

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 May 2022

Public Authority: Office of Police and Crime Commissioner
for Cambridgeshire and Peterborough

Address: PO Box 688
PE29 9LA

Decision (including any steps ordered)

1. The complainant requested from the Office of the Police and Crime Commissioner for Cambridgeshire and Peterborough ("OPCC") copies of the application forms for successfully appointed applicants to the position of Legally Qualified Chair ("LQC") for Police Conduct Panels for the past ten years.
2. The Commissioner's decision is that the information requested falls within the definition of personal data. The OPCC was therefore entitled to withhold this information under section 40(2) of FOIA.
3. The Commissioner does not require the OPCC to take any steps as a result of this decision notice.

Request and response

4. On 25 June 2021, the complainant emailed the OPCC and requested the following information:

"I request copies of the actual applications made by persons who were subsequently appointed as Chair for the past 10 years"

5. The OPCC responded on 13 July 2021. It stated that the names of those who were appointed were in the public domain. However, the application forms contained information the applicants would not expect to be made public and would be withheld under section 40(2) of FOIA.
6. Following an internal review, the OPCC wrote to the complainant on 31 July 2021. It stated that the exemption of section 40(2) of FOIA continued to be upheld.

Scope of the case

7. The complainant contacted the Commissioner 13 September 2021 to complain about the way his request for information had been handled. The complainant maintained it was in the public's interest to have access to this information.
8. The following analysis focuses on whether the OPCC is entitled to rely on section 40(2) of FOIA in respect of this information request.

Reasons for decision

9. Section 40(2) (Personal Information) of FOIA states 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.
10. 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').
11. 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.

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

12. 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.

Is the information personal data?

13. Section 3(2) of the DPA defines personal data as:
 "any information relating to an identified or identifiable living individual".
14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. 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.
16. 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.
17. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to specific individuals who were candidates for the posts of LQCs. He is satisfied that the information withheld both relates to and identifies those individuals. The withheld information contains addresses, telephone numbers and email addresses. Additionally, the withheld information contains special category data relating to age, gender, sexual orientation, and disability. There are also free text fields where other special category data is recorded. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
18. 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.
19. The most relevant DP principle in this case is principle (a).
20. 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".

21. 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.

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

22. 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.
23. 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.

24. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

² 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 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".

- 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.
25. 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

26. 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.
27. 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.
28. The OPCC have stated they cannot identify any legitimate interest in the release of the withheld information. They consider the candidates had an expectation that their information would be confidential to the application process.
29. The complainant indicated in his correspondence to the ICO on 13 September 2021 he believed there were legitimate reasons for disclosure. He advised that as LQC's are appointed to carry out a public role and are appointed by a public body, the public should know whether those appointing them are asking the right questions of applicants. Particularly, whether they are asked to disclose information which may lead them to be disqualified from being appointed or that may later lead to their removal. The complainant expressed he believed it to be in the public interest to know if such information was disclosed on the application forms.

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 the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
31. The Commissioner considers that the OPCC provided sufficient information to meet the complainant's identified legitimate interests by publication of the blank application form online which they directed the complainant to via a link. This application form contained all the questions asked of the applicants in relation to that part of the recruitment process. The Commissioner considers this is sufficient to address the legitimate interests of transparency and openness by the OPCC in relation to the complainant's request to see the questions applicants were asked.
32. The Commissioner accepts that information on application forms completed by the candidates included personal information and views they would not have any expectation of being disclosed and that were part of an application process.
33. The Commissioner notes the legitimate interest in knowing if such information were disclosed on the application forms, however, from the information provided during this investigation, the Commissioner is satisfied that such information would be disclosed as part of the recruitment process checks undertaken by the OPCC.
34. As the Commissioner has decided in this case that further disclosure is not necessary to meet the legitimate interest in disclosure, 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).
35. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's view

36. 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) of FOIA.

Right of appeal

37. 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

38. 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.
39. 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

Phillip Angell
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF