

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 August 2018

Public Authority: Chief Constable of West Midlands Police

Address: Police Headquarters

PO Box 52

Lloyd House

Colmore Circus

Queensway

Birmingham

B4 6NQ

Decision (including any steps ordered)

1. The complainant asked West Midlands Police (WMP) for information about its involvement in Sandwell Council's decision to delay internal standards investigations while WMP conducted a related criminal investigation. WMP disclosed an 'if asked' press statement describing the nature of its interaction with Sandwell Council, and refused to disclose the remaining information it held, citing the exemptions at sections 30(1) (investigations and proceedings) and 40(2) (personal data) of the FOIA.
2. The Commissioner's decision is that WMP was entitled to rely on section 30(1) of the FOIA to refuse to disclose the remaining information. However, she found a breach of section 10(1) (time for compliance) of the FOIA because WMP did not respond to the request within the statutory timescale for compliance. She also found a breach of section 1(1)(a) in that WMP failed to clarify that it did not hold some of the requested information.
3. No steps are required.

Background

4. By way of background to the request, the Commissioner understands the following.
5. The complainant had submitted standards complaints to Sandwell Council about some of its councillors. He also believed that the councillors had made criminal allegations about him, to WMP, which WMP were investigating.
6. WMP advised Sandwell Council to consider delaying its standards investigations in respect of the councillors, pending the outcome of certain criminal investigations. The complainant believed those investigations to relate specifically to the criminal allegations made against him, by the councillors.
7. It appears that Sandwell Council decided to delay the standards investigations, so as not to prejudice or jeopardise WMP's criminal investigation.

Request and response

8. On 5 February 2018, the complainant wrote to WMP and requested information in the following terms:

"The BBC have reported...that WMP requested that various Standards Investigations being undertaken by the Council pursuant to statute should be delayed for several weeks pending your own unspecified investigations. The BBC also report that as of last week you rescinded the said request.

1 Please disclose all records of communications passing between WMP and Sandwell Council relating to this matter;

2 Please state which Standards Investigations WMP asked to be postponed and why;

3 It would be helpful if you could also state under what legal provision you purported to delay an official investigation by the Council."

9. WMP responded on 3 April 2018. With regard to the first two parts of the request, it refused to disclose the requested information, citing the non-disclosure exemptions at sections 30(1) and 40(2) of the FOIA. With regard to the third part of the request, it said:

"We have advised the council that they may wish to wait for the outcome of any police investigation before pursuing any misconduct matters internally.

It is clear that an internal investigation has the potential to undermine a criminal one in a number of ways, including the premature or inappropriate disclosure of information to witnesses, suspects or victims."

10. The complainant requested an internal review on 26 April 2018. WMP wrote to the complainant on 17 May 2018 with the outcome of the internal review. It upheld its application of sections 30(1) and 40(2) of the FOIA.

Scope of the case

11. The complainant contacted the Commissioner on 20 May 2018 to complain about the way his request for information had been handled.
12. The analysis below considers the timeliness of WMP's response to the request. It also considers the application of section 30(1)(a) to withhold information in respect of questions (1) and (2). As the Commissioner found it to be engaged, it has not been necessary to also consider the other exemptions cited by WMP. The Commissioner has also considered WMP's response in respect of question (3).

Reasons for decision

Section 1 – general right of access

Section 10 – time for compliance

13. Section 1(1) of the FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.
14. Section 10(1) of the FOIA states that on receipt of a request for information a public authority should respond to the applicant within 20 working days.
15. From the information provided to the Commissioner in this case it is evident that, having received the request on 5 February 2018 and having responded to it on 3 April 2018, WMP breached sections 1(1) and 10(1) by failing to respond to the request within 20 working days.

Section 1 – general right of access

16. With regard to question (3), the complainant was dissatisfied with WMP's response to his request to "...state under what legal provision you purported to delay an official investigation by the Council". Having regard to the wider context of the request, the Commissioner considers this to be a request to know the formal powers under which (the complainant believes) WMP instructed Sandwell Council to delay its standards investigations.
17. WMP's response is reproduced at paragraph 9, above. It stated that WMP had "advised" Sandwell Council that it "may wish" to wait for the outcome of any police investigation before pursuing its own investigations.
18. WMP explained to the Commissioner that this was in fact the text of a pre-prepared 'if asked' press statement. It said that the advice referred to was drawn from its experience that criminal investigations could be undermined by internal investigations being conducted simultaneously where there are related or overlapping matters. WMP clarified to the Commissioner that it was advice that it had given to Sandwell Council, and not a mandatory instruction to pause its investigation. The Commissioner notes that comments in the withheld information confirm this.
19. On the basis of the above, the Commissioner considers that the complainant has requested in question (3) information that WMP does not hold (as WMP was not invoking or asserting any legal powers or rights when it advised the Council). The wording of the 'if asked' statement makes it clear that the advice to Sandwell Council was not mandatory.
20. While the Commissioner considers that WMP should have explicitly stated that it did not hold the information requested in question (3) (and therefore that it breached section 1(1)(a) (duty to confirm or deny whether information is held) of the FOIA), she is satisfied that it provided advice which clarified why no legislative provision could be identified, and thus that, otherwise, it dealt correctly with this part of the request.

Section 30 – investigations and proceedings

21. Section 30(1)(a) of the FOIA states:

"Information held by a public authority is exempt information if it has at any time been held by the authority for the purpose of –

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained - (i) whether a person should be

charged with an offence, or (ii) whether a person charged with an offence is guilty of it".

22. The Commissioner considers that the phrase "at any time" means that information can be exempt under section 30(1)(a) of the FOIA if it relates to a specific ongoing, closed or abandoned investigation.
23. Consideration of section 30(1)(a) is a two-stage process. First, the exemption must be shown to be engaged. Secondly, as section 30 is a qualified exemption, it is subject to the public interest test. This involves determining whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Is the exemption engaged?

24. The first step is to address whether the requested information falls within the class specified in section 30(1)(a) of the FOIA.
25. The Commissioner has issued guidance on section 30¹ which states that section 30(1)(a) can only be claimed by public authorities that have a duty to investigate whether someone should be charged with an offence.
26. The public authority in this case is WMP. As a police force, WMP has a duty to investigate allegations of criminal offences by virtue of its core function of law enforcement. The Commissioner is therefore satisfied that it has the power to carry out investigations of the type described in section 30(1)(a).
27. The Commissioner's guidance describes the circumstances in which the subsections of section 30(1) might apply. With respect to section 30(1)(a), the guidance says:

"The exemption applies to both investigations leading up to the decision whether to charge someone and investigations that take place after someone has been charged.

Any investigation must be, or have been, conducted with a view to ascertaining whether a person should be charged with an offence, or if they have been charged, whether they are guilty of it.

It is not necessary that the investigation leads to someone being charged with, or being convicted of an offence...."

¹ <https://ico.org.uk/media/for-organisations/documents/1205/investigations-and-proceedings-foi-section-30.pdf>

28. WMP confirmed to the Commissioner that, at the time of the request and also at the time of the internal review, the requested information related to a live criminal investigation.
29. Referring to the wording of the request, the explanation provided by WMP, and having viewed the withheld information, the Commissioner is satisfied that it was held in relation to an investigation conducted by WMP of the type described in section 30(1)(a). She is therefore satisfied that the exemption provided by section 30(1)(a) is engaged.

The public interest test

30. Section 30(1)(a) is subject to a public interest test. This means that even though the exemption is engaged, the information may only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
31. In accordance with her guidance, when considering the public interest in maintaining exemptions, the Commissioner considers that it is necessary to be clear what they are designed to protect.
32. The purpose of section 30 is to preserve the ability of the police (and other applicable public authorities) to carry out effective investigations. Key to the balance of the public interest in cases where this exemption is found to be engaged, is whether the disclosure of the requested information could have a harmful impact on the ability of the police to carry out effective investigations. Clearly, it is not in the public interest to jeopardise the ability of the police to investigate crime effectively.

Public interest arguments in favour of disclosure

33. The complainant was concerned by the Council's decision to delay the standards investigations. During the period in which the standards investigations were paused, one councillor left the Council, meaning that they could no longer be subject to a Council standards investigation. The complainant felt that the consequence of the Council's decision to delay the standards hearings was that the councillor had evaded due process. He also considered that it meant that voters at local elections were not properly appraised of concerns that had been raised about the conduct of certain councillors. For these reasons he considered it was in the public interest that scrutiny of the decision to delay the Council's standards investigations be permitted.
34. WMP accepted that disclosing information about investigations would provide greater transparency with regard to the investigative process. It agreed that it was in the public interest that public authorities operate in as transparent a manner as possible, as this should ensure they operate effectively and efficiently. The credibility of WMP and, more broadly, of

the overall law enforcement process, is closely tied to the integrity of the WMP's investigative processes and the public understanding of these processes.

35. WMP also accepted the general public interest in transparency surrounding the integrity, or otherwise, of public officials. Disclosure of the portion of the requested information which related to the standards investigations would add to public awareness in this area.

Public interest arguments in favour of maintaining the exemption

36. In favour of maintaining the exemption, WMP argued that it would not be in the public interest to disclose information held as part of a live criminal investigation, including the identities of anyone involved. It said that it was of paramount importance that the confidentiality of any criminal investigation be maintained, without fear that information would be disclosed to the world at large, under the FOIA.
37. It said that the public must be able to have confidence that information provided to WMP will only be used for appropriate purposes and that the confidentiality of any information provided to it will be maintained.
38. It said that where current or future law enforcement functions of WMP may be compromised by the disclosure of information, this is unlikely to be in the public interest. In this case, providing information about a live investigation may jeopardise current and future police operations and compromise the prevention and detection of crime.
39. WMP said there is a strong public interest in public authorities being able to conduct efficient and effective investigations to prevent and detect crime. This ensures that offenders are brought to justice and that the public is protected. WMP needs to be able to conduct live criminal investigations effectively, away from public scrutiny to safeguard their accuracy, thoroughness and objectivity.
40. It also said that it would not be in the public interest to provide information that may be of assistance to offenders or which might interfere with the process of an individual being brought to justice. The right to a fair trial is also of paramount importance and any disclosure which could attract media attention prior to any proceedings, could compromise an individual's right to a fair trial under the Human Rights Act.

Balance of the public interest

41. In reaching a conclusion on the balance of the public interest, the Commissioner has considered what public interest there is in WMP disclosing the requested information. The Commissioner also considered whether disclosure would be likely to harm any investigation, which

would be counter to the public interest, and what weight to give to these competing public interest factors.

42. As set out at paragraph 32, the purpose of section 30 is to protect the effective investigation and prosecution of offences. Clearly, it is not in the public interest to jeopardise the ability of the police to investigate crime effectively.
43. Set against this, the Commissioner recognises the importance of the public having confidence in public authorities that are tasked with upholding the law. Confidence will be increased by allowing scrutiny of their performance and this may involve examining the decisions taken in particular cases.
44. In this case, the complainant's concerns about the consequences of the decision to delay the Council's standards investigation do carry some weight. The delay meant that the Council did not have the opportunity to investigate complaints about its councillors prior to a round of local elections. Had it been able to do so, it is possible that its findings might have had a bearing on the voting in those elections². Furthermore, as set out in paragraph 33, above, one councillor could in fact no longer be subject to a standards investigation by the Council.
45. The Commissioner recognises the public interest in transparency and accountability with regard to the conduct of public officials who are subject to the allegations, and in the public being able to reach an informed view as to whether such matters are being investigated appropriately. Disclosure of the requested information in this case would demonstrate to the public WMP's commitment to openness and transparency. It would also enable the public to scrutinise the decisions taken to delay the standards investigations, against the background of the consequences claimed by the complainant.
46. However, the possibility of harm occurring as a result of disclosure must be given serious consideration. In the circumstances of this case, the Commissioner has given much greater weight to the arguments for protecting WMP's ability to conduct effective investigations (including into allegations of criminal offences) as its criminal investigation was ongoing at the time of both the request and the internal review.
47. The Commissioner has had sight of the withheld information. It is principally administrative in its focus (in terms of setting out the

² Although it is important to note here that the Commissioner is unaware of the precise details of the complaints against the councillors

timescale for WMP's criminal investigation and its progress towards its completion) and is not concerned with examining the detail of the allegations which were the basis of either WMP's criminal investigation or Sandwell Council's standards investigations. However, it does identify various individuals, some of whom are identified as being the subject of criminal allegations.

48. Disclosure of the information would therefore have placed in the public domain the identities of those under investigation prior to any decision having been reached by WMP about whether they should be charged with any crime. This may have serious consequences for the individuals in question, not least in terms of reputational damage.
49. The Commissioner is also satisfied that the withheld information constitutes intelligence as to WMP's approach towards undertaking a live criminal investigation, and as such it would be likely to prejudice WMP's position if it was placed in the public domain. The Commissioner is satisfied that it will generally not be in the public interest for information which reveals the police's intentions with regard to a live criminal case to be placed in the public domain.
50. The withheld information also includes information which identifies witnesses. As well as potentially having repercussions for the witnesses in this investigation, disclosing such information could create a perception among the wider public that the identities of witnesses may be disclosed to the world at large. This may deter people from coming forward and cooperating with prosecuting authorities, particularly where criminal offences have been alleged. This is particularly apparent when an investigation is live, as in this case. There is a very significant public interest in avoiding that outcome and it is a factor of some weight in favour of maintenance of the exemption in this case.
51. Having given due consideration to the arguments put forward by both parties, the Commissioner is satisfied that section 30(1)(a) has been applied appropriately in this case and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Right of appeal

52. 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: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

53. 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.
54. 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
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