unfair. He therefore decided that the section 40(2) FOIA exemption had been applied correctly.

Other matters

32. During the Commissioner's investigation, the police offered to meet with the complainant to aid his understanding of the conditional caution process and their use of that disposal in this matter. However, the complainant told the police and the Commissioner that he wanted to see a formal decision by the Commissioner before he would consider meeting the police.

Right of appeal

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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: 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

Jon Manners
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