

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 June 2022

Public Authority: Chief Constable of Bedfordshire Police
Address: Bedfordshire Police Headquarters
Woburn Road
Kempston
Bedford
MK43 9AX

Decision (including any steps ordered)

1. The complainant has requested from Bedfordshire Police, information about the time the local Police and Crime Commissioner ('the PCC') had spent with it as a volunteer Special Constable. Bedfordshire Police refused the request, citing sections 31 (Law enforcement) and 40 (Personal data) of FOIA.
2. The Commissioner's decision is that Bedfordshire Police was entitled to rely on section 40(2) of FOIA to refuse to disclose the requested information.
3. The Commissioner requires no steps as a result of this decision.

Request and response

4. On 4 August 2021, the complainant wrote to Bedfordshire Police and requested information in the following terms:

"N.B. This request is made to Bedfordshire Police, not the PCC or the OPCC [Office of the Police and Crime Commissioner], and should not be discussed or shared with the PCC or anyone in his office including [the] Chief Executive.

[The PCC] frequently states in public that he has worked 400 hrs as a Special Police Officer, a claim he also made during his election campaign to be PCC.

Can Bedfordshire Police please provide:

- The number of hours worked by [the PCC] as a Special Police Officer after training by week and month?
 - The number of training hours spend [sic] by [the PCC] to become a Special Police Officer.
 - I would also appreciate it if the policing neighbourhoods [the PCC] policed could be included, if possible?"
5. Bedfordshire Police responded on 1 September 2021. It confirmed that it held information falling within the request's scope, but refused to disclose it, applying the exemptions at sections 31(1)(a) and (b) (Law enforcement) and 40(2) (Personal information) of FOIA.
 6. The complainant requested an internal review on 5 September 2021. Bedfordshire Police provided the outcome of the internal review on 5 October 2021. It upheld its application of sections 31(1)(a) and (b) and 40(2) to withhold the requested information.

Scope of the case

7. The complainant contacted the Commissioner on 1 November 2021 to complain about the way his request for information had been handled. He disagreed with Bedfordshire Police's decision to apply sections 31 and 40 to withhold the requested information, arguing that it had failed to demonstrate that any harm would flow from the requested information being disclosed.
8. The analysis below considers whether Bedfordshire Police was entitled to rely on section 40(2) to withhold the requested information. Having determined that section 40(2) was cited correctly, it was not necessary to go on to consider the application of sections 31(1)(a) and (b).
9. The Commissioner has viewed the withheld information.

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 UK General Data Protection Regulation ('UK 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.

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

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 three component parts of the request ask for information about the PCC's time as a Special Constable. They mention him by name and the requested information could only be identified and extracted by direct reference to him.
19. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information both relates to, and identifies, the PCC. The withheld information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
20. 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.
21. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

22. Article 5(1)(a) of the UK GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

23. 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.
24. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

25. 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"².

² Article 6(1) goes on to state that:-

26. In considering the application of Article 6(1)(f) of the UK 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.

27. 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

28. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to

"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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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".

be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

29. The complainant has not offered any explanation as to what legitimate interest is being pursued in this request. The Commissioner surmises from his wider correspondence that he believes the legitimate interest in transparency would be served by disclosure of the requested information, to enable the public to compare information the PCC has made public about his time as a Special Constable with that held by Bedfordshire Police.

Is disclosure necessary?

30. '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.
31. Since the complainant apparently wishes to compare the PCC's public claims about his time as a Special Constable against Bedfordshire Police's records, the Commissioner considers that there would be no alternative means of achieving this.

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

32. 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.
33. 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.
34. In the Commissioner's view, a key issue is whether the data subject (in this case, the PCC) has a reasonable expectation that their information will not be disclosed. This expectation can be shaped by factors such as their general expectation of privacy, whether the information relates to

them in their professional role or to them as individuals, and the purpose for which they provided their personal data.

35. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to the data subject.
36. Bedfordshire Police told the Commissioner that, like all volunteers and staff, the PCC was entitled to expect that his personal data would be kept confidential by Bedfordshire Police and that it would not be shared unnecessarily. It acknowledged that he had placed certain information about his time as a Special Constable in the public domain, but considered that it was entirely a matter for him what information he chose to publish on his own website, and that it did not alter Bedfordshire Police's duty to keep staff and volunteer information confidential.
37. Bedfordshire Police also said that the PCC had not been approached and asked whether he would consent to the disclosure of the requested information because the complainant had stipulated that his request "should not be discussed or shared with the PCC or anyone in his office".
38. It reiterated:

"The data subject has an expectation working/volunteering for Bedfordshire Police that the number of hours they volunteered would not be published and their personal data would not be disclosed. We are unable to make contact to gain consent as the requestor did not want Bedfordshire Police to make contact with the PCC or his office. The role of the PCC is to hold the police to account therefore [sic] would not expect disclosure of personal data under the FOIA. We would not disclose any officers volunteer or paid or police staff hours of work or hours of training this is their personal information and people would expect it to be secure and not share [sic] to the public".

39. The Commissioner recognises that the PCC has proactively placed certain information about his time as a Special Constable in the public domain. Specifically, the PCC's website contains the following statement:

"I recently completed 400hrs of service as a Special Constable with Bedfordshire Police, 220hrs of which were on frontline response duties as an officer.

Some of my frontline response duties included shifts in Luton, Bedford, Ampthill, Biggleswade, Leighton Buzzard, Dunstable and much of the central and northern areas of our county."

40. The Commissioner has viewed the withheld information and has seen nothing which contradicts this statement.

41. The Commissioner recognises that police volunteers and staff will have an expectation that information about them and how they do their jobs will be held confidentially by Bedfordshire Police, and that this expectation is a reasonable one. He considers the PCC to be no different in this regard.
42. The complainant argues that as the PCC has already published information about his time as a Special Constable he cannot reasonably hold the same expectation of confidence as if he had not publicised the information.
43. However, the Commissioner notes that what is being requested by the complainant is different from the information which the PCC has chosen to publish on his website. While the PCC published the total hours he volunteered for, and some of the areas in which he policed, the complainant has requested to know the total hours broken down into training hours and working hours, and a precise list of the neighbourhoods in which he worked.
44. Bedfordshire Police has been forbidden by the complainant from making the PCC aware of the request. This prevents Bedfordshire Police from asking him for his consent to the disclosure. This is unfortunate as, had the complainant not stipulated that the PCC should not be contacted about the request, it might have been possible to obtain his consent to the disclosure of some or all of the requested information. As it is, the Commissioner must consider whether the legitimate interests identified above justify the disclosure of information about someone without either their knowledge or their consent.
45. As set out above, the Commissioner considers that the PCC will have a reasonably held expectation of confidentiality as regards information Bedfordshire Police holds about his time as a Special Constable because he has not disclosed information about that time in the level of detail that the complainant is requesting.
46. The requested information is more intrusive than the information the PCC published. It concerns the time worked by the PCC once trained, where he worked and how long his training took. This is more detailed information about his role as a Special Constable which he might reasonably expect would remain confidential unless he chose to share it. Disclosure might encourage unwarranted speculation about his experience, aptitude or commitment which might be unfair and distressing to him.
47. The Commissioner considers that if Bedfordshire Police were to disclose the requested information, there is a real possibility that the PCC would be made aware of the disclosure of information about him, which would have been made without his knowledge or consent and by an

organisation with which he currently works closely (the PCC is an elected official with responsibility for oversight of Bedfordshire Police). He would be likely to find this to be intrusive and distressing.

48. Furthermore, were the PCC's published comments not supported by the actual information, then the Commissioner considers that this may have in turn supported any legitimate interest in disclosure of the withheld information; this is not the case.
49. In view of the information the PCC has already published about the time he spent volunteering as a Special Constable, it is unclear to the Commissioner what further public benefit there would be in disclosing the additional detail requested here. He therefore finds that the likely intrusion and distress described in paragraph 47 would be unwarranted and unjustified.
50. Having weighed the likely impact of disclosure in this case, against the lack of compelling reasons for disclosure, the Commissioner has determined that there is insufficient legitimate interest in disclosure to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of this information would not be lawful.

The Commissioner's view

51. In this instance, the Commissioner is satisfied that Bedfordshire Police was entitled to withhold the requested information under section 40(2), by way of section 40(3A)(a) of FOIA.
52. It has therefore not been necessary for the Commissioner to consider whether section 31 of FOIA provides grounds for withholding the information.

Other matters

53. Although they do not form part of the main body of this decision notice, the Commissioner wishes to highlight the following matters of concern.
54. It was necessary to issue an Information Notice to elicit a response from Bedfordshire Police, as it did not respond to the Commissioner's enquiries within the requested timescales. When responding to the Notice, it did not provide a copy of the withheld information (as required by the Notice) until prompted to again by the Commissioner. The Commissioner also had to obtain clarification on points which Bedfordshire Police had not addressed in its response, although it did respond promptly to those further enquiries.

55. Although the Commissioner has not considered the application of section 31 of FOIA, he would comment that the arguments provided to him by Bedfordshire Police are lacking in analysis and do not persuade him that there is a causal link between disclosure of the specific information that was requested in this case, and prejudice to the law enforcement functions.
56. 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

57. 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@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

58. 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.

59. 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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Wycliffe House
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SK9 5AF**