

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 March 2017

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

Decision (including any steps ordered)

1. The complainant has requested information about officers connected to an investigation being undertaken by the Independent Police Complaints Commission (the "IPCC"). Having disclosed most of the requested information, the IPCC refused to provide the ranks of the remaining two officers on the basis that this would identify them and thereby breach the Data Protection Act 1998 (the "DPA"). The Commissioner's decision is that section 40(2)(personal information) is properly engaged in respect of one officer. However, in respect of the other officer, the Commissioner requires the IPCC to take the following steps to ensure compliance with the legislation:
 - disclose the rank stated in the confidential annex provided with this notice.
2. The IPCC 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.

Background

3. The request can be followed on the "*What do they know?*" website¹.

4. The IPCC has explained the following about police misconduct notices:

"The IPCC will serve misconduct notices on serving or retired police officers in circumstances where potential conduct matters has been identified. Conduct can be identified by the police force and referred to the IPCC for investigation. Conduct can also be identified by the investigator in the course of the investigation..."

A conduct matter is defined as any matter about which there is not or has not been a complaint, where there is an indication (whether from the circumstances or otherwise) that a person serving with the police may have committed a criminal offence or behaved in a manner which would justify disciplinary proceedings (Section 12, Police Reform Act 2002)".

5. The Commissioner has viewed the withheld information.

Request and response

6. On 5 June 2016 the complainant wrote to the IPCC and requested information in the following terms:

"The last update of the IPCCs investigations into officers named in the Rotherham child exploitation cover-up was in February of 2016.

1) Please provide me with any further information, notices or memos that update the IPCCs current position in relation to these investigations.

2) How many misconduct notices have been served in relation to the investigation?

3) Of those officers served with misconduct notices so far, how many have retired, been dismissed from the force or taken redundancy?

¹ https://www.whatdotheyknow.com/request/how_many_police_officers_involve

4) From the above figures (re question 2), how many of those officers that have left the force have retained full pension?"

7. This was supplemented with a further request on the same day:

"Further to my initial FOI request, and in the interests of clarity, I would like to add the following questions:

3a) How many officers who have been served notices still remain employed by the police service?

3b) What are the respective ranks of all the officers that have been served notices?

Please consider this a continuation of my earlier request".

8. On 1 July 2016 the IPCC responded. In respect of parts 1, 2, 3 and 3a, it cited section 22, advising that it intended to publish this information within the next month. In respect of part 3b it advised that this was exempt under section 40(2) of the FOIA. It advised that it did not hold information regarding part 4.
9. The complainant requested an internal review of the response to part 3b on 3 July 2016. Following the Commissioner's intervention this was provided on 31 October 2016. The IPCC disclosed some further information but maintained its position regarding section 40(2) for the ranks of the remaining two officers.

Scope of the case

10. The complainant initially contacted the Commissioner on 29 August 2016 as he had not received a response to his request for an internal review. Following its provision, the complainant advised the Commissioner that he remained dissatisfied. He asked the Commissioner to consider the partial withholding of information for part 3(b) of his request. The Commissioner will consider this below.

Reasons for decision

Section 40 – personal information

11. 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.

Is the requested information personal data?

12. The first step for the Commissioner to determine is whether the requested information constitutes personal data, as defined by the Data Protection Act 1998 (DPA). If it is not personal data, then section 40 cannot apply.
13. The definition of personal data is set out in section 1 of the DPA. This provides that, for information to be personal data, it must relate to an individual and that individual must be identifiable from that information.
14. 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.
15. From the definition above it follows that information, that does not relate to and identify an individual, is not personal data.
16. The first question for the Commissioner to consider is whether the requested information is personal data as defined in section 1 of the DPA.
17. Therefore, for the purposes of considering the application of section 40(2), the Commissioner must first establish if the disclosure of the withheld information could reasonably lead to the identification of a person by another individual.
18. The IPCC has confirmed that it interpreted part 3(b) of the request as relating to all officers, and former officers, who were the subject of current misconduct notices at the time of the request. At the time of writing this notice, the IPCC has now disclosed all of these ranks other than for two officers as it believes they would be identifiable from disclosure.
19. The IPCC has confirmed that it has interpreted the request as meaning the rank/s of the officers at the time that the misconduct notices were served. This means the rank that they were serving at that point, or the last rank they were holding if they had retired. The dates the notices were served is not known. Whether they remain serving officers, or even if they currently remain under investigation, is not part of the request.
20. The IPCC has also confirmed that the remaining two officers are of a rank or ranks above that of Chief Inspector. This necessarily means that, at the time the misconduct notices were served, they were either a serving Superintendent, Chief Superintendent, Assistant Chief Constable, Deputy Chief Constable or Chief Constable or that they had retired whilst serving at that rank.

21. The Commissioner asked various questions in order to establish whether the officers were identifiable from disclosure of their rank only. In respect of this she established the following:

"The IPCC investigation is primarily concerned with the period from 1997 to 2013, though some allegations relate to matters outside of this timeframe.

The investigation is not focused upon any specific policing unit or team, but is framed around CSE [Child Sexual Exploitation] service delivery within a specific 'District' which crosses over specific teams like Intelligence and Safeguarding teams.

We do not hold information as to the number of officers in the relevant policing district during the period under investigation..."

22. It is therefore apparent to the Commissioner that there is a considerable time period of 16 years covered by the request and a full policing District as opposed to a small team of people.

23. The IPCC further advised the Commissioner:

"We decided to withhold the ranks of officers above Chief Inspector, meaning that we have confirmed to [the complainant] that the withheld ranks were at Superintendent or above at the time that the notices were served. This does not confirm, however, that they held the rank of Superintendent or above at the time of the matters under investigation. Accordingly, the information you have requested about rank structure and roles in Rotherham appears to us to be of limited relevance to the question whether these two individuals would be identifiable from their ranks ..."

24. It is not known whether the remaining officers are male or female, or whether they are retired or serving. If they are serving, it is not known if they remain serving officers at same force, in the same Division or at the same rank. They may have been promoted or moved force, they may even have been demoted.

25. This response from the IPCC indicates that no presumption can be made about the ranks of the remaining officers at the time that the notices were served. Therefore, hypothetically, either of them may currently be a Chief Constable, or they may have achieved that rank immediately prior to retiring. They may also have been at a considerably lower rank during their time at Rotherham Division having attained the rank of Superintendent or above by the time the misconduct notice was served.

The Commissioner's view

26. A test used by both the Commissioner and the First-tier tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks reidentification of an individual from information which, on the face of it, appears truly anonymised.
27. The ICO's Code of Practice on Anonymisation¹ notes that:

"The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA".
28. In summary, the motivated intruder test is that if the risk of identification is "*reasonably likely*" the information should be regarded as personal data.
29. Having had the opportunity to review the withheld ranks, and being aware of the current status of the two officers, the Commissioner accepts that the numbers within the scope of the request are low. However, even where the number may be low, the Commissioner does not consider that this in itself means that it constitutes personal data.
30. In respect of one officer, the Commissioner considers that they are not reasonably likely to be recognised. Whether and where they are serving is not known and the rank they had when working in Rotherham Division is also not known. The fact that they had achieved a particular rank at the time that the misconduct notice was served does not therefore assist with their identification. The information is therefore not their personal data and section 40 is not engaged. This rank should therefore be provided, and the relevant details will be included in a confidential annex to this notice.
31. However, it is the Commissioner's view that this is not the case for the other officer and she considers that it would be "*reasonably likely*" for a motivated intruder to identify this party. She therefore finds that the requested information is the personal information of the officer concerned. Furthermore, as it relates to alleged misconduct, it is also sensitive personal data as defined in section 2(g) of the DPA.

32. This means that the information can only be disclosed if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions and, because it is sensitive personal data, also one of the Schedule 3 conditions. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.
33. Therefore, even if the Commissioner found that disclosure would be generally fair, this would not impact on the disclosure of the information if she found that no Schedule 3 condition could be satisfied. She has proceeded on the basis that she accepts that there may be some possibility that in this case disclosure could reasonably be considered to be fair, due largely to the seniority and responsibility of the officer concerned, and has therefore gone on to consider the applicability of the Schedule 3 DPA conditions. If there is no relevant Schedule 3 condition then a full consideration of any data protection principle or any Schedule 2 condition is unnecessary.

Is there a relevant Schedule 3 condition?

34. The Commissioner's general view is that the two conditions in Schedule 3 that might apply in relation to disclosures made under the FOIA are the first condition, which is that the data subject has consented to disclosure, and the fifth condition, which is that the data subject has already deliberately made the personal data public.
35. The Commissioner is aware of no evidence that the first or fifth condition is met and the complainant did not advance any argument about those conditions.
36. In conclusion, the Commissioner does not find that any condition in DPA Schedule 3 is met. Therefore, disclosure of this sensitive personal data would be in breach of the first data protection principle. The finding of the Commissioner is that the exemption provided by section 40(2) is engaged and the IPCC was not obliged to disclose the rank of this remaining officer.

Right of appeal

37. 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

38. 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.
39. 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

Carolyn Howes
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