

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 August 2016

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

Address: 3 Northgate Street
Warwick
CV34 4SP

Decision (including any steps ordered)

1. The complainant requested information from the Office of the Police and Crime Commissioner (OPCC) for Warwickshire relating to complaints made about the Chief Constable of Warwickshire Police.
2. The OPCC provided some information within the scope of the request but refused to provide the remainder, citing the exemption under section 31(1)(g) (law enforcement) of the FOIA as its basis for doing so.
3. The Commissioner's decision is that the OPCC was entitled to rely on section 31(1)(g) by virtue of section 31(2)(a) and (b) to withhold the remaining requested information.
4. The Commissioner requires no steps to be taken.

Request and response

5. On 16 January 2016, the complainant wrote to the OPCC using the *whatdotheyknow* website and requested information in the following terms:

"(1) Please disclose the number of complaints, both recorded/non-recorded, made against Chief Constable Martin Jelley in the past year (16.01.2015 to 16.01.2016)

(2) How many of the complaints met the Independent Police Complaints Commission referral criteria

(3) How many times have you referred Chief Constable Jelley to the Independent Police Complaints Commission

(4) What was the outcome of each referral

(5) What was the nature of each of the complaints against Chief Constable Jelley

(6) What was the outcome of each of the complaints".

6. The OPCC responded on 12 February 2016. It provided some information within the scope of the request, relating to 'past' complaints, but refused to provide the remainder, citing section 31(1)(g) of the FOIA as its basis for doing so.
7. Following an internal review the OPCC wrote to the complainant on 14 March 2016. It revised its original position, clarifying its application of section 31(1)(g) and providing some more information.

Scope of the case

8. The complainant contacted the Commissioner on 16 March 2016 to complain about the way her request for information had been handled.
9. She told the Commissioner she was dissatisfied with the way the OPCC dealt with her request for information, including the timeliness with which it handled the request. She also disputes the OPCC's application of section 31.
10. The analysis below considers the OPCC's application of section 31(1)(g) of the FOIA to the withheld information. The Commissioner has also considered the timeliness with which the OPCC handled the request.
11. The withheld information comprises information relating to points 5 and 6 of the request in respect of one 'live' complaint in the period specified. The OPCC explained 'live' complaints as being:

"those complaints in which either the relevant investigation has not been concluded or any appeal rights have either not been exhausted or the time to appeal has not expired".

Reasons for decision

Section 31 law enforcement

12. Section 31 provides a prejudice based exemption which protects a variety of law enforcement interests. That means that, in order to engage the exemption, there must be a likelihood that disclosure would cause prejudice to the interest that the exemption protects.
13. The OPCC considers section 31(1)(g) of the FOIA is the relevant section in this case. That section states:

"31 – (1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)".

Functions for a specified purpose

14. The Commissioner has issued guidance on section 31 of the FOIA¹ in which she observes that the first five exemptions listed under section 31(2) all include the term "ascertaining". In that respect, her guidance states:

"To 'ascertain' is to make certain or prove. In this context it means that the public authority with the function must have the power to determine the matter in hand with some certainty. The public authority must not only be responsible for the investigation but it must also have the authority to make a formal decision as to whether that person has complied with the law. This could include taking direct action itself such as revoking licences or imposing fines, or it could involve taking a formal decision to prosecute an offender".

15. In this case, the OPCC is citing 31(1)(g) by virtue of 31(2)(a) and (b) - the purpose of ascertaining whether any person has failed to comply with the law and the purpose of ascertaining whether any person is responsible for any conduct which is improper respectively.

¹ <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

16. The Commissioner first considered whether the OPCC has the authority to exercise a relevant function.

17. The OPCC told the complainant:

"Under the Police Reform Act, the PCC is the Appropriate Authority in respect of qualifying complaints against the Chief Constable..."

18. Regarding its application of section 31(1)(g), the OPCC considers that disclosure of any information that would prejudice its ability to perform its functions would engage the exemption. In that respect, it said:

"In respect of any complaints to the OPCC that it is the 'appropriate authority' for, it has the power to determine whether or not that complaint is recorded and if it is recorded, investigate it. Such investigations would include determining whether or not any person has failed to comply with the law and/or is responsible for conduct that is improper. Therefore, I have determined that the OPCC has been entrusted with functions to fulfil the purposes of (2)(a) and (2)(b) above and that those functions were specifically designed to fulfil those purposes".

19. The Commissioner is satisfied that part of the OPCC's functions include investigating complaints involving the chief officer that may be relevant to sections 31(2)(a) and (b), provided the prejudice envisaged would or would be likely to arise.

20. Consideration of the section 31 exemption involves two stages. First, in order to be engaged, the following criteria must be met:

- the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant subsection;
- the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual and of substance; and
- it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met - whether disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

21. Secondly, the section 31 exemption is qualified by the public interest, which means that, once the exemption has been engaged on the basis of the prejudice test, the information must be disclosed if the public

interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

The prejudice test

22. The Commissioner considers that the prejudice test is not a weak test, and a public authority must be able to point to prejudice which is 'real, actual and of substance'. If the consequences of disclosure would be trivial or insignificant, there is no prejudice.
23. She also considers that the authority must be able to show how the disclosure of the specific information requested would, or would be likely to, lead to the prejudice. If the authority cannot show that the prejudice would or would be likely to occur, then the exemption is not engaged.
24. The withheld information in this case comprises information relating to a 'live' complaint. The OPCC considered that the exemption applied because, as the complaint was ongoing at the time of the request, disclosure would prejudice its ability to comply with its statutory duties.

Applicable interests

25. The relevant applicable interests listed in this exemption are "*ascertaining whether any person has failed to comply with the law*" and "*ascertaining whether any person is responsible for any conduct which is improper*" respectively.

The nature of the prejudice

26. Next, the Commissioner has considered whether there would be a causal relationship between disclosure and the prejudice which the exemption is designed to protect against. She has also looked at whether the resultant prejudice which is alleged is real, actual and of substance.

27. The OPCC told the complainant:

"To ensure fair administration of justice the PCC [Police and Crime Commissioner] must be able to conduct investigations without fear that information is disclosed into the public domain prior to the conclusion of due process".

28. The OPCC also argued:

"that as the matter was ongoing it was reasonable for the OPCC to take the position that disclosing information about the nature and outcome of the complaint could prejudice the OPCC's future investigation (if it were to be the case that the IPCC overturned the decision to not record the complaint). Releasing such information

into the public domain without all the facts, could lead to undue public scrutiny which may impact on the course of the investigation”.

29. It added that the potential impact of disclosure would be of substance because it would be possible for members of the public and/or the press to obtain information and seek to influence the formal process for determining complaints about chief officers.

The likelihood of prejudice

30. In its initial correspondence with the complainant, the OPCC said that disclosure of information relating to ‘live’ complaints *would* prejudice the Police and Crime Commissioner’s ability to comply with his statutory duties. It subsequently confirmed that it was relying on the lower limb of the test - that prejudice *would be likely* to occur.

Would disclosure be likely to prejudice law enforcement?

31. In considering whether the OPCC has a function for any of the purposes listed in subsection (2), the Commissioner has taken account of its argument that the basis for engaging the exemption is the prejudice to the OPCC’s statutory function to investigate complaints. The Commissioner accepts that the ability of the OPCC to comply with its statutory duties is clearly an applicable interest falling within the scope of section 31(1)(g).
32. Having considered the withheld information, she is satisfied that it relates to the applicable interests.
33. With regard to the second criterion, the Commissioner accepts that there is a clear causal link between disclosure and the prejudicial outcome covered by the exemption. The Commissioner acknowledges that the withheld information relates to a complaint that was ongoing at the time of the request.
34. She accepts that as, at the time of the request, the complaint matter was not concluded, disclosure of the withheld information may have impacted on the course of the investigation and undermined the formal process. Furthermore, having considered the nature of the prejudice that could occur, the Commissioner is satisfied that this would clearly have been real and of substance.
35. As the Commissioner accepts that the outcome of disclosure predicted by the public authority would be likely to occur she finds that the exemption provided by section 31(1)(g) in conjunction with section 31(2)(a) and (b) is engaged.

The public interest test

36. Section 31 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
37. From the evidence the Commissioner has seen, the complainant did not put forward any public interest arguments.

Public interest arguments in favour of disclosing the requested information

38. In correspondence with the complainant, the OPCC said:

"The OPCC does recognise that there may be arguments in favour of disclosure such as ensuring that Chief Officers are held to account for their actions".

39. Regarding the public interest in transparency, the OPCC said that, on the basis that, at the conclusion of an investigation some high level information will be made available to the public, this satisfies the public's legitimate expectations that the actions of the public authority are subject to scrutiny.
40. The OPCC also recognised the public interest in transparency, for example in disclosing information about complaints in order to preclude allegations that an investigation lacked thoroughness or was biased. In this case however, the OPCC considered that there was no evidence that the investigation was not being conducted properly and that it was unlikely in any event, that the requested information – a summary of the nature and outcome of the complaint – would allow such scrutiny even if it were justified.

Public interest arguments in favour of maintaining the exemption

41. In support of maintaining the exemption, the OPCC said that the public must have confidence in the way in which investigations are carried out, with investigators provided with the time and space to explore all aspects of the case without the fear that incomplete information is made available in the public domain and/or to the press. It told the complainant:

"It is right that the OPCC as investigator has a 'safe space' to objectively reach its own conclusions away from external influences".

42. The OPCC said that it was clearly in the public interest that such investigations are not compromised.

Balance of the public interest arguments

43. The Commissioner has considered the public interest arguments including the public interest in transparency.
44. In her view, there will always be a public interest in disclosing information which allows scrutiny of how public authorities, such as the OPCC, operate and how well they serve the public in carrying out their statutory functions.
45. In that respect, the Commissioner has taken into account that the public interest is satisfied in some way by the disclosure of information at the end of an investigation.
46. The Commissioner also acknowledges that there is a public interest in protecting the safe space in which investigations, such as those into complaints about a Chief Constable, are conducted. She agrees that this would be undermined by disclosure.
47. The Commissioner considers that appropriate weight must be given to the public interest inherent in the exemption – that is the public interest in avoiding likely prejudice to the OPCC's ability to ascertain whether anyone has failed to comply with the law or whether anyone is responsible for improper conduct. The Commissioner considers that it is clear that there is a substantial public interest in avoiding that prejudice and that this is a strong public interest factor in favour of the exemption.
48. The Commissioner has also taken into account that, at the time of the request, the complaint was 'live' and the formal investigation process had not reached its conclusion. This, in the Commissioner's view, adds weight to the public interest in maintaining the exemption in this case.
49. In all the circumstances of the case, the Commissioner has concluded that the public interest in maintaining the exemption provided by section 31(1)(g) in conjunction with sections 31(2)(a) and (b) outweighs the public interest in disclosure. In reaching this view she has given particular weight to the public interest in protecting the safe space in which such investigations are conducted.
50. The OPCC was therefore not obliged to disclose the withheld information.

Section 10 time for compliance

51. The complainant told the Commissioner:

"I am making a complaint because I am dissatisfied with the way [the OPCC] dealt with my freedom of information request of 16.01.16 and which was not answered until 12.02.16." My request for internal review was made on 12.02.16 but was not replied to until 14.03.16".

52. Section 10(1) of FOIA provides that a public authority must comply with section 1(1) promptly and no later than 20 working days following receipt of the request.
53. The request for information in this case was submitted on 16 January 2016 which was a Saturday. Section 10(6) provides that the "date of receipt" is the day on which a public authority receives the request for information and "working day" is any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a bank holiday.
54. The Commissioner therefore considers that the date of receipt by the OPCC would have been Monday 18 January 2016.
55. Therefore she considers that the response of 12 February 2016 was sent within 20 working days of receipt.
56. From the information provided to the Commissioner in this case, she is satisfied that the OPCC responded to the request within the statutory time frame of 20 working days. The OPCC has therefore not breached section 10 of the FOIA.

Other matters

57. In addition to her complaint about the date on which the OPCC responded to her request for information, the complainant was also dissatisfied with its handling of the internal review. She told the Commissioner:

"My request for internal review was made on 12.02.16 but was not replied to until 14.03.16".

58. 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 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.

59. In this case, she is satisfied that the internal review was completed within the timescales set out in her guidance.
60. The complainant is dissatisfied that the internal review response was initially sent to her at her private email address rather than to the *whatdotheyknow* address that was used to make the request.
61. The Commissioner considers that it is good practice for a public authority to respond to the address used to make the request even if it holds another valid contact address for a complainant. She expects that the OPCC will have due regard to what is the appropriate address for correspondence in its future handling of requests.

Right of appeal

62. 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

63. 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.
64. 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
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