

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 August 2024

Public Authority: West Yorkshire Police and Crime Panel

Address: Wakefield One
Burton Street
Wakefield
WF1 2EB

Decision (including any steps ordered)

1. The complainant has requested information about a non-FOIA complaint which he previously made, from West Yorkshire Police and Crime Panel ("the Panel"). The Panel advised the complainant that it did not hold the requested information.
2. The Commissioner's decision is that, on the civil standard of the balance of probabilities and based on the wording of the request, no information is held.
3. For expediency, the Commissioner also considered whether some information that had been located following the employment of a wider interpretation of the request, was suitable for disclosure. The Panel advised that this was exempt by virtue of section 42(1) (Legal professional privilege) of FOIA. The Commissioner found that the Panel was entitled to withhold this information.
4. The Commissioner does not require any steps.

Background

5. The position as to whether a different Police and Crime Panel was itself a public authority for the purposes of FOIA has been previously considered by the First-tier Tribunal [EA/2019/0351]. In its determinations, it

concluded that it was. This notice has therefore been issued on that same premise.

6. Information about West Yorkshire Police and Crime Panel can be found online¹. Regarding the matter that is the subject of this request, it says:

“The Police Reform and Social Responsibility Act 2011 introduced significant changes in police governance and accountability, in particular the introduction of directly elected Police and Crime Commissioners and a Police and Crime Panel for each force area. In May 2021, as part of the devolution deal for West Yorkshire, the functions of the Police and Crime Commissioner transferred to the newly elected Mayor for West Yorkshire.

The Mayor must be able to demonstrate that the decisions they make, and the way they make them are appropriate. The Police and Crime Panel is in place to constructively challenge the Mayor whilst also supporting them to ensure that they meet the needs of all the communities they have been elected to serve.

The West Yorkshire Police and Crime Panel maintains a regular check and balance on the actions, decisions and performance of the West Yorkshire Mayor in relation to police and crime functions. The Panel does not scrutinise West Yorkshire Police; it scrutinises how the Mayor carries out their statutory responsibilities and how they set the strategic direction for the Police Force.

The Mayor is not accountable to the Panel, instead they are directly accountable to the public”.

7. And:

“The Panel has a legal role to consider non-criminal complaints against the Mayor of West Yorkshire, when acting in relation to their policing and crime functions, and the Deputy Mayor for Policing and Crime (DMPC)”.

8. Regarding the consideration of complaints that it receives, the Panel’s “Complaints and Misconduct Procedure” is available on its website².

¹ <https://www.westyorkshire-pcp.gov.uk/>

²<https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.westyorkshire-pcp.gov.uk%2Fmedia%2Fk4ii2l0x%2Fcomplaints-procedure-june-2024.docx&wdOrigin=BROWSELINK>

Request and response

9. On 12 February 2024, the complainant wrote to the Panel and requested the following information:

“In November 2021, you were sent a complaint about alleged violation of Article Six of the Human Rights Act by the mayor.

What is the reason that no complaint was recorded?”.

(It is understood that the complaint referred to, which is not FOIA related, was made by this complainant.)

10. On 8 March 2024, the Panel responded. It explained:

“You wrote to the Police and Crime Panel on 18th November 2021 regarding your concerns about the West Yorkshire Combined Authority's Unreasonable Behaviour Policy.

In response to your complaint, I wrote to you on 29th November 2021 explaining the specific and limited duties that the Police and Crime Panel has in relation to the recording and handling of complaints about the Mayor and Deputy Mayor for Policing and Crime. I explained that the Regulations and the Panel's own complaints procedure do not cover complaints about the merits of a decision made by the Mayor when acting in relation to their PCC functions, for example a complaint where you disagree with a policy that the mayor or Deputy Mayor has introduced. I went on to state that it is for this reason that the Panel is unable to take up this matter through its complaint process.

I also provided you with details of where you should direct your complaint in my email of 29th November 2021. This information was again explained to you in my later emails of 3rd December 2021, 10th December 2021, 16th March 2022 and 10th March 2022. There have also been a number of further exchanges of emails since that date explaining the different roles and functions of the Police and Crime Panel, the West Yorkshire Combined Authority Policing and Crime Team and the regulations that govern their functions in an attempt to explain why your complaint was not recorded by the Police and Crime Panel”.

11. The complainant requested an internal review on 8 March 2024. He said:

“The Mayor's ‘Unreasonable Behaviour’ policy which extinguishes the right to complain without any recourse to appeal is a clear and unambiguous violation of Article Six of the Human Rights Act. If that point was not made clear in the original complaint, then it

ought to have been identified through the legal advice that you assured me that you had sought, unless your advisor is incompetent.

In any case, a Freedom of Information Request is a request for information to be made public, and a spurious assertion that you have already explained something does not fulfil that requirement.

Accordingly I would like an internal review of your response. If the regulations prevent you from investigating a violation of the Human Rights Act by the mayor in the course of their PCC functions, then you need to cite those regulations.

Alternatively, if the reason that you did not record the complaint is that your legal advisor is an idiot, then you would need to provide a record of their advice”.

12. The Panel provided an internal review on 8 April 2024 in which it maintained its position, explaining that no information was held.

Scope of the case

13. The complainant contacted the Commissioner on 10 April 2024, to complain about the way his request for information had been handled. His grounds were as follows:

“In an internal review of the request, a ‘Senior Legal Officer is reported as having “Confirmed that the Panel does not hold any record of a complaint made in November 2021” about alleged violation of Article Six of the Human Rights Act by the mayor.’

The letter goes on to describe a complaint alleging a violation of Article Six: how can they be describing that complaint if they hold no record of it?

Or why has a senior legal officer confirmed that they have no record of a complaint when clearly they have?

It is disingenuous, if not downright dishonest”.

14. The Commissioner will consider whether or not any recorded information is held below.
15. For expediency, and with the assistance of the Panel, he has also used his discretion to consider further points, as detailed below.
16. The Commissioner’s duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the

requirements of Part 1 of FOIA. FOIA is concerned with transparency of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held by public authorities. FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.

Reasons for decision

Section 1 – General right of access

17. 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.
18. In this case, the complainant suspects that the Panel holds information from which it could answer the request. The Panel's position is that it does not.
19. 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.
20. 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.
21. Therefore, the Commissioner has sought to determine whether, on the balance of probabilities, the Panel holds any 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 the information.
22. In response to his enquires, the Panel was asked to provide the Commissioner with a copy of any recorded information held in respect of

the November 2021 complaint and any decision-making made in relation to that complaint. The Panel subsequently provided this information.

23. Regarding the grounds of complaint in paragraph 13 above, it explained:

"The Police and Crime Panel does hold an email from the complainant dated 18th November 2021 (the 'original complaint', provided [to the Commissioner]); however, this complaint relates to the Mayor's Unreasonable Behaviour policy and does not reference alleged violation of Article Six of the Human Rights Act by the Mayor. This is why the internal review response stated that the Panel does not hold any record of a complaint about alleged violation of Article Six being made in November 2021. You will see from the subsequent email trail relating to the original complaint that the complaint regarding the allegation of a violation of Article Six of the Human Rights Act was introduced by the complainant at a later stage, on 10th December 2021".

24. In further support of its position, and providing related email evidence, the Panel went on to explain to the Commissioner that:

"The above was clearly explained in the email to the complainant dated 8th April 2024 setting out the outcome of the internal review of the complainant's FOI request... This correctly states that 'Having reviewed your FOI request, the Senior Legal Officer, Planning & Highways has confirmed that the Panel does not hold any record of a complaint made in November 2021 'about alleged violation of Article Six of the Human Rights Act by the mayor'. However, the response does then go on to address and explain what complaint had been received by the Panel from the complainant on 18th November 2021 and sets out in full over a number of paragraphs how that complaint had been considered and the reasons why it was not a matter that the Police and Crime Panel could deal with:

- 'On 18th November 2021 the Panel received a complaint that the Mayor's Policing and Crime Office had removed the right of appeal from their Unreasonable Behaviour policy along with oversight of the implementation of that policy and that this was unacceptable.'
- That complaint was considered in accordance with the Panel's Complaints and Misconduct Procedure ("the Procedure") with a view to being recorded as a complaint. Under paragraph 7.3 of the Procedure, complaints that purport to be about the Mayor but which relate to the situations described in paragraphs 5.6 to 5.10 of the Procedure will not be recorded by the Panel.

- Following due consideration, the decision reached was that the Panel was unable to consider the matter as a complaint through its complaint process because the Panel's Complaints and Misconduct Procedure does not apply to the merits of a decision made by the Mayor when acting in relation to their Policing and Crime functions, for example a complaint that disagrees with a policy that the Mayor has introduced (the situation described in paragraph 5.9 of the Procedure).
- As a result, the complaint received on 18th November 2021 was not recorded by the Panel".

25. The Commissioner finds this to be an entirely reasonable response to the grounds of complaint provided to him by the complainant, ie that his original complaint to the Panel did not refer to an "alleged violation of Article Six of the Human Rights Act". Accordingly, no relevant information would be held and the Commissioner agrees with the Panel's position.

Further findings

26. Taking a more pragmatic view, the Commissioner asked the Panel whether it would consider a wider interpretation of the request as the complainant may have been confused regarding his correspondence; he hoped this might forego the need for the complainant to make a further FOIA request and the associated continued correspondence.
27. For expediency the Panel agreed to this approach, so the Commissioner therefore asked it to consider whether it held any recorded information which evidenced the "due consideration" of **either** the original complaint of 18th November 2021 **or** the latter one of 10th December 2021, such as an agenda item, meeting notes or internal emails. If not, he asked what format any "consideration" of the complaints would have taken.
28. The Panel responded advising that it did hold some information which consisted of email correspondence with its lawyers, and that this was legally privileged. Therefore, the Commissioner invited the Panel to submit rationale to support non-disclosure of these emails for him to consider in this notice. These arguments have not been presented to the complainant to ensure matters are dealt with expeditiously. The Commissioner considers that the complainant will not be disadvantaged by this as he will be able to appeal the findings if he disagrees; this action also means that he has not had to make a further request.
29. The Commissioner has viewed the three email chains which have been withheld under section 42 of FOIA.

Section 42 – Legal professional privilege

30. Section 42 of FOIA states that a public authority may refuse to disclose information which is subject to legal professional privilege (LPP).
31. There are two types of LPP – litigation privilege and advice privilege. The Panel has claimed that the withheld information is subject to advice privilege as it applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed actions to be taken regarding how to deal with the two non-FOIA complaints.
32. The Panel has advised that the withheld information consists of:
 - Communications between a professional legal advisor and client.
 - Communications made for the sole purpose of obtaining legal advice.
 - Information communicated in the legal advisor's professional capacity.
33. From what he has seen, the Commissioner is satisfied that the withheld information comprises confidential communications between client and legal adviser for the dominant purpose of seeking and giving legal advice. It falls within the definition of advice privilege and is therefore subject to LPP. Accordingly, the Commissioner finds that the exemption is engaged in respect of the withheld emails.
34. Section 42 is a class-based exemption, so there is no need for a public authority to demonstrate any prejudice or adverse effect. It is however qualified by the public interest test.

Public interest in favour of disclosure

35. The Panel has recognised:
 - The need for public authorities to be transparent and accountable.
 - The complainant's reasonable suspicion of wrongdoing.
 - That disclosure would encourage better advice and more robust, well-considered decision-making in future.

Public interest in favour of maintaining the exemption

36. The Panel has argued:

“Although it is appreciated that the content of the legal advice is very important to the complainant and disclosure has been sought in circumstances in which the complainant is suspicious about the same, that suspicion is not considered to be reasonable. Whilst the need for transparency and accountability of public bodies is also

important, it is considered that the public would expect the Panel to be allowed to conduct its internal deliberations and decision-making processes regarding the consideration of complaints by reference to the statutory framework for the same within a safe space in which the Panel, through its Panel Officers, is able to seek, obtain and consider legal advice without external interference.

The professional legal advisor is subject to regulation by a professional external body and should be able to continue giving full and proper legal advice on such matters with an expectation that their legal advice is kept confidential. The quality of internal discussions and decision-making – and the ability of the Panel to effectively carry out its complaints role – is improved by the ability to seek and obtain legal advice as and where considered appropriate and this may deteriorate if the Panel were to be deterred from seeking legal advice, and the professional legal advisor deterred from giving full and proper legal advice, for fear it would later be disclosed. It is not therefore considered to be in the public interest to disclose the withheld information”.

Balancing of the Public Interest Test

37. The Commissioner recognises the public interest in promoting accountability and transparency, particularly around the actions of public bodies. He also recognises the importance of maintaining openness in communications between client and lawyer to ensure full and frank legal advice.
38. The general public interest inherent in section 42 will generally be extremely strong owing to the importance of the principle behind LPP: safeguarding confidential communications between client and lawyer to ensure access to full and frank legal advice. A weakening of the confidence that parties have that legal advice will remain confidential undermines the ability of parties to seek advice and conduct litigation appropriately. This erodes the rule of law and the individual rights it guarantees.
39. The Commissioner accepts that there will always be a public interest in transparency, accountability and in the public having access to information to enable them to understand more clearly why particular decisions have been made and certain processes followed.
40. The Commissioner has attached appropriate weight to the public interest in disclosure as set out above. However, having viewed the withheld information, he does not consider that this is strong enough to outweigh or override the substantial public interest in protecting the principle of LPP in this particular case.

41. Having considered the relevant factors the Commissioner is satisfied that the public interest in maintaining the exemption in this case outweighs the public interest in disclosure. He considers that the limited public benefits in disclosure would not offset the resulting detriment to the Panel's ability to obtain legal advice.
42. The Commissioner's decision, therefore, is that the Panel is entitled to withhold the information caught by a wider interpretation of the request, under section 42 of FOIA.

Right of appeal

43. 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

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

44. 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.
45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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