

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 April 2019

Public Authority: Chief Constable of Hampshire Constabulary
Address: Police Headquarters
Tower Street
Winchester
Hampshire
SO23 8ZD

Decision (including any steps ordered)

1. The complainant has requested information about the expenses claimed by a named police officer. Hampshire Constabulary refused to disclose the information on the grounds that it was exempt under section 40(2) (personal information) of the FOIA.
2. The Commissioner's decision is that Hampshire Constabulary was entitled to rely on the exemption to refuse the request.
3. The Commissioner requires no steps.

Request and response

4. On 22 May 2018, the complainant wrote to Hampshire Constabulary and requested information in the following terms:

"1) Please provide a (blank) copy of the Terms and Conditions of Employment for all Hampshire Constabulary personnel. I will accept a standard format/template without reference to individual names, actual salary, and personal details. But the T & Cs must include details of working hours and overtime obligations.

2) Please provide details of the total number of overtime hours claimed and paid by Hampshire Constabulary for 2015, 2016 and 2017.

3) Please supply a copy of all expenses claims submitted by you as Chief Constable for 2015, 2016, 2017.

4) Please supply a copy of all expenses claims submitted by [police officer's name redacted] for 2015, 2016, 2017."

5. Noting the date of receipt of the request (which was posted) as 30 May 2018, Hampshire Constabulary responded on 27 June 2018. It disclosed the information requested at the first three points of the request. In respect of the fourth point, it refused to disclose the information it held, stating that it was exempt from disclosure under section 40(2) (personal information) of the FOIA.
6. The complainant requested an internal review of the decision to refuse the fourth point of the request on 5 August 2018. Following the Commissioner's intervention, Hampshire Constabulary provided the outcome of the internal review on 13 November 2018, upholding its decision to apply section 40(2).

Scope of the case

7. The complainant initially contacted the Commissioner on 18 October 2018 to complain about Hampshire Constabulary's failure to conduct an internal review.
8. On 6 November 2018 the Commissioner chased a response from Hampshire Constabulary; it provided an internal review on 13 November 2018.
9. The complainant then submitted a further complaint to the Commissioner on 19 November 2018 regarding the decision to apply section 40(2) to refuse his request.
10. The Commissioner has considered Hampshire Constabulary's application of section 40(2) to refuse the information requested in the fourth point of the request. She has also commented on the delayed internal review in the 'Other matters' section of this decision notice.

Reasons for decision

11. As Hampshire Constabulary's refusal of the request was after 25 May 2018, the date the new Data Protection Act 2018 (DPA) and General Data Protection Regulation (GDPR) legislation came into force, the Commissioner considers that the DPA/GDPR applies.

Section 40 personal information

12. 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.
13. 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 set out in Article 5 of the GDPR.
14. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data then section 40 of FOIA cannot apply.
15. 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 data protection principles under the DPA.

Is the information personal data?

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

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

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. 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.
19. 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.
20. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the police officer named in the request. She is satisfied that this

¹ As amended by Schedule 19 Paragraph 58(3) of the Data Protection Act 2018

information, which comprises a copy of the expenses claims submitted by the named officer, both relates to and identifies the officer concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

21. 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 data protection principles.
22. The most relevant data protection principle in this case is principle (a).

Would disclosure contravene principle (a)?

23. 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".

24. In the case of an FOI 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.
25. 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

26. 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.
27. The Commissioner considers that the lawful basis most applicable is basis (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"².

² Article 6(1) goes on to state:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

28. 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;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
29. 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

30. 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.
31. 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.
32. The complainant has not expressed any reason to the Commissioner for requesting the information, beyond believing it to be his right to have access to it. However, from reading the request correspondence with Hampshire Police, the Commissioner notes that the complainant believes

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)(a) 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 (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

he saw the named officer attending to personal business while on duty. Although apparently having been advised by Hampshire Constabulary that at the time he was observed, the named officer was on a break, the complainant nevertheless wants to scrutinise the wider expenses claims of the named officer in light of this.

33. The Commissioner accepts that it is legitimate for members of the public to be able to scrutinise the expenses claimed by senior police officers and senior police staff. Disclosure promotes openness and transparency with regard to the spending of public money within an environment of ongoing constraint and budgetary cuts. For this reason, the expenses claimed by Chief Officers (Assistant Chief Constables, Deputy Chief Constables, Chief Constables and civilian staff of an equivalent seniority) are routinely published by UK police forces.
34. The Commissioner notes that while the named policeman is a mid-ranking officer, he is significantly below the senior rank for which expenses are routinely published³. It is not his expectation that details of the expenses incurred in his employment will routinely be made available for scrutiny by the public (although they are of course subject to scrutiny by the force itself). Hampshire Constabulary has confirmed that officers of his rank are not subject to the proactive publication of expenses. It has also confirmed that the named officer does not consent to the disclosure of information about his expenses in order to respond to this particular request.
35. The Commissioner does not consider that there is the same legitimate interest in members of the public scrutinising the individual expenses claims of less senior police officers, particularly where the officer in question is identifiable. Officers are entitled to make expenses claims in the course of their employment, in accordance with their contractual terms. If an officer is suspected of behaving in a way which breaches the terms of their contract of employment, this is something which may be reported to the force and it should be permitted to investigate the allegation as necessary. The Commissioner does not consider that there is, as a matter of course, a legitimate interest in individual members of the public conducting their own investigations in this regard. She further notes in this instance that the complainant has been given an explanation by the force regarding what he saw, which suggests that Hampshire Constabulary has looked into the matter.

³ Chief Officer level - Assistant, Deputy and Chief Constables

36. Having considered all the circumstances of the case, the Commissioner does not accept that a legitimate interest is being pursued in the fourth point of the request.
37. As the Commissioner has decided in this case that there is no legitimate interest in the disclosure of the requested information, she has not gone on to consider whether it is necessary or to conduct the balancing test. As there is no legitimate interest in disclosure, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
38. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

Conclusion

39. The Commissioner has therefore decided that Hampshire Police was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Other matters

Section 45 - internal review

40. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather, they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA. However, the Commissioner has issued guidance in which she has stated that in her view internal reviews should take no longer than 20 working days to complete, and even in exceptional circumstances the total time taken should not exceed 40 working days.
41. In this case, 70 working days elapsed between the complainant submitting his request for an internal review and Hampshire Constabulary notifying him of the outcome. Hampshire Constabulary explained that this was because it did not appear to have received the request, and it only became aware of it when the Commissioner intervened. On receipt of the Commissioner's chaser letter, Hampshire Constabulary responded to the internal review request within five working days.
42. The Commissioner has no reason to doubt that the request was posted by the complainant. Equally, however, since the request was not sent

using a tracked postal service, there is no evidence that it was received by Hampshire Police prior to the Commissioner's intervention.

43. The Commissioner does not have sufficient information from which to determine whether the section 45 code has been complied with in this case.

Right of appeal

44. 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

45. 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.
46. 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

Jon Manners
Group Manager

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