

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 27 July 2020

**Public Authority:** Chief Constable of Gwent Police

**Address:** [FOI@gwent.pnn.police.uk](mailto:FOI@gwent.pnn.police.uk)

### **Decision (including any steps ordered)**

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1. The complainant requested information tender documentation regarding the commissioning of the Alcohol Diversion Scheme for Gwent. Gwent Police withheld the information requested under section 43 of the FOIA. During the course of the Commissioner's investigation, Gwent Police disclosed some information but maintained that the remaining information was exempt under sections 43 and 40(2) of the FOIA.
2. The Commissioner's decision is that section 43 is not engaged but Gwent Police has correctly applied section 40(2) to the names of the evaluation panel.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the remaining withheld information, with the exception of the names of the evaluation panel members.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 11 December 2018, the complainant wrote to Gwent Police and requested information in the following terms:

*"I would like to submit a FOI request regarding the commissioning of the Alcohol Diversion Scheme for Gwent, which I understand will also be rolled out to other areas of Wales. From information already in the public domain I understand that there were two tenderers for the scheme. I would like to understand why one of the tenderers was preferred and successfully secured the contract versus the other; and as such would like to view scoring documentation and other decision-making tools or rationale used in relation to the tendering exercise".*

6. Gwent Police responded on 28 January 2019 and stated that the information requested was exempt under section 43 of the FOIA.
7. On 28 January 2019 the complainant requested an internal review of the handling of the request.
8. Gwent Police provided the outcome of its internal review on 28 August 2019 and upheld its decision that the information was exempt under section 43 of the FOIA.
9. The complainant wrote back to Gwent Police on 20 August 2019 and pointed out that whilst he accepted that some information may be exempt under sections 41 and 43, he did not think all of the information would be exempt as *"blanket confidentiality of the entire tender submission breaches current Government Guidelines"*.

## Scope of the case

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10. The complainant contacted the Commissioner on 4 September 2019 to complain about the way his request for information had been handled.
11. During the course of the Commissioner's investigation, Gwent Police disclosed some information. However, it maintained that the remaining information was exempt under section 43 of the FOIA. Gwent Police also stated that it considered some of the remaining information to be exempt under section 40(2).
12. In light of the above, the scope of the Commissioner's investigation into this complaint is to determine whether Gwent Police should disclose the remaining information held relevant to the request.

## Reasons for decision

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### Section 43 – commercial interests

13. Section 43(2) of the FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
14. For section 43(2) to be engaged the Commissioner considers that three criteria must be met:
  - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed must relate to the commercial interests;
  - Secondly, 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 to those commercial interests; and
  - Thirdly, it is necessary to establish whether the alleged prejudice would, or would be likely, to occur.

#### *The applicable interests*

15. The Commissioner's guidance explains that a commercial interest relates to a person's ability to participate competitively in a commercial activity i.e. the purchase and sale of goods or services. In this case, the remaining information which has been withheld under section 43 comprises tender evaluation documentation in relation to the two tenderers for the contract in question, including comments made by the evaluation panel and pricing schedules. The Commissioner is satisfied that the information relates to the purchase and sale of services and is therefore commercial and falls within the remit of section 43(2).

#### *Whose commercial interests and the likelihood of prejudice?*

16. In order for the exemption to be engaged it is necessary for it to be demonstrated that disclosure of information would result in some identifiable commercial prejudice which would or would be likely to be affect one or more parties.
17. Gwent Police confirmed that it is relying on the higher threshold that disclosure of this information would prejudice the commercial interests of the tenderers involved.
18. The ICO has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. The

Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; i.e. either prejudice 'would' occur or prejudice 'would be likely to' occur.

19. With regard to likely to prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)* confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been real and significant risk'.
20. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner (EA/2005/0026 & 0030)* commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge'.
21. Gwent Police considers that disclosure of the remaining withheld information would have the following effects:

**Comments by the evaluation panel which contain specific references to the tender responses** – disclosure "*would provide other organisations with information deemed to be of commercial interest and allow them to acquire competitive gain in terms of service provision and or future bids*".

**Tender response and question sheet for each of the quality questions which include information about contracts, relationships with other organisations or processors and security provisions around handling personal data** - disclosure "*would provide other organisations detailed commercial knowledge of their competitors and reveal technical and organisational security information which would place the organisation at risk should this information be publicly disclosed*".

**Pricing schedule which indicates a breakdown of costs** – disclosure "*would provide other organisations detailed commercial knowledge of their competitors and provide an opportunity to acquire competitive gain in terms of service provision and or future bids*".

22. When a public authority is claiming that disclosure of requested information would prejudice the commercial interests of a third party the Commissioner follows the findings of the Information Tribunal decision in the case *Derry Council v Information Commissioner [EA/2006/0014]*. This confirmed that it is not appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Instead, the Commissioner expects that arguments advanced by a public authority should be based on its prior knowledge of the third party's concerns. The Commissioner

explained this position to Gwent Police and asked for evidence that any third parties had been consulted about disclosure of the information requested in this case. Gwent Police confirmed that "*no contact has been made with third parties regarding this request*".

23. The Commissioner considers that the arguments submitted in support of the prejudice envisaged in this case are generic and somewhat limited. Despite specifically asking it to do so Gwent Police has failed to explain exactly *how* disclosure would have the effect it is claiming. In the Commissioner's view, Gwent Police's arguments amount to little more than mere assertions that prejudice would occur.
24. In light of the limited representations submitted and the fact that Gwent Police has failed to demonstrate that the prejudice it envisages to any third party is based on prior knowledge or any consultation with the third parties concerned, the Commissioner has no alternative but to find that Gwent Police has failed to demonstrate that the section 43 exemption is engaged in this case. As the exemption is not engaged, the Commissioner is not required to consider the balance of the public interest.

### **Section 40(2) – third party personal data**

25. 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.
26. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. 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 General Data Protection Regulation ('GDPR').
27. 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 the FOIA cannot apply.
28. 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 DP principles.

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

***Is the information personal data?***

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

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

30. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

31. 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.

32. 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.

33. The withheld information in this case comprises the names of individuals who were on the tender evaluation panel. The Commissioner is satisfied that these names both relate to and identify the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

34. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

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

**Would disclosure contravene principle (a)?**

36. 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"*.

37. 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.

38. 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

39. 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.

40. 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"*<sup>2</sup>.

41. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the 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.

42. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

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<sup>2</sup> 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) 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"*.

*Legitimate interests*

43. In considering any legitimate interests in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
44. 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.
45. Gwent Police stated that it had considered the legitimate interests of the individuals who participated in the tender evaluation process. It confirmed that the complainant had been provided with the roles/job titles of the individuals concerned, which in Gwent Police's opinion satisfies any legitimate interest of the public in terms of transparency. Gwent Police is of the view that disclosing the names of the individuals concerned would constitute "*a disproportionate and unwarranted level of interference with the individuals' rights and freedoms – particularly their right to privacy and family life under the Human Rights Act 1998. Declaring evaluator names could expose individuals to threat of bribery or corruption so names are withheld for their own privacy and protection*".
46. The Commissioner considers that the public has a legitimate interest in knowing that any decision to award the contract in question was made by individuals with the appropriate knowledge and experience to be able to make decisions of this nature.

*Is disclosure necessary?*

47. '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 the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
48. The Commissioner accepts that, to a large extent, the legitimate interests in terms of transparency and accountability has been satisfied through disclosure of the job titles of the evaluation panel members. This disclosure goes some way to demonstrating that the individuals had sufficient experience and knowledge to make a decision to award the contract in question. However, as the job roles are ones that potentially relate to a number of officers, for example Senior Procurement Officer, she accepts that disclosure of the names of the individuals involved



could provide further clarity and assurance to the public about the decision making process. For example, it could provide assurance that the individuals involved had no connection with the tenderers concerned and therefore no bias had taken place in terms of the contract award. She considers that disclosure of the withheld information in this case is necessary to meet this legitimate interest.

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

49. 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 the 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.
50. 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.
51. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
52. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
53. Gwent Police advised that the contract in question was a collaborative framework with other two other constabularies with Gwent Police acting as the lead authority. There were three evaluators on the panel and one Gwent Police Procurement Administrator who collated the scores.
54. Gwent Police advised the Commissioner confirmed that each constabulary has its own Privacy Notice in relation to staff and their personal data. Staff would expect their personal data to be managed in accordance with their corresponding Privacy Notice. Gwent Police confirmed that the individuals concerned had not been asked to provide consent to disclosure of their personal data. Gwent Police advised that

this was not an option *because "roles have changed and staff have retired"*.

55. Gwent Police considers that disclosure of the names of the individuals on the evaluation panel to be *"a disproportionate and unwarranted level of interference with the individuals' rights and freedoms – particularly their right to privacy and family life under the Human Rights Act 1998. Declaring evaluator names could expose individuals to threat of bribery or corruption so names are withheld for their own privacy and protection"*.
56. The Commissioner accepts that the individuals concerned were carrying out their duties as Police officers and staff. She also accepts that the individuals would have not had an expectation that details of their work on the panel evaluating the bids would be disclosed to the world at large, albeit that the Commissioner considers that the infringement into their privacy if their names were disclosed is arguably relatively limited.
57. The Commissioner notes that the staff involved have changed roles and some have retired. She also notes that Gwent Police has disclosed the job titles of the panel members which she considers would provide some understanding of the role and experience of individuals who sat on the panel.
58. Taking all of the above into account, the Commissioner has concluded that it would be unfair to the individuals concerned to release their personal data. Disclosure would not have been within the reasonable expectations of the individuals and the loss of privacy has the potential to cause unwarranted distress. The Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful. The Commissioner has therefore decided that Gwent Police was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

## Right of appeal

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59. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

60. 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.

61. 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 .....**

**Joanne Edwards**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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