



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

Appeal Reference: EA/2019/0100

Decided upon the papers

Before

**JUDGE
FIONA HENDERSON**

Between

I FITZSIMMONS

Appellant

**and
INFORMATION COMMISSIONER**

Respondent

DECISION AND REASONS

This appeal is refused for the reasons set out below.

Introduction

1. This is an appeal against Decision notice FS50804680 dated 26th March 2019 which held that the Office of the Police and Crime Commissioner for Hampshire (OPCC) did not hold the relevant information and therefore had complied with s1(1) FOIA.

Background

2. The Police and Crime Commissioner for Hampshire is an elected official whose core functions are to “*secure the maintenance of the police force for the area and to ensure that the police force is efficient and effective*”. Amongst other things he is also responsible for:
 - Holding the Chief Constable to account,
 - setting the priorities for the force and producing the Police and Crime Plan,
 - setting the annual budget and Council tax precept,
 - publishing an annual report stating how priorities and targets have been met.¹
3. The Appellant had made a FOIA request on 4th December 2017 to ask of the PCCH:

¹ P27 bundle Narrative Statement from PCCH Statement of Accounts 2017/8

“Are you now, or have you ever been, a Freemason?”. The OPCC stated that they did not hold information in response to the request, a position which was upheld by the Information Commissioner in decision notice FS50726586². Whilst the Commissioner was investigating that case it was clarified by OPCC that being a member of the Freemasons was not listed on any of the copies of the Register of Interests that the PCCH had submitted and the OPCC had no recorded information (either biographical information from public sources or created after his election) which indicated that he was or had been a Freemason. There was a statutory requirement for current membership to be declared but no statutory requirement to declare any previous membership.

Information Request

4. On 5th October 2018 the Appellant wrote to the Police and Crime Commissioner for Hampshire (PCCH) with 8 requests which included:

“5) In your published statement of interests, you omitted to list your membership of the Freemasons, which is a charity. Please explain this omission and advise the person(s)/entity to who/which [sic] your statement was submitted”.

5. The OPCC replied by letter dated 31st October 2018 and in relation to request 5 observed:

“I would advise that your request for information needs to be specific and relate only to information that may be held as a record. We are unable to respond to questions that seek opinion, explanation or views.”

6. The Appellant requested an internal review by letter dated 7th November 2018 which was addressed directly to the PCCH. Insofar as it relates to request 5 he stated:

“Your membership of the Freemasons is not listed on your statement of interests. If you are not now a Freemason, please confirm accordingly. Otherwise, please confirm why you failed to enter this fact on your statement of interests”.

7. The OPCC’s internal review dated 13th November 2018 stated in relation to request 5:

“[the original response explained that] under the FOI Act, we are unable to provide opinion, explanation or views in response to a request, which is correct.

The exception to this is if it is already contained within a document held by the organisation. I have searched the organisation records and we hold no information that answers your question.”

The Appellant was told that the statement of Interests for register was submitted by the PCCH to the Monitoring Officer of the organisation, who is the Chief Executive (as per the PCC’s code of Conduct).³

Complaint to the Commissioner

8. The Appellant complained to the Commissioner by letter dated 22nd November⁴. In relation to request 5 he stated:

² 21st May 2018 p 64 bundle.

³ <https://www.hampshire-pcc.gov.uk/wp-content/uploads/2016/08/ML-code-of-conduct.pdf>

“[the PCCH] obviously knows if he is a Freemason and my [Request for Information] was addressed to him. It is ludicrous for [the Acting head of Governance and Policy] to say he has no record of PCCH’s affiliations when PCCH has already reported in his statement of interests his affiliation with other church charities. It is a matter of grave public concern to the public that all his affiliations should be recorded. After all he has declared his membership of the Conservative Party - so why would he not declare his Freemason affiliation?”

He attached the PCCH’s narrative statement including his core functions from the statement of accounts 2017/18.

9. The ICO asked the OPCC for further details of the searches that had been done and the record retention policy. The OPCC replied by email dated 4th January 2019⁵ and in relation to request 5 relied largely upon the reply they gave in FS50726586⁶ arguing that the request was for an explanation or an opinion not recorded information and that they had answered the parts that they could.
10. Following further correspondence in which the Appellant raised further arguments relating to request 5, the Commissioner issued a decision notice confined to request 5 which upheld the OPCC’s response.

Appeal

11. The Appellant appealed on 27th March 2019⁷. His grounds can be summarised as:
 - i. The Commissioner was wrong to consider information held by OPCC when the request was addressed to PCCH who is the appropriate legal authority and personally responsible.
 - ii. The PCCH was wrong not to clarify the extent to which he is affiliated to Freemasonry.
 - iii. The information is held because the PCCH knows if he is or ever has been a Freemason.
 - iv. He raises public interest arguments as to why he believes it is important that this information should be in the public domain.
12. The Commissioner opposed the Appeal in her response dated 13.05.19⁸. She relies upon the contents of her Decision Notice and adds that:
 - i. The Commissioner maintains that the OPCC are the correct public authority and does not accept that the PCCH and OPCC are separate legal entities.
 - ii. It is outside of the scope of this appeal whether the PCCH is or is not affiliated to Freemasonry, the Appeal is limited to whether the information is held.
13. This case was heard by a Judge sitting alone⁹ because the issue in the appeal is whether the public authority holds the information in dispute¹⁰. All parties have

⁴ He sent a follow up letter dated 28th November enclosing hard copies of the correspondence to date.

⁵ P41 bundle

⁶ 27th April 2018 p 46 bundle

⁷ P8 bundle

⁸ P9A-9H bundle

consented to the case being determined on the papers. The Tribunal has had regard to all the documentary information before it. In concluding that it is in the interests of justice to determine this case without an oral hearing pursuant to rule 32 of the *Tribunal Procedure (First Tier Tribunal) (General Regulatory chamber) Rules 2009* the Tribunal has had regard to the overriding objective as set out in rule 2. The Commissioner had suggested that the Tribunal may benefit from writing to OPPC to ask for questions regarding the structure and link to the PCCH however, I have had regard to the Police UK website (<https://www.police.uk/hampshire/pcc/>) and the PCCH website (<https://www.hampshire-pcc.gov.uk>)¹¹ and the *Police Reform and Social Responsibility Act 2011* which sets out the powers, functions and organisation of a PCC. I am satisfied from this that I have sufficient information to determine the appeal on the evidence already submitted. In reaching this decision I remind myself that the burden of proof is the civil standard (namely the balance of probabilities not absolute certainty) and in applying rule 2 I have had regard in particular to:

- Proportionality,
- Delay, and
- The Tribunal's obligation to be flexible.

Ground i: The correct Public authority

14. The Appellant's case is that the request was addressed to the PCCH in person not his office and that he has a legal obligation to the public. He argues that the PCCH is:

- a legal independent entity not a staff member,
- he is personally and legally accountable under FOIA,
- he knows whether he is or has ever been a Freemason.

He draws an analogy with MPs whom he believes are subject to FOIA and asks therefore why does the ICO consider PCCH immune?

15. I observe that the analogy with MPs is misconceived as they are not subject to FOIA although some requests relating to e.g. their expenses are, because the House of Commons is listed in Schedule 1 of FOIA as a public authority.

16. The ICO's response is that for the purposes of FOIA, PCCH and OPCC are one and the same, the PCCH website clearly sets out that PCCH staff are the PCCH's team therefore ICO say OPCC were the correct public authority. They rely upon the interchangeability of the OPCC and PCCH in official material such as the PCCH's website. I have had regard to the website and I take into consideration that:

- the postal address for the PCCH is given as: Office of the Police Crime Commissioner for Hampshire
- The email address is: opcc@hampshire.pnn.police.uk
- The register of interests is signed as received by the Monitoring officer who is the Chief executive of the OPCC.

⁹ Paragraph 11(2) of The Practice Statement composition of Tribunals in relation to matters that fall to be decided by the General Regulatory Chamber on or after 6 March 2015

¹⁰ Paragraph 11(3)(a)(i) of the Practice Statement

¹¹ Both of which are relied upon in the ICO response

- The OPCC has a Record retention and disposal policy. This states at 4.1: *“While the Police and Crime Commissioner is the Data Controller registered with the Information Commissioner’s Office, day-to-day responsibility for compliance with this policy rests with the Chief Executive. Such responsibility may be delegated to other members of the Senior Management Team as appropriate”*.¹² Whilst it is accepted that this document is dated after the information request it is consistent with the handling of information at the relevant time as evidenced in the correspondence within the bundle.
- The website also indicates that FOI requests are received by OPCC.¹³

17. The above examples of the operation of the OPCC are consistent with the statutory role and function of a Police Commissioner which was established pursuant to s1 of *Police Reform and Social Responsibility Act 2011* (PRSRA 2011). The PCCH is a corporation sole with wide powers of delegation.¹⁴ Schedule 1 of the PRSRA 2011 provides for payment of the Commissioner and staff and for administrative support for the role of PCC. In particular section 5 provides that a PCC must appoint:

(a) a person to be the head of the commissioner’s staff (referred to in this Part as the commissioner’s chief executive); and

(b) a person to be responsible for the proper administration of the commissioner’s financial affairs (referred to in this Part as the commissioner’s chief finance officer)....

(3) A police and crime commissioner may appoint such other staff as the commissioner thinks appropriate to enable the commissioner to exercise the functions of commissioner.

18. Consequently, I agree with the ICO that the PCCH and OPCC are not separate legal entities. The OPCC is set up in order to enable the PCCH to exercise his functions which he is entitled to delegate pursuant to s18 of the PRSRA 2011. In my judgement it is immaterial whether the request goes to the Office or the office-holder because FOIA relates to information that is held in association with the public office not private information also known to the office holder. In light of the PCCH’s powers of delegation it is appropriate for the office to respond to FOIA requests as that will encompass all information held on the PCCH’s behalf by his staff as well as all information held by him in his official capacity.

19. I have considered whether the ICO has been inconsistent in FS50726586 which lists the PCCH as the public authority, however, I am satisfied from the contents of the decision notice (and the correspondence within the bundle relating to that case) that the term is being used to refer to the OPCC and not the PCCH as an individual. For example: *“The PCC explained that ... any biographical information it holds about the Commissioner¹⁵ will therefore have*

12. <https://www.hampshire-pcc.gov.uk/wp-content/uploads/2018/10/Hampshire-Record-Retention-and-Disposal-Policy-2018.pdf>

13. <https://www.hampshire-pcc.gov.uk/transparency/foi>

14. S18 2011 Act

15. Emphasis added

*been obtained from other public sources or created after the election or from declarations that the Commissioner makes upon taking office. Such information would be held by the PCC's communications and governance teams*¹⁶.

This is consistent with the references to the OPCC as the recipient of FOIA requests relating to the PCCH on the PCCH website and consistent with the delegated authority and provision for administrative support set out in PRSA 2011.

Grounds ii, iii and iv

20. From his correspondence, it appears that the Appellant has formed the view that the PCCH is or has been a Freemason. He has not provided any reasons for this belief but has argued that it is in the public interest that this information should be in the public domain. It is not the Tribunal's role to investigate the factual accuracy of this belief. Regardless of the public interest, FOIA is limited to information that "is" held not information that a party believes "should" be held.

21. The PCCH constitutes a public authority for the purposes of FOIA pursuant to Part V of Schedule 1 FOIA. Entitlement to information under FOIA is provided for in section 1:

(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

...

Information is defined in s84 FOIA as:

"...information recorded in any form";

22. From this I am satisfied that the entitlement to information relates only to information that is held. This means information already in existence and in recorded form. It does not provide an obligation to create information, provide explanations or to put thoughts into recorded form in response to a request. A further limit is that the information is held by the public authority (and not any individual in their personal capacity).

23. It is not disputed that current membership of the Freemasons is something that the PCCH would be required to declare on the register of interests. There is no such declaration on the current or previous versions of this document. As such the information requested is not held in relation to this declaration. It is not within the jurisdiction of this Tribunal to investigate whether the submission was accurate or not at the date that the declaration was made¹⁷ as FOIA relates to information held (not whether information held is accurate). The OPCC's evidence which I accept is that there is no requirement to declare past

¹⁶ Paragraph 15 of FAS50726586

¹⁷ The Tribunal has not been provided with any reason to suggest that the submission was inaccurate

membership on the register of interests which deals only with current association.

24. I am satisfied that the request for information relates to information that is held by PCCH in relation to his public office (which would include information in the public domain that is held by his administrative staff). Whilst it is beyond doubt that the PCCH “*knows if he is or ever has been a freemason*” unless the information is held in recorded form by or on behalf of the PCCH (which includes within the OPCC) in his official capacity it falls outside FOIA.

Sufficiency of the search

25. The request was firstly for an explanation of the PCCH’s “omission” to list membership of the Freemasons. As set out above, requests for explanations only fall within FOIA if they already exist in recorded form. I am satisfied that whilst it is unlikely (in the absence of an amendment to the Register of interests)¹⁸ that a specific explanation of the omission would be recorded; a record that the PCCH had never been a Freemason or had left the Freemasons would fall within the scope of the request. I have had regard to the searches undertaken in relation to FS50726586¹⁹ which are relied upon in relation to this case. I am satisfied that the search term used of “Freemason” was appropriate and could be expected to identify any relevant material. I am also satisfied with the sufficiency of the search which included electronic searches of profile documents, press cuttings, social media postings and official documentation. I accept the evidence that the IT policy prohibits the use of personal computers for official business and that it was not likely that information held in relation to PCCH (the official rather than the private individual) would be found there. I am satisfied on a balance of probabilities that no information that falls within the scope of the request is held.
26. The Appellant has already been told to whom the Register of interests was submitted, in the absence of information held relating to any “explanation”, no-one can have had any recorded explanation submitted to them. Consequently, I am satisfied that there is no further information held in response to the second half of the request.

Conclusion

27. For the reasons set out above the appeal is refused.

Signed Fiona Henderson

Judge of the First-tier Tribunal

Dated this 18th day of October 2019

Promulgate date 21st day of October 2019

¹⁸ The evidence was that previous versions had been included in the search p46

¹⁹ P 46 bundle