

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 March 2022

Public Authority: Chief Constable of South Yorkshire Police
Address: Police Headquarters
Carbrook House
Carbrook Hall Road
Sheffield
South Yorkshire
S9 2EH

Decision (including any steps ordered)

1. The complainant has requested information about a deceased police officer including complaints made about him, his disciplinary record and reports relating to misconduct. South Yorkshire Police ('SYP') would neither confirm nor deny whether it held the requested information, citing the exemption at section 38(2) (Health and safety) of FOIA.
2. The Commissioner's decision is that SYP has not demonstrated that section 38(2) is engaged in this case.
3. The Commissioner requires SYP to take the following steps to ensure compliance with the legislation.
 - Confirm or deny whether information falling within the scope of the request is held, and either disclose that information or issue a refusal notice compliant with section 17 of FOIA.
4. SYP 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.

Request and response

5. On 24 March 2021, the complainant wrote to SYP and requested information in the following terms:

"According to the BBC 'At the time of his death, [police officer's name redacted] was under investigation for his alleged role in the Rotherham abuse scandal.'

REQUEST.

Disclose:

1. The police disciplinary record of [name redacted]. This includes but is not limited to punishments or censure or other disciplinary matters.

2. All complaints made against [name redacted]. This includes but is not limited to child abuse and sexual matters.

3. All IPCC/IOPC and police reports relating to misconduct, wrongdoing, etc. by [name redacted].

The request does not include any personal data as defined by FOIA.

When answering, please confirm which data is held."

6. SYP responded on 12 April 2021. It would neither confirm nor deny whether it held the requested information, citing section 38(2) (Health and safety) of FOIA.
7. Following an internal review, SYP wrote to the complainant on 27 May 2021. It maintained that section 38(2) had been correctly applied to the request.

Scope of the case

8. The complainant contacted the Commissioner on 29 May 2021 to complain about the way his request for information had been handled. He disagreed with SYP's application of section 38(2) of FOIA to neither confirm nor deny whether the requested information was held.
9. The analysis below considers whether SYP was entitled to rely on section 38(2) to neither confirm nor deny whether it holds the requested information.

10. Due to the sensitive nature of the information that has been requested, some parts of the Commissioner's section 38 analysis are contained in a confidential annex to this decision notice. This has been disclosed to the public authority only.

Reasons for decision

11. Section 1(1)(a) of FOIA provides that where a public authority receives a request for information, it is obliged to tell the applicant whether it holds that information. This is commonly known as the 'duty to confirm or deny'. There are, however, exemptions from the duty to confirm or deny.

Section 38 – Health and safety

12. Section 38(1) of FOIA states:

"Information is exempt information if its disclosure under this Act would, or would be likely to-

- (a) endanger the physical or mental health of any individual, or
- (b) endanger the safety of any individual."

13. Section 38(2) removes the duty to confirm or deny:

"... if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, have either of the effects mentioned in subsection (1)."

14. Therefore, for section 38(2) to be engaged, the act of confirming or denying whether the requested information is held **must itself** endanger, or be likely to endanger, the physical or mental health of any individual, or their safety.
15. FOIA does not explain what 'endanger' means. However, the Commissioner's guidance on section 38¹ explains that endangering mental health implies that the disclosure of information (or confirmation/denial in this case) might lead to a psychological disorder or make mental illness worse. This means that it must have a greater impact than simply causing upset and distress.

¹ <https://ico.org.uk/for-organisations/section-38-health-and-safety/#text5>

16. In order to engage this exemption SYP must demonstrate that there is a causal link between the endangerment alleged and confirming/denying whether it holds the requested information. It must show that confirming/denying would, or would be likely to, have a detrimental effect on the physical or mental health of any individual. The effect cannot be trivial or insignificant. Even if the likelihood falls short of being more probable than not, it needs to be such that there may very well be endangerment.
17. Explaining that it was SYP's responsibility to satisfy the Commissioner that it had complied with the law, the Commissioner asked SYP to explain why confirming/denying would endanger, or be likely to endanger, the health and/or safety of any individual. He asked it to ensure that it provided evidence which demonstrated a clear link between confirming/denying and any endangerment which may occur. He also asked it to clarify the likelihood of endangerment occurring, and the public interest arguments it had considered, both for and against, confirming/denying that information is held.
18. In a brief reply, SYP told the Commissioner that confirming/denying would involving placing information about a named officer in the public domain which:

"... would most likely attract unwanted attention and press coverage.

This would most certainly then impact on, the lives of his family and relatives potentially causing unnecessary upset, distress, mental or physical health concerns to them from unwanted attention from those interested in this case."
19. SYP has not specified which limb of section 38(1) it is relying on, but the Commissioner notes that its arguments are concerned with matters covered by section 38(1)(a) - the physical or mental health of any individual. It has not directly addressed the likelihood of endangerment occurring, but its comments suggest that it considers that endangerment "would be likely to" occur as a result of confirming/denying that information is held. The Commissioner interprets "would be likely to" as there being a very significant and weighty chance of endangerment occurring.
20. When considering the degree of endangerment alleged and whether it is significant enough to engage the exemption, the Commissioner must be satisfied that the nature of the endangerment is "real, actual or of substance" and not trivial or insignificant. He must also be satisfied that some causal relationship exists between confirming/denying and the stated endangerment.
21. The Commissioner is disappointed to note that SYP's response to him contains no information on these points. Rather, it has simply

speculated that confirming/denying in response to the request might increase public interest in the deceased officer, which might have a negative effect on the health of his surviving relatives. It has not elaborated on what that negative effect might be (beyond saying it may be distressing and upsetting) or its severity.

22. In its response to the Commissioner's questions, SYP said that it was satisfied that it had provided a detailed explanation of its position to the complainant, and so the Commissioner has looked at that correspondence. The refusal notice states:

"It is important to stress that disclosures under the Freedom of Information Act are disclosures to the world, not just to the individual making the request, and such responses may be published on a public facing disclosure log.

Confirming or denying whether such details exist regarding an individual would be [sic] appear unfair to place into the public domain. The information which [sic] is likely to cause an individual, for example the relatives and close family or colleagues of the deceased, distress as disclosure could cause unwanted contact from those interested in this case, whilst they seek to progress with their lives without further unwanted attention."

23. The Commissioner notes that this is similarly vague in its assessment as to how confirming/denying might endanger someone, and how, and the extent to which, they might be endangered.
24. The Commissioner's published position with regard to 'endangerment' to mental health is that it constitutes more than just 'distress' or 'upset'. Endangering mental health implies that confirming or denying might lead to a psychological disorder or make mental illness worse. This means that it must have a greater impact than simply causing upset and distress.
25. In the absence of any specific analysis as to how the increased attention SYP foresees as a result of confirming/denying might affect surviving family members, the consequences of confirming or denying that it has described seem closer to 'distress' than to a level of mental or emotional turmoil that would trigger, or exacerbate, a psychological disorder.
26. On this point, the Tribunal in *Andrew Lownie v the Information Commissioner and The National Archives and The Foreign and*

Commonwealth Office EA/2017/0087 (12 July 2018)² rejected arguments that the probability of “distress” to living relatives was sufficient to engage section 38, commenting:

“Whilst distress can be a trigger leading to mental ill-health, we do not consider that distress in itself should be equated with mental ill-health for the purposes of s.38. A healthy or unhealthy person may experience distress without suffering any, or any additional mental ill-health” (paragraph 49).

27. The Tribunal stated that a risk was not the same as a specific danger. In finding that the degree of probability was insufficient, the Tribunal judged that section 38 was not engaged in that case.
28. In reaching a decision on this case, the Commissioner has also considered arguments regarding the likelihood and severity of endangerment which, due to their sensitive and personal nature, are considered in the confidential annex attached to this decision notice.
29. The Commissioner understands that the suggestion of renewed interest in the deceased officer is likely to be stressful and upsetting to their surviving relatives, and he is sympathetic to their situation. However, as set out above, ‘upset’ and ‘distress’ do not meet the threshold for engaging section 38 of FOIA. Taking all the above into consideration, the Commissioner considers that the causal link between confirming/denying and a “very significant and weighty chance” of endangerment has not been made in this case. Nor has SYP shown that the endangerment it envisages is “real, actual or of substance”.
30. The Commissioner’s decision is therefore that SYP has not shown that section 38(2) of FOIA is engaged in this case and that it was not entitled to rely on it to neither confirm nor deny holding the requested information.
31. As the exemption is not engaged, it has not been necessary to consider the public interest test. SYP must now take the steps set out in paragraph 3.

²https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2252/EA-2017-0087_Decision_2018-07-11.pdf

Other matters

32. The Commissioner would like to record that while he asked SYP to provide specific information in support of its application of section 38(2), it did not do so. Its response to his enquiries largely repeated the general position it stated to the complainant in the refusal notice.
33. The Commissioner also invited SYP to consider whether any other exemptions applied, but it did not offer any arguments in that regard.
34. The Commissioner is disappointed at the general lack of detail in SYP's response and that it did not address the specific points raised with it. It suggests that SYP failed to fully engage with his investigation.
35. The Commissioner uses intelligence gathered from individual cases to inform his insight and compliance function. This aligns with the goal in his draft "Openness by design"³ strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting systemic non-compliance, consistent with the approaches set out in his "Regulatory Action Policy"⁴.

³ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁴ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

36. 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

37. 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.
38. 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

Samantha Bracegirdle
Senior Case Officer
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SK9 5AF