

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 July 2020

Public Authority: Commissioner of the Metropolitan Police Service

Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant has requested from the Metropolitan Police Service (the "MPS") details of officer misconduct hearings which have been published on the force's website and removed after 28 days.
2. The MPS refused to disclose the requested information finding that it was exempt by virtue of section 40(2) (Personal information) of the FOIA. The Commissioner's decision is that the MPS was entitled to withhold some of the information. However, she also finds that some of the outcomes can be suitably redacted to prevent identification of the officers concerned.
3. The Commissioner requires the MPS to take the following steps to ensure compliance with the legislation:
 - disclose the information identified in the confidential annex served with this notice.
4. The MPS 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

5. The MPS has explained that:

"... the [requested] information has already been published in line with Police Misconduct amendment regulations 2015, Regulation 36(10). Regulation 36(10) refers to the 28 [day] timescale and although it states that a notice should be published for a period of no less than 28 days, the MPS position is, that we will remove the information after this time period has elapsed. As such, neither the individuals concerned, nor their families, would reasonably expect this information to be released again".

Request and response

6. On 1 May 2020, the complainant wrote to the MPS and requested information in the following terms:

"The Met Police publishes outcomes of officer misconduct hearings here - <https://www.met.police.uk/foi-ai/af/accessing-information/published-items/?q=&dt=Misconduct+outcome> - but they only stay online for 28 days so can no longer be viewed after that. Under the Freedom of Information Act please provide me with copies of all misconduct outcomes published by the Met on that link from 01/02/20 to 31/03/20."

7. On 8 June 2020, the MPS responded. It refused to provide the requested information, citing section 40(2) (Personal information) of the FOIA.
8. The complainant requested an internal review on 1 July 2020.
9. The MPS provided an internal review on 29 July 2020 in which it maintained its position.

Scope of the case

10. The complainant contacted the Commissioner on 29 October 2020 to complain about the way his request for information had been handled. His grounds of complaint were as follows:

"The Met Police publishes information about misconduct hearings for its officers but only for 28 days when it removes the information. Other professional bodies leave their misconduct findings online. The Met Police refused to release misconduct findings over a set period that had been previously published but

since removed. It cited personal data as an exemption, but had previously put the same information into the public domain - there is no law that says it has to remove the data after 28 days so I argued it should still provide it".

11. The Commissioner asked him to confirm whether or not he would be satisfied with receiving anonymised information, as he had suggested this when requesting an internal review. He responded:

"I would accept redacted material as suggested, but I would also like you to establish if the MPS can withhold the unredacted material or not under FOIA on section 40 grounds, seeing as it has previously published the names before removing the information after a period of time".

12. The MPS did offer an anonymised disclosure 'outside the FOIA' to the complainant but he chose not to accept this.
13. The Commissioner has viewed the withheld information.
14. The Commissioner will consider the citing of section 40 below.

Reasons for decision

Section 40 – Personal information

15. The MPS advised the Commissioner that the withheld information:

*"... constitutes the personal data of 14 named police officers relating to 15 misconduct outcomes:-
4 cases were not proven / no breach of professional standards
1 case was partly proven
1 resulted in a written warning
2 resulted in final written warnings
4 officers were dismissed without notice
3 cases related to former officers who would have been dismissed without notice had they still been employed by the MPS".*

16. The Commissioner notes that some of the requested information remains available online by way of media articles which were based on information which had previously been disclosed by the MPS. However, the original disclosure was **not** made under the remit of the FOIA and its continued availability is not something which is being facilitated by the MPS.
17. 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 one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

18. In this case the relevant condition is contained in section 40(3A)(a)¹. 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 General Data Protection Regulation ('GDPR').
19. 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 the FOIA cannot apply.
20. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

21. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

22. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
23. 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 more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
24. 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.
25. Clearly the requested information relates to named individuals and the outcome of misconduct hearings they were subject to. Accordingly, it is their personal data.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

Would disclosure contravene principle (a)?

26. Article 5(1)(a) of the GDPR states that: "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
27. 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.
28. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
29. In addition, if the requested data is criminal offence data, in order for disclosure to be lawful and compliant with principle (a), it must also meet the requirements of Article 10 of the GDPR.

Is the information criminal offence data?

30. Information relating to criminal convictions and offences is given special status in the GDPR.
31. Article 10 of the GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to: a) the alleged commission of offences by the data subject; or b) proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.

32. The MPS has advised:

"As none of the conditions required for processing criminal offence data are satisfied there is no legal basis for its disclosure. Processing criminal offence data in order to disclose it under the FOIA would breach principle (a) and so therefore this information is exempt".

33. Although not necessary for considering the disclosure of criminal offence data, it further added:

*"In considering the application of Article 6(1)(f) of the GDPR we have considered the three-part test, Legitimate interests test, Necessity and Balancing test:-
The MPS recognises that there may be a legitimate public interest inherent in the disclosure of information upon a request for information under the Freedom of Information Act given the associated benefit of enhancing transparency and accountability of*

public authorities. This enhanced transparency may also improve public confidence with the MPS.

The MPS acknowledges that misconduct outcomes are of public interest and also demonstrates openness and transparency. However, in this particular case the outcomes were made public in early 2020 for 28 days, the MPS therefore considers the public interest has already been met. Whilst being open and transparent regarding the conduct of our officers we also need to make sure we balance the rights of the individuals with the interests of the community.

As described by the ICO in various decision notices, "Necessary" means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so a measure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

As explained in our initial response the information has already been published in line with Police Misconduct amendment regulations 2015, Regulation 36(10). Regulation 36(10) refers to the 28 timescale and although it states that a notice should be published for a period of no less than 28 days, the MPS position is, that we will remove the information after this time period has elapsed. As such, neither the individuals concerned, nor their families, would reasonably expect this information to be released again".

34. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include criminal offence data. She has reached this conclusion on the basis that the outcomes concern the consideration as to whether or not named police officers have committed criminal offences.
35. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.
36. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under the FOIA are the conditions at Part 3 paragraph 29 (consent from the data subject) or Part 3 paragraph 32 (data made manifestly public by the data subject).

37. Whilst it is noted that details regarding some of the officers concerned are still in the public domain by way of the media, the Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to an FOIA request or that they have deliberately made this data public. As none of the conditions required for processing criminal offence data are satisfied there is no legal basis for its disclosure. Processing this criminal offence data in order to disclose it under the FOIA would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

Would it be possible to anonymise any of the information and disclose it?

38. The complainant also suggested to the Commissioner that, if it were not possible to have full disclosure, he would be happy for the information to be anonymised and disclosed to him.
39. The Commissioner notes that the MPS did offer to do this, but that it was only offered as a personal disclosure outside the terms of the FOIA.
40. 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.
41. Having considered the misconduct outcomes caught within the scope of the request, the Commissioner is satisfied that it would not be possible to redact all of them. This is because information about some of the named officers can be found online in media reports, as mentioned above, and it would not be possible to remove enough information to prevent their reidentification. Furthermore, were such redaction attempted, the amount of redaction necessary would mean that the remaining information would be rendered meaningless.
42. However, some of the outcomes are not found in the public domain. In these cases, the Commissioner considers that it is possible to redact information such as names, dates and locations, whereby the parties could not be identifiable; she also considers that to do so would be a fairly simple task. Furthermore, the Commissioner is satisfied that there would be sufficient data remaining to make the disclosures useful and of some value to the public.
43. The Commissioner will provide the MPS with a copy of the information that she finds should be disclosed in a confidential annex.

44. The Commissioner also finds that it would be unfair to disclose the name of the chairperson at the panel, where included, so this may be withheld.

Right of appeal

45. 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

46. 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.
47. 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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