

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 May 2024

Public Authority: Office of the Police and Crime Commissioner for Cheshire

Address: Cheshire Constabulary HQ
Clemonds Hey
Oakmere Road
Winsford
CW7 2UA

Decision (including any steps ordered)

1. The complainant has requested information about its staff from the Office of the Police and Crime Commissioner for Cheshire ("OPCC").
2. The OPCC has provided some information but refused to disclose the remainder, citing section 40(2) (Personal information) of FOIA. The Commissioner's decision is that it was entitled to do so. No steps are required.

Background

3. The Commissioner has previously considered this request under case reference IC-256179-W0Q0¹.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4028398/ic-256179-w0q0.pdf>

4. In that case, the OPCC had refused to confirm or deny whether information was held, citing section 40(5) of FOIA. The Commissioner required the OPCC to:
 - Confirm or deny whether any information is held.
 - If information is held, the OPCC should either disclose it or issue a refusal notice explaining why it is exempt from disclosure.
5. This decision notice relates to the OPCC's response to that step.

Request and response

6. On 20 June 2023, the complainant wrote to the OPCC and requested the following information:

"Can you please let me know:

1. How many staff are employed in the PCC's office?
2. How many of the employees have served in the police?
3. What were the roles of those who have served in the police?"

7. On 18 July 2023, the OPCC responded. It provided a weblink to part (1) of the request² which showed the structure of the OPCC. It refused to confirm or deny whether it held the other requested information, citing section 40(5) (Personal information) of FOIA.
8. The complainant was dissatisfied with the response to parts (2) and (3) of the request and the Commissioner went on to consider this in the decision notice referred to in paragraph 3, above.
9. In compliance with that decision notice, as suggested by the Commissioner, the OPCC initially clarified with the complainant that he wished to know the officer's current roles in the OPPC as opposed to any previous roles they had when serving officers.
10. Following this clarification, on 5 March 2024, the OPCC confirmed holding information and provided a response to part (2) of the request. However, it refused to respond to part (3) of the request saying that it was the personal information of the three staff concerned.

² <https://www.cheshire-pcc.gov.uk/SysSiteAssets/media/downloads/commissioner-and-office/the-office/staff-information/opcc-structure-may23.pdf>

11. The complainant requested an internal review on 7 March 2024. He said:

“Perhaps first of all, we should make clear what the purpose of the Police and Crime Commissioners is. It is to give the public some sort of control over the police. That this is necessary can be seen in the almost daily reports of police misconduct in the press. Yet I now find that in Cheshire four employees, including the Commissioner, are ex police. It is quite clear that in Cheshire the Police and Crime Commissioner's Office has been hijacked by ex policemen (policewomen?).

I can only think that your refusal to answer my request is to hide from me the full extent of this hijack.

It seems strange that the website shows that Mr Dwyer was an ex Assistant Chief Constable but you are not prepared to say who the others are.

...It says on the Cheshire Police and Crime Commissioner's web site that one of the purposes of this office is to provide victims of crime with some sort of satisfaction. Yet you have totally failed to provide that. I can only surmise that you are protecting the police”.

12. On 10 April 2024, the OPCC provided an internal review. It maintained its position.

Scope of the case

13. The complainant contacted the Commissioner on 17 April 2024, to complain about the way his request for information had been handled. His said:

“Essentially, the Police and Crime Commissioners were set up to give the public oversight of the police. In Cheshire it appears that the PCC Office has been 'taken over' by ex-police and it is crucially important for the public to know what the roles of the ex policeman are”.

14. The Commissioner will consider the application of section 40 of FOIA to part (3) of the request below.

Reasons for decision

Section 40 - Personal information

15. 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.
16. In this case the relevant condition is contained in section 40(3A)(a)³. 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').
17. 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.
18. 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?

19. Section 3(2) of the DPA defines personal data as "any information relating to an identified or identifiable living individual".
20. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
21. 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.
22. 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.

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

23. Whilst the complainant has not asked for the names of the officers concerned, the OPCC has explained that disclosure:

"...would constitute 'personal data' as a role title will relate to an individual employee who can be identified, directly or indirectly, by such an 'identifier'. It should be noted all employees within the OPCC have a unique role title, with no two employees having the same role title. Furthermore, I believe that previous employment history is the 'personal data' of an individual employee and, therefore, exempt by virtue of Section 40(2) of the Act".

24. It is noted that the OPCC has only a small number of staff, 16 at the time of the request.

Motivated intruder

25. A test used by both the Commissioner and the First-tier tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if they were intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of reidentification of an individual from information which, on the face of it, appears truly anonymised.

26. The ICO's Code of Practice on Anonymisation⁴ notes that:

"The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA".

27. In summary, the motivated intruder test is that if the risk of identification is "reasonably likely" the information should be regarded as personal data.

28. In the circumstances of this case, the Commissioner is satisfied that the request relates directly to three employees. Whilst the information is only limited, colleagues would recognise each other from the descriptors given and members of the public may also recognise the staff from their unique job titles. The Commissioner is therefore satisfied that the risk of

⁴ <https://ico.org.uk/media/fororganisations/documents/1061/anonymisation-code.pdf>

identification is reasonably likely. The information both relates to, and identifies, those concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

29. 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.
30. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

31. 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".
32. 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.
33. 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

34. Article 6(1) of the UK 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.
35. 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"⁵.

⁵ 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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy

36. 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.
37. 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

38. 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 be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
39. The complainant has previously argued: "I think it is important to know how independent the Cheshire Police and Crime Commissioner is from

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".

Cheshire Police. The Commissioner is himself an ex Assistant Chief Constable of Cheshire Police”.

40. The complainant has now been advised regarding the numbers of ex-police employees at the OPCC and the Commissioner considers that any argument regarding ‘proportionality’ has therefore been satisfied. Furthermore, it is noted that the complainant has specified that he only wishes to know current roles, not former roles, therefore disclosure of the current roles would not assist in ascertaining whether any of the employees were previously Cheshire Police officers so any ‘independence’ from the force would not be learned from responding to this part of the request.

41. In his grounds of complaint to the Commissioner, the complainant has said that it is “crucially important for the public to know what the roles of the ex policeman are”. However, he has not explained why it is so important and it is not readily apparent to the Commissioner why disclosure to this granular level, allowing for reidentification, would be so important. The Commissioner also recognises that, whilst in some circumstances there is some expectation that serving police officers may be publicly named because of their roles, the employees here are no longer police officers and would have no such expectation.

42. When seeking an internal review, the complainant said to the OPCC:

“Turning now to my case I was accused of racial harassment but is beyond any doubt that my accuser lied under oath. This can be easily seen by comparing her statement to the police with the CCTV evidence. But when I referred this matter to the police, the sergeant said the crime could not be solved and refused to give me any reasons why. This is clearly 'perverting the course of justice'. Yes, by a policeman. I can only surmise that this is to avoid embarrassing the policewomen who interviewed me. And what followed was a cover up by the police.

It says on the Cheshire Police and Crime Commissioner's web site that one of the purposes of this office is to provide victims of crime with some sort of satisfaction. Yet you have totally failed to provide that. I can only surmise that you are protecting the police”.

43. It is noted that the complainant is clearly dissatisfied with the service he has received, apparently from both Cheshire Constabulary and the OPCC. However, there seems to be no obvious legitimate interest in disclosing the personal information of the three ex-officers, other than what is likely to be for a personal reason for the complainant himself. Nevertheless, the Commissioner notes that there is a general interest in understanding the profile of employees within such offices.

Is disclosure necessary?

44. '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.
45. It is noted that the complainant seems to be dissatisfied with the service he received from Cheshire Constabulary and the OPCC. However, the Commissioner can see no obvious reason why disclosure of the personal information about the three ex-officers would be of any assistance. If he wishes to complain about an officer, be they a serving police officer or an ex-police officer, then he would be able to do so through the appropriate channels without seeking full disclosure to the world through the FOIA regime. If this is not his intention, then he now knows the number of staff who are ex-police, which evidences proportionality, and the Commissioner can envisage no necessity in disclosure of the remaining personal information.
46. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, ie a general interest in understanding the profile of OPCC employees, he has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

The Commissioner's view

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

Right of appeal

48. 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

49. 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.
50. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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