

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 21 September 2023

**Public Authority:** Chief Constable of Cambridgeshire  
Constabulary

**Address:** Constabulary Headquarters  
Hinchingsbrooke Park  
Huntingdon  
Cambridgeshire  
PE29 6NP

#### **Decision (including any steps ordered)**

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1. The complainant has requested information about an action undertaken by Cambridgeshire Constabulary. In compliance with a previous decision notice on the request, Cambridgeshire Constabulary disclosed some information, but withheld the remainder, citing sections 38(1) (Health and safety) and 40(2) (Personal information) of FOIA.
2. Further information was located during the course of the Commissioner's investigation. This was fully withheld under section 40(2) of FOIA.
3. The Commissioner's decision is that Cambridgeshire Constabulary was entitled to rely on section 40(2) of FOIA. He also finds that, on the civil standard of the balance of probabilities, no further information is held. No steps are required.

#### **Request and response**

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4. On 23 December 2022, the complainant wrote to Cambridgeshire Constabulary and requested the following information:

“Please release all available information relating to the decision making process of the return of the 2 beagles to MBR [Marshall Bio Resources] acres”.

5. The complainant was dissatisfied with Cambridgeshire Constabulary’s initial responses to the complaint, and they complained to the Commissioner. On 25 June 2023, the Commissioner issued a decision notice<sup>1</sup>, which required Cambridgeshire Constabulary to issue a fresh response to the request, either disclosing all the information held, or issuing a refusal notice explaining why any withheld information was exempt from disclosure.
6. On 31 July 2023, Cambridgeshire Constabulary complied with the decision notice. It disclosed an email chain, with redactions made under sections 38(1) and 40(2) of FOIA. It advised that this was all the information it held.

## Scope of the case

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7. The complainant contacted the Commissioner on 7 August 2023 to complain about the way their request for information had been handled. They said:

“The requester has not requested any personal information. If data can be [sic] successfully anonymised to the extent that the requester would not be able to identify the individual(s) (even if the public authority could still identify them using other data in its possession), then the data is not subject to the exemption and can be disclosed, as per the Judgment of Common Services Agency (Appellants) v Scottish Information Commissioner (Respondent) (Scotland) [2008] UKHL 47.

Therefore Cambridgeshire Constabulary could have anonymised and released some of the information, instead of hastily applying an exemption in order to comply with the Decision Notice”.

8. The Commissioner contacted the complainant to advise that the withheld information only consisted of personal information, and asked them to clarify the grounds of their complaint in light of this.

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4025706/ic-235037-x2v2.pdf>

9. The complainant responded. They confirmed they had been slightly confused regarding the exemptions cited and explained:

"... the redacted email refers to an attached document. This document has not be [sic] disclosed and there is no explanation to where this document has come from.

Overall I'm just general [sic] dissatisfied with the amount of information disclosed. The original request states, 'Please release ALL available information relating to the decision making process of the return of the 2 beagles to MBR acres'. The disclosed email will only be part of the decision making process.

Even if the decision making process was simply to contact the Home Office and follow their advice there would more to show this. There would be event logs and internal emails. As there were protest [sic] at the police headquarters as well as a criminal investigation there were potentially lots of steps involved in the decision making process.

This is a very unique situation (property was stolen but the property was a living animal and the return of the animal could have result in the animal's death). I have a strong interest in this subject and wish learn more about it, as I am currently researching ethics and the law surrounding animals".

10. It therefore became apparent that an email attachment that fell within the request's scope had not been considered for disclosure. Cambridgeshire Constabulary then considered the email attachment and advised the Commissioner that it was fully exempt under section 40(2) of FOIA.
11. As the complainant had previously accepted the redaction of personal information, the Commissioner will not consider the citing of section 40 to cover the names / contact details which are withheld in the body of the email chain itself.
12. However, as the Commissioner has now had access to the email attachment he will consider its disclosure separately, albeit this will necessarily be under section 40(2). The complainant is unaware of its content as it only came to light at a late stage, however, rather than seek the complainant's further views, the Commissioner considers it timely to consider its disclosure below; he does not consider the complainant to be disadvantaged by this approach.
13. The Commissioner will also consider whether any further information is held.

14. The Commissioner has viewed the withheld information. He has also discussed the request with Cambridgeshire Constabulary.

## **Reasons for decision**

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### **Section 1 – General right of access**

15. Section 1 of 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.
16. In this case, the complainant suspects that Cambridgeshire Constabulary holds more information from which it could answer the request. Cambridgeshire Constabulary's position is that it does not.
17. 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.
18. The Commissioner will consider the complainant's evidence and arguments. He 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. He 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, he is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.
19. Therefore, the Commissioner has sought to determine whether, on the balance of probabilities, Cambridgeshire Constabulary holds any further recorded information within the scope of the request. Accordingly, he asked it to explain what enquiries it had made in order to reach the view that it did not hold any further information.
20. Cambridgeshire Constabulary explained to the Commissioner that it had received a written complaint about MBR (this is the email attachment referred to above, which the Commissioner will consider below). That complaint was forwarded to an appropriate contact within the Home Office, who had subsequently discussed the matter with the Animals in

Science Regulation Unit ("ASRU")<sup>2</sup>, which oversees the licencing of the MBR site. The Home Office responded to Cambridgeshire Constabulary saying that that no rules had been breached and it recommended that the dogs concerned were returned to the site. This detail is all included in the email chain that has been disclosed to the complainant, omission of the attachment being an oversight.

21. As the email states that the contact at the Home Office had been in discussion with the ASRU regarding the return of the dogs to MBR, it seems clear to the Commissioner that the actual decision-making on that point was not made by Cambridgeshire Constabulary.
22. Other than the attachment, which has been withheld under section 40, Cambridgeshire Constabulary said that the related email chain is the only recorded information that is held.
23. Whilst the complainant is of the view that there should be more information, all they have requested is anything related to the decision-making surrounding the return of the dogs to the establishment from whence they were taken. Following advice received from the Home Office, Cambridgeshire Constabulary returned the dogs, as it had no legal basis for taking any other action and there were no further lines of enquiry necessary. On this basis, the Commissioner accepts that it is inherently unlikely that any further information is held.

### **The Commissioner's conclusion**

24. 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 the paragraphs, above, the Commissioner is required to make a finding on the balance of probabilities.
25. The Commissioner considers that Cambridgeshire Constabulary contacted the relevant party within the force to consider whether or not any information was held in respect of the request. Based on the information provided, the Commissioner is satisfied that, on the balance of probabilities, no further recorded information within the scope of the request is held. He is therefore satisfied that Cambridgeshire

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<sup>2</sup> <https://www.gov.uk/government/collections/animals-in-science-regulation-unit>

Constabulary has complied with the requirements of section 1 of FOIA in this case.

## **Section 40 – Personal information**

26. This has been cited to cover the letter of complaint which was submitted to Cambridgeshire Constabulary. The letter formed an attachment in the disclosed email chain. The attachment itself does not include the name or details of its author, although Cambridgeshire Constabulary has told the Commissioner who it is.
27. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
28. In this case, the relevant condition is contained in section 40(3A)(a)<sup>3</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
29. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
30. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

### **Is the information personal data?**

31. Section 3(2) of the DPA defines personal data as: "any information relating to an identified or identifiable living individual".
32. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
33. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or

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<sup>3</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

34. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus. Whilst the author of the attachment isn't actually named, the Commissioner will consider whether or not they may be identifiable from the content of the letter alone.

### **Motivated intruder**

35. 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 of reidentification of an individual from information which, on the face of it, appears truly anonymised.

36. The ICO's Code of Practice on Anonymisation<sup>4</sup> 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".

37. In summary, the motivated intruder test is that if the risk of identification is "reasonably likely" the information should be regarded as personal data.
38. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the author of the letter and that the style in which the complaint is written, coupled with the subject matter and information in the public domain, means that it would be reasonably likely that the author could be identified, particularly by those close to the subject matter of the request.

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<sup>4</sup> <https://ico.org.uk/media/fororganisations/documents/1061/anonymisation-code.pdf>

39. The Commissioner is therefore satisfied that the risk of identification of the author is reasonably likely. The information both relates to, and identifies, the party concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
40. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
41. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

42. Article 5(1)(a) of the UK GDPR states that: "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
43. In the case of an 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 lawful, fair and transparent.
44. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

### **Lawful processing: Article 6(1)(f) of the UK GDPR**

45. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:  
  
"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child<sup>5</sup>".

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<sup>5</sup> Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-



46. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
47. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

### **Legitimate interests**

48. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
49. The complainant, and indeed many members of the public, clearly have concerns over the facility at MBR, the use of animals for the research industry being a particularly emotive subject matter. The Commissioner therefore recognises that there is a legitimate interest in disclosure of the letter of complaint, which is of some limited relevance to the

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"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

information request, albeit the letter itself does not actually relate to the decision-making process regarding the return of the dogs.

50. The Commissioner also accepts that there will always be a public interest in transparency regarding the work of the police so there is also a legitimate interest on this basis.

### **Is disclosure necessary?**

51. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
52. It is noted that Cambridgeshire Constabulary has already provided most of the requested information. However, as far as the Commissioner is aware, the remaining complaint letter itself is unlikely to be available to the complainant via any other channel (unless its source is personally known to the complainant - the narrow subject matter means that the Commissioner considers this is a possibility).
53. It is also noted that general information about the incident is available online, which includes the types of concerns which are raised within the withheld letter. As such, the Commissioner considers there is only a limited interest to be served by fully disclosing the letter into the public domain.

### **Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms**

54. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
55. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;

- whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
56. In the Commissioner's view, a key issue is whether the individual concerned would 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.
57. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
58. The author of the letter of complaint has clearly approached the police in a private capacity in order to raise their concerns. As an individual, the Commissioner considers that they would have no reasonable expectation that Cambridgeshire Constabulary would disclose their personal correspondence and place it in the public domain – indeed, on this occasion the Commissioner considers that they would be in a position to have done this themselves were they so minded.
59. As the author's concerns have largely been disclosed by other means, the Commissioner cannot see any necessity to disclose those remaining details, disclosure of which may allow for reidentification of the party concerned. Furthermore, it is noted that the letter itself is not directly related to the decision-making which led to the return of the dogs to MBR. Regarding any damage or distress that may be caused to the individual, it is likely that disclosure could involve unwarranted contact from the media or those sympathetic to the cause, whereby they may try to contact that party, which may be intrusive.

### **The Commissioner's view**

60. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
61. In light of this decision it has not been necessary to also consider Cambridgeshire Constabulary's application of section 38 to the request.

## Right of appeal

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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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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 .....**

**Carolyn Howes  
Senior Case Officer  
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Wycliffe House  
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