



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2016/0217

Decided without a hearing

**Before
CHRIS RYAN
JUDGE
MICHAEL HAKE
GARETH JONES
TRIBUNAL MEMBERS**

Between

POLICE AND CRIME COMMISSIONER FOR LINCOLNSHIRE

Appellant

and

INFORMATION COMMISSIONER

First Respondent

and

VICTORIA YOUNG

Second Respondent

DECISION AND REASONS

Subject matter: FOIA Absolute exemptions - Personal data s.40

Cases: *Goldsmiths International Business School v The Information Commissioner & Home Office*
[2014] UKUT 0563 (AAC).

GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is allowed in part and the Decision Notice dated 25 August 2016 is substituted by the following notice:

Public Authority: Police and Crime Commissioner for Lincolnshire

Complainant: Victoria Young

The Decision Notice stands except that the Public Authority is not required to disclose the information sought under part 5 of the request for information submitted by the Complainant on 16 January 2016.

REASONS FOR DECISION

Introduction

1. This Appeal arises from the Information Commissioner's Decision Notice FS50618842 dated 25 August 2016 ("the Decision Notice"). The Information Commissioner decided that the Police and Crime Commissioner of Lincolnshire ("PCC") should have disclosed to the Second Respondent, Victoria Young ("Ms Young"), all of the information which she had sought in a request for information about complaints made against the Chief Constable of Lincolnshire dated ("the Request"). The basis of the Decision Notice was that, although the requested information was the Chief Constable's personal data, that did not, on the particular facts of this case, render it exempt from the PCC's obligation to disclose under section 1 of the Freedom of Information Act 2000 ("FOIA").

The Request and the PCC's response to it.

2. The Request was dated 16 January 2016 and was in these terms:
 - (1) *"Please disclose the number of complaints, both recorded/non-recorded, made against Chief Constable Neil Rhodes 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 Rhodes 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 Rhodes*
(6) *What was the outcome of each of the complaints.*"

3. The terminology adopted in the Request reflects the established process for dealing with complaints made against senior police officers, such as a Chief Constable. Such complaints are handled by the appropriate Police and Crime Commissioner. He or she must decide whether or not it should even be recorded as a complaint. It will not be so recorded if, for example, it is vexatious or fanciful. Some categories of police conduct that are recorded must be referred to the Independent Police Complaints Commission ("IPCC") for investigation. Other categories may be referred voluntarily, or they may be dealt with at local level.
4. Cases which are considered by the IPCC are not routinely publicised. The IPCC will consider all the circumstances (including the seriousness of the conduct under review and the potential impact on public confidence in the police service) before deciding whether or not to issue a press statement about a case, as well as the stage of the investigation at which it becomes appropriate to do so.
5. The Request was rejected in an email from the PCC dated 11 February 2016. The relevant part read:

"The information you have requested constitutes personal information. The exemption applicable to this is section 40(2) of [FOIA], concerning third party personal information. This is an Absolute Exemption so there is no requirement to conduct a harm or public interest test. Any information is exempt from disclosure [under FOIA] if it relates to or is supplied by another individual and disclosure of that information would contravene any of the principles of the 1998 Data Protection Act. In this particular case, disclosure of the requested information would contravene Principles 1 and 2 of the Act, whereby personal data shall be processed fairly and lawfully and only obtained for one or more specified purpose or purposes."

6. The refusal was maintained, following an internal review conducted at the request of Ms Young.

The law relied on by the PCC to support its refusal to disclose

7. FOIA section 40(2) provides that information is exempt information if it constitutes personal data of a third party, the disclosure of which would contravene any of the data protection principles.
8. It has been accepted by all parties to this Appeal that all the requested information constituted the personal data of the Chief Constable.
9. The data protection principles are set out in Part 1 of Schedule 1 to the Data Protection Act 1998 ("DPA"). The first and second principles are as follows:

"1. Personal data shall be processed fairly and lawfully, and in particular shall not be processed unless-

(a) at least one of the conditions in Schedule 2 is met, ...

2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes."

10. The conditions to be considered under sub-paragraph (a) of the first principle are set out in Schedule 2, but only one is relevant to the facts of this case. It is found in paragraph 6(1) and reads:

"The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

The term "processing" has a wide meaning (DPA section 1(1)) and includes disclosure.

The Information Commissioner's investigation and Decision Notice

11. On 1 March 2016 Ms Young complained to the Information Commissioner about the way in which the Request had been handled. The Information Commissioner investigated the complaint (as she was required to do under FOIA section 50) and was provided with details of the information covered by the Request. She then issued her Decision Notice on 25 August 2016.
12. The Decision Notice recorded the Information Commissioner's conclusion that all of the requested information constituted the personal data of the Chief Constable, but that disclosure would not breach the first or second of the data protection principles.
13. The Information Commissioner started by considering if disclosure would be fair. In that connection she took into account the seniority of the Chief Constable's position and concluded that he could not reasonably have a legitimate expectation that the requested information would not be disclosed, if requested. She conceded that disclosure was likely to cause some distress but that this was likely to be minor. Against those considerations, affecting the individual's rights and freedoms, the Information Commissioner set the legitimate public interest in disclosure - in this case the transparency of procedures designed to maintain integrity in the police service. She concluded that the legitimate interests of the public were sufficient to outweigh any negative impact on the Chief Constables right to maintain privacy in respect of information that concerned his public role.
14. Having determined that disclosure would not be unfair, the Information Commissioner went on to consider the impact of paragraph 6 of Schedule 2. She concluded that, as disclosure was necessary to satisfy the previously identified legitimate public interest in disclosure and would not cause any unnecessary interference with the rights, freedoms and legitimate interest of the Chief Constable, the condition for disclosure was met.
15. Finally, the Information Commissioner concluded, in the absence of any convincing argument to the contrary by the PCC, that disclosure would also be lawful. She also rejected the suggestion that the second data protection principle would be breached by disclosure.

16. On the basis of those conclusions the Information Commissioner directed the PCC to disclose all of the requested information.

The appeal to this Tribunal

17. The PCC lodged an appeal to this Tribunal on 20 September 2016.
18. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, she ought to have exercised her discretion differently. We may, in the process, review any finding of fact on which the notice in question was based. Frequently, as in this case, we find ourselves making our decision on the basis of evidence that is more extensive than that submitted to the Information Commissioner.
19. The PCC put forward three grounds of appeal. All were based on the application of the first data protection principle and there was no challenge to the Information Commissioner's conclusion that the second data protection principle did not apply.
20. The first ground of appeal was that the Information Commissioner had been wrong to conclude that paragraph 6 of Schedule 2 was satisfied (with the consequence that disclosure would also be unfair). Second, it was asserted that the Information Commissioner had adopted a blanket approach to the whole of the requested information and had not applied the relevant criteria for disclosure to each element of information which Ms Young had sought. Third, in a submission that departed from the approach previously adopted by the PCC, it was argued that some of the requested information (in particular that sought under part 5 of the Request) constituted sensitive personal data, which should not be disclosed unless one of the conditions set out in Schedule 3 of the DPA was satisfied, in addition to a Schedule 2 condition.
21. The expression "sensitive personal data" is defined in DPA section 2 as follows:

"In this Act 'sensitive personal data' means personal data consisting of information as to –

(a) the racial or ethnic origin of the data subject,

(b) his political opinions,

(c) his religious beliefs or other beliefs of a similar nature,

(d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),

(e) his physical or mental health or condition,

(f) his sexual life,

(g) the commission or alleged commission by him of any offence, or

(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

22. The PCC relied on section 2(g), information (in this case) about an alleged criminal offence. Detail about each of the allegations was provided to us in closed material and is summarised in the first annex to this decision, which is to remain confidential unless and until our decision is reversed on appeal.
23. As indicated above, before sensitive personal data may be disclosed it is necessary to demonstrate that at least one of the conditions set out in Schedule 3 of the DPA is met, in addition to a Schedule 2 condition. The text of Schedule 3 is set out in the second annex to this decision. The PCC asserted that none of the Schedule 3 conditions applied in the circumstances of this case.
24. The PCC supported its Grounds of Appeal with two witness statements, one signed by the Chief Constable himself and the other by Malcolm Burch, the PCC's Chief Executive.
25. The Chief Constable acknowledged that there was a strong public interest in transparency and accountability in respect of someone performing his role and that this could include disclosure of allegations of misconduct. He referred to one instance in 2013 when the IPCC considered that allegations made against him should be investigated locally. Following a detailed, independent investigation by another police force, the allegations were found to have been without foundation and they were withdrawn. The Chief Constable accepted that it had been appropriate in that case for details of the investigation to have been made public, even though he found it personally upsetting. He added, in a passage of his witness statement that veered towards argument, rather than evidence, that he did not think that as a general rule detail of all allegations should be put into the public domain, particularly if they had insufficient evidential foundation. This would not aid transparency, he claimed, or increase public awareness and would simply put unfounded allegations into the public domain. The Chief Constable thought that this would not only cause him personal distress, but would risk undermining public confidence in the Lincolnshire Police's work, with no countervailing advantage to the public.
26. Mr Burch's evidence covered the following topics:
 - a. The extent to which the PCC published information about its functions, both voluntarily and under compulsion of law - including statistics on complaints and the procedures for handling them.
 - b. The procedures followed when dealing with complaints - substantially as summarised in paragraph 3 above.
 - c. The work of the IPCC and its policy in relation to the publication of its investigation reports and, more rarely, information about ongoing investigations.
27. Before the Appeal came on for hearing, the Information Commissioner changed her position from that adopted in the Decision Notice. In her written submissions, she accepted that the disputed information within part 5 of the Request constituted sensitive personal data and that no condition from Schedule 3 of the DPA would be

met. She also conceded that, even if it were not sensitive personal data, its disclosure would cause unwarranted prejudice to the Chief Constable, such that condition 6(1) from Schedule 2 would not be met and disclosure would not be fair.

28. Ms Young objected to the Information Commissioner's late change of position and maintained her stance that all the requested information should be disclosed. She suffered from the (sadly inevitable) disadvantage of not knowing what information the PCC held, which fell under part 5 of the Request, but argued that it would be perfectly fair for all the requested information to be disclosed, given the seniority of the Chief Constable's position and the consequent need for a high level of transparency and accountability. It was not appropriate, in her view, to apply different criteria depending on whether or not a complaint was recorded or referred to the IPCC.

Our conclusions

29. It is apparent to us, from the detail about information falling within part 5 of the Request (provided to us under conditions of confidentiality and summarised in Annex 2 to this decision), that the allegations do include material relating to alleged criminality. They are therefore sensitive personal data and we are required to consider whether any of the Schedule 3 conditions were satisfied. Having reviewed them carefully, we have considered that none was.
30. The Information Commissioner was therefore right to concede that the relevant information could be withheld by the PCC.
31. We turn next to information, which fell within part 5 of the Request but was not sensitive personal data (that is, information about allegations about the Chief Constable, which did not relate to criminality). We should first state that the relevant information refers only to the Chief Constable in his official capacity and has no relevance to any other aspect of his life. It also refers to circumstances on which the IPCC considered there was no case for the Chief Constable to answer.
32. In considering this category of information we are required to apply the test set out in DPA section 1(a). We take that to mean that disclosure should only be ordered if it would be fair and lawful and, in particular, necessary for the purposes of legitimate interests pursued by Ms Young, without amounting to an unwarranted interference into the rights and freedoms, or legitimate interests, of the Chief Constable.
33. Rather than start with the broad issue of fairness, as the Information Commissioner did in his Decision Notice, we consider that the possible application of paragraph 6 of Schedule 2 should be considered first. We believe that the phrase "in particular" in DPA section 1 requires us to adopt that approach. Only if we find that none of the Schedule 2 conditions apply should we revert to the general wording of section 1 and consider whether disclosure would not be fair and lawful for some other reason. We observe that the approach adopted by the Information Commissioner led her to consider the balance between individual's rights and legitimate interests in disclosure at the stage of considering fairness, rather than when assessing the application of the relevant Schedule 2 conditions. That seems to us to give rise to a risk of confusion between the two elements of the test for disclosure set out in DPA section 1.

34. When we come to consider paragraph 6 of DPA Schedule 2 we are assisted by a series of propositions that were endorsed by the Upper Tribunal in *Goldsmiths International Business School v The Information Commissioner & Home Office* [2014] UKUT 0563 (AAC). They were:

“35. Proposition 1: Condition 6(1) of Schedule 2 to the DPA requires three questions to be asked:

“(i) Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?

(ii) Is the processing involved necessary for the purposes of those interests?

(iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?”

Authority: *South Lanarkshire* at [18].¹

36. Proposition 2: The test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.

Authority: *Corporate Officer (Information Tribunal)* at [58]², *South Lanarkshire* at [18] and *Farrand* at [29]³.

37. Proposition 3: “Necessity” carries its ordinary English meaning, being more than desirable but less than indispensable or absolute necessity.

Authority: *Corporate Officer (Divisional Court)* at [43] and *Farrand* at [26]-[27].

38. Proposition 4: Accordingly the test is one of “reasonable necessity”, reflecting the European jurisprudence on proportionality, although this may not add much to the ordinary English meaning of the term.

Authority: *Corporate Officer (Divisional Court)* at [43]⁴, *South Lanarkshire* at [27] and *Farrand* at [26].

39. Proposition 5: The test of reasonable necessity itself involves the consideration of alternative measures, and so “a measure would not be necessary if the legitimate aim could be achieved by something less”; accordingly, the measure must be the “least restrictive” means of achieving the legitimate aim in question.

Authority: *Corporate Officer (Information Tribunal)* at [60]-[61] and *South Lanarkshire* at [27].

40. Proposition 6: Where no Article 8 privacy rights are in issue, the question posed under Proposition 1 can be resolved at the necessity stage, i.e. at stage (ii) of the three-part test.

Authority: *South Lanarkshire* at [27].

¹ *South Lanarkshire Council v Scottish Information Commissioner* [2013] UKSC 55 (“*South Lanarkshire*”);

² *Corporate Officer of the House of Commons v Information Commissioner and Others* (EA/2007/0060-0063, 0122-0123 and 10131)

³ *Farrand v Information Commissioner* [2014] UKUT 310 (AAC)

⁴ *Corporate Officer of the House of Commons v Information Commissioner and Others* [2008] EWHC 1084 (Admin)

41. Proposition 7: Where Article 8 privacy rights are in issue, the question posed under Proposition 1 can only be resolved after considering the excessive interference question posed by stage (iii).

Authority: Corporate Officer (Information Tribunal) at [60]-[61] and South Lanarkshire at [25].

42. Proposition 8: The Supreme Court in South Lanarkshire did not purport to suggest a test which is any different to that adopted by the Information Tribunal in Corporate Officer (Information Tribunal).

Authority: South Lanarkshire at [19]-[20] and Farrand at [26].

35. Proposition 2 requires us to start with the question of whether Ms Young has a legitimate interest in disclosure. We believe that Ms Young's desire for full accountability and transparency provides her with such an interest. Whether disclosure is reasonably necessary to serve that interest (Propositions 3 and 4) requires us to consider whether the interest could be served in another way that did not involve the disclosure of the information under consideration (Proposition 5). In that connection, the PCC argued that the whole regime for handling police complaints provided for disclosure at a level appropriate to the different categories of complaint received and the PCC's assessment of them. We accept that argument. The allegations are of such a nature that the public interest in transparency and accountability is served by the degree of transparency built into the complaints regime.
36. Even if we were wrong on that issue, we find that disclosure would be an unwarranted interference in the Chief Constable's rights (Proposition 1, read with Propositions 6 and 7). Those rights arise from both his personal interest in not being held up for public criticism on allegations that were found not to be sustainable, as well as his interest in the role of Chief Constable not being undermined during his time in that office.
37. The final category of information to be considered is that falling within the scope of parts 1-4 and 6 of the Request. We consider that different considerations apply to this information, which is statistical in nature. We apply the same principles as above but find that the complaints procedures do not aggregate data in the way that the Request requires, so that it is only by disclosing the requested information that the identified interest in disclosure can be served. We also find that the degree of interference with the Chief Constable's rights, as identified above, will be very much less than in the case of the part 5 information. The statistics of complaint against an individual responsible for all the operations of a County Constabulary will frequently reflect the performance of the organisation as a whole and will not necessarily relate to the Chief Constable as an individual, although the complaint will still have the capacity to reflect badly on him or her. Given the seniority of the position of Chief Constable, we do not think that a holder of that office should reasonably expect that the sort of information covered by parts 1-4 and 6 of the Request will remain confidential, even though the detail of those complaints that do not proceed beyond the preliminary stages of an investigation may be.

38. We conclude that, in the case of this category of information the condition set out in paragraph 6 of Schedule 2 is satisfied. There is, moreover, no other factor that would make disclosure unfair or unlawful and we therefore find that the Information Commissioner was right to decide that it should have been disclosed by the PCC.

Conclusion

39. In light of those findings we have concluded that the Information Commissioner was right to order disclosure in respect of items 1-4 and 6 of the Request, but (as she has now conceded) fell into error in ordering disclosure of the information requested in respect of item 5 of the Request.

40. Our decision is unanimous.

Signed Judge Christopher Ryan

Judge of the First-tier Tribunal

Date: May 18, 2017

Promulgated: May 23, 2017