

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 March 2022

Public Authority: Chief Constable of Warwickshire Police
Address: Police Headquarters
Leek Wootton
Warwickshire
CV35 7QA

Decision (including any steps ordered)

1. The complainant requested information relating to the action taken against officers who attended an alleged BBQ during lockdown. Warwickshire Police confirmed that it held the information but refused to provide it, relying on section 40(2) of FOIA (personal data) to do so.
2. The Commissioner's decision is that Warwickshire Police have correctly applied section 40(2) to withhold the information.
3. The Commissioner does not require any further steps.

Request and response

4. On 15 December 2020 the complainant made the following request for information under FOIA:

“Please can you state what action was taken as a result of the internal disciplinary against the officers who attended a BBQ in contravention of lockdown restrictions? I also require a copy of the force's findings. I appreciate personal details may be redacted.”
5. After asking for clarification, Warwickshire Police responded to the complainant's request on 11 January 2021 stating that it withheld the information under Section 40(2).
6. The complainant sought an internal review of Warwickshire Police's decision on 11 January 2021.
7. Warwickshire Police provided the complainant with its response to the internal review request on 29 January 2021 in which it maintained its position.

Scope of the case

8. The complainant contacted the Commissioner on 5 February 2021 to complain about the way their request for information had been handled.
9. The Commissioner considers the scope of his investigation is to establish whether Warwickshire Police is entitled to withhold the requested information under section 40(2) of FOIA.

Reasons for decision

Section 40 personal information

10. 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.

11. 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').
12. 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.
13. 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?

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

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

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.
17. 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.
18. The information which has been requested relates to the action taken, by Warwickshire Police, against officers who attended an alleged BBQ during lockdown. In response to its request for clarification, the complainant provided an article taken from local media which stated the number of officers, the police station they were based at and the fact that they were all off duty.

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

19. As part of his investigation, the Commissioner asked Warwickshire Police to explain why some misconduct outcomes had been published in the past². Warwickshire Police stated that where officers faced misconduct meetings, these were held in private and there is clear expectation of privacy. Warwickshire Police further explained that like most forces they chose to disclose generalised and anonymised data about the outcome of misconduct meetings, but that "due to the information already published by the media, it is not possible to release any further information without risking identification of the individuals involved."
20. During the course of his investigation, the Commissioner asked Warwickshire Police further questions as to how the requested information could be linked to one or more individuals.
21. Warwickshire Police responded that due to the fact that it has already been reported that the officers were all from the same shift in Bedworth, a small police station, and the date of the incident being reported, that the officers could be identified through a "jigsaw identification" process.
22. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that any of the information would relate to the five officers. He is satisfied that any information would both relate to, and when read with the request, identify the officers concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
23. 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.
24. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

25. 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".

² [Misconduct outcomes | Warwickshire Police](#)

26. In the case of a 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.
27. 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.

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

28. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that “processing shall be lawful only if and to the extent that at least one of the” lawful bases for processing listed in the Article applies.
29. 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”³
30. In considering the application of Article 6(1)(f) of the 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;

³ 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 provides that:-

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

- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

31. 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

32. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
33. Further, 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
34. In this case the Commissioner accepts that there is a legitimate interest in knowing whether those responsible for upholding and enforcing the law are maintaining the highest professional standards.

Is disclosure necessary?

35. '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.
36. As Warwickshire police ordinarily publish the results of gross misconduct outcomes and anonymised misconduct hearings on their website, the Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

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

37. 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.

38. 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.
39. In the Commissioner's view, a key issue is whether the individuals concerned 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.
40. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
41. As the requested information relates to disciplinary action taken against the officers involved, Warwickshire Police explained that if this information were to be disclosed, and the individuals involved identified through the "jigsaw identification" process, this could potentially have personal ramifications for the officers involved.
42. The Commissioner notes that, ordinarily, disciplinary outcomes would be disclosed with appropriate redactions to personal information. However, in this case the Commissioner has determined that to do so would reveal the personal information of the individuals, which may cause harm or distress.
43. Warwickshire Police explained to the Commissioner that it had not asked the individuals if they consent to disclosure of the information. However, it does not consider that they would consent to disclosure of this information, as it may allow them to be identified.
44. The Commissioner has not seen any evidence to suggest that the individuals involved would have a reasonable expectation that their personal data would be disclosed in response to an information request. The Commissioner therefore considers that disclosure of this information would be disproportionately intrusive to the data subjects as it would

reveal information about the data subjects which is not otherwise in the public domain.

45. The law provides that there must be a pressing social need for any interference with privacy rights and that the interference must be proportionate.
46. The Commissioner does note the complainant's arguments that they requested for the information to be anonymised.
47. Whilst the Commissioner understands the complainant's needs for wanting to obtain this information and the wider public interest in accountability and openness in relation to Warwickshire Police and its misconduct outcomes, he is mindful that disclosure under FOIA is disclosure to the world at large and not just to the requester.

The Commissioner's Conclusion

48. Based on the above factors, and having seen the withheld information, 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.
49. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
50. The Commissioner therefore finds that section 40(2) of the FOIA is engaged in respect of the withheld information.

Other matters

Engagement with the Commissioner

51. The Commissioner recognises that almost all public authorities have experienced increased difficulties in meeting their statutory obligations to provide information during the Covid-19 pandemic.
52. As a reasonable and proportionate regulator, the Commissioner is always willing to work with any public authority to minimise the burden of dealing with requests and complaints to his office. He is usually willing to extend deadlines – particularly when the public authority is able to offer a reasonable timetable for providing its response.

53. However as Warwickshire Police failed to respond to the Commissioner's enquiries in a timely manner, it was necessary for him to issue an Information Notice in this case, formally requiring a response. The Information Notice will be published on the Commissioner's website.
54. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in our Openness by design strategy to improve standards of accountability, openness and transparency in a digital age. We aim to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our Regulatory Action Policy⁴.

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

Right of appeal

55. 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

56. 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.
57. 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

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