

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 August 2017

Public Authority: Chief Constable of Staffordshire Police
Address: Police Headquarters
PO Box 3167
Stafford
ST16 9JZ

Decision (including any steps ordered)

1. The complainant has requested information about Operation Kalmia from Staffordshire Police ("SP"). SP provided some information but refused to provide the remainder citing section 40(2) (personal information) of the FOIA. It also advised that some information was not held but subsequently located this information and provided it to the complainant – he was dissatisfied with the content.
2. The Commissioner's decision is that section 40(2) of the FOIA is properly engaged. In respect of the late disclosure, she finds that this does fulfil the request albeit that its late provision is a breach of sections 1(1)(a) (general right of access) and 10(1) (time for compliance) of the FOIA. No steps are required.

Background

3. This request refers to Operation Kalmia. This was an investigation which was managed by the Independent Police Complaints Commission (the "IPCC"). According to its website¹: "*The investigation looked at disclosure issues prior to the 2008 trial of five men for the murder of Kevin Nunes in Staffordshire in 2002 – and how a protected witness was*

¹ <https://www.ipcc.gov.uk/news/ipcc-concludes-managed-investigation-staffordshire-police>

dealt with by Staffordshire police". The investigation concluded in March 2016.

Request and response

4. On 10 November 2016 the complainant wrote to SP via the "*What do they know?*" website² and requested the following information:

"Earlier this year Staffordshire Police provided a FIO [sic] response indicating that a number of officers involved in the investigation into the murder of Kevin Nunes received either Chief Constable or Divisional Commander commendations for their work.

This investigation has attracted a lot of public interest following the Royal Court of Justice overturning the convictions of five men convicted of the murder. Cited in the court judgement was a management review report referred to as the 'Costello Report', that had not been disclosed during the original trial.

Following the decision of the appeal court, the IPCC launched a managed investigation referred to as Operation Kalmia. The investigation looked into the conduct of a number of officers involved in the case, 14 officers were notified that they were directly under investigation.

It would appear that some of the 14 officers investigated by the IPCC, and who featured in the Costello Report, may have also received Staffordshire Police commendations for their part in the original murder investigation. The previous FIO [sic] responses from Staffordshire Police also suggest that some of the commendations were actually awarded by Det. Chief Supt Costello, the author of the controversial 'Costello Report'.

I would like to request the following information.

1. The number of officers from the 14 officers directly investigated by Operation Kalmia that received either a Chief Constable or Divisional Commander commendation.

2. The detailed 'citation' wording each of the commendation [sic] given to officers directly investigated by Operation Kalmia. (By

² https://www.whatdotheyknow.com/request/operation_kalmia_commendation_ci

citation, I mean the wording of the commendation that clearly indicates what personal quality or conduct is being commended)

3. An indication in respect of each commendation as to whether that officer was subsequently disciplined (formally or informally) following Operation Kalmia.

4. An indication in respect of each commendation as whether following Operation Kalmia disciplinary action was recommended or in respect of retired officers, or [sic] that an indication that disciplinary action would have been recommended had the officer still been serving".

5. SP responded on 7 February 2017. It provided the information requested at parts (1) and (3) of the request. In respect of part (2), it confirmed holding this but found it to be exempt from disclosure under section 40(2) of the FOIA. In respect of part (4) it advised that this information was held by the IPCC and the complainant should direct his request to them.
6. The complainant requested an internal review on 8 February 2017. When doing so he indicated that he was happy for officer names to be redacted in respect of part (2) of the request.
7. Following an internal review SP wrote to the complainant on 7 March 2017. It maintained its position.
8. During the Commissioner's investigation SP made a disclosure in respect of part (4) of the request - it did so after saying that, because it could answer part (3) of the request, it could obviously answer part (4). However, the complainant remained dissatisfied with what was provided as he considered that it did not fulfil the request made.

Scope of the case

9. The complainant contacted the Commissioner on 8 March 2017 to complain about the way his request for information had been handled. He asked her to consider the withholding of the wording of the Commendation Citations at part (2) of his request. He also asked her to consider whether or not SP holds the information at part (4) of his request.
10. The Commissioner will consider whether SP can rely on section 40(2) of the FOIA to withhold the information at part (2) if the request.

11. As SP has since revised its response and provided information in respect of part (4) of the request she will also consider whether or not this satisfies the request.

Reasons for decision

Section 40 – personal information

12. This exemption has been cited in respect of part (2) of the request. It has been cited in respect of the 'citation wording' of three commendations which fall within the scope of the request and the complainant has indicated that he wishes to know what personal quality or conduct is being commended in the commendations. He has stipulated that he is content for the names of the officers to be redacted thereby meaning, in his view, that no-one is identifiable.
13. 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 the disclosure of that personal data would be in breach of any of the data protection principles.

Is the requested information personal data?

14. The first step for the Commissioner to determine is whether the requested information constitutes personal data, as defined by the Data Protection Act 1998 (DPA). If it is not personal data, then section 40 cannot apply.
15. 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 data protection principles under the DPA. The Commissioner notes in this case that SP considers that disclosure would breach the first data protection principle.
16. In order to rely on section 40(2) the requested information must constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as:

*" ...data which relate to a living individual who can be identified
a) From these data, or
b) From those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."*

17. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
18. From the definition above, it follows that information or a combination of information, that does not relate to and identify an individual, is not personal data.
19. The first question for the Commissioner to consider is whether the requested information is personal data as defined in section 1 of the DPA.

The complainant's view

20. It is the complainant's view that redacting the names of the officers concerned from the text of the commendations will ensure their anonymity.

SP's view

21. SP has advised that:

"A commendation forms part of an individual's personal achievements within Staffordshire Police and would be included in their personnel file. Any wording within a commendation provides an assessment of that individual's work, which would constitute personal information".

22. And, in respect of the complainant's view that commendations are generally made public it said:

"Although the details of these commendations may well have been published, the full wording of each would not have been.

Each commendation is specific to the individual, containing details of conduct during the operation. Should these commendations be released, it would not be beyond the realms of possibility that an individual could deduce which commendation was issued to each officer, thus giving details of that officers conduct. Therefore I am of the opinion that this satisfies the terms of exemption under Section 40 of the Act".

23. It also advised that SP would seek permission from award winners prior to making any public release. However, it added that, in this particular instance, the awards were classed as 'discreet' because of the nature of the work involved and the associated sensitivities.

24. The Commissioner was also advised that the complainant was an ex-police officer who had worked in the Sensitive Policing Unit and that it could be anticipated that he would personally know the officers concerned.

The Commissioner's view

25. A test used by both the Commissioner and the First-tier Tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of reidentification of an individual from information which, on the face of it, appears to have been anonymised.

26. The ICO's Code of Practice on Anonymisation³ notes that:

"The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA".

27. In summary, the motivated intruder test is that if the risk of identification is "*reasonably likely*" the information should be regarded as personal data.

28. The requested information in this case relates to three police officers who received commendations, several years ago, in relation to a murder investigation which was later deemed to be flawed. In explaining his motives behind the request the complainant says that he is seeking to ascertain "*... was Staffordshire Police in truth supportive of the questionable conduct of these officers*", focusing his request on SP itself rather than the officers personally.

29. Whilst the Commissioner accepts that the information is something which would be held on a personnel file so may well be considered to have some sensitivity attached to it, what she must consider is whether or not redaction of the officers' names, as suggested by the complainant, could properly anonymise the commendations thereby not engaging the exemption at section 40(2) of the FOIA.

³ <https://ico.org.uk/media/fororganisations/documents/1061/anonymisation-code.pdf>

30. Whilst it is obvious that the individual officer would be able to identify his or herself from the disclosure of the withheld information, the Commissioner is satisfied that, as an individual, they would already know that information. What she needs to ascertain is the likelihood of any other party – including the complainant - being able to identify them from a disclosure to the world at large.
31. SP has advised the Commissioner that:

"[The complainant] could clearly identify which commendation related to which of his ex-colleagues as could other individuals unless such significant reactions were made which would then render the documents unreadable".
32. The Commissioner has viewed the commendations in full and has determined as follows.
33. Whilst it is simple to redact the names of the officers, their actual roles and reasons for being awarded the commendations make them more readily identifiable to anyone who has a knowledge of the Sensitive Policing Unit where they were employed - such as the complainant himself or anyone else with a detailed knowledge of the trial and / or the Operation Kalmia investigation. She therefore considers that, with only the names redacted, there is sufficient further information within the content of the commendations which would make it reasonably likely that a motivated intruder could identify the officers concerned and that these commendations do therefore constitute their personal data.
34. Furthermore, in order for the complainant to ascertain whether or not SP was *"... in truth supportive of the questionable conduct of these officers"* it would be necessary for the complainant to be able to identify who these officers were so he could "match them up" with any officer referred to in either Operation Kalmia or the Costello report. Otherwise it would not be possible to ascertain who received the commendation and whether or not they were an officer whose conduct was brought under question.
35. Having accepted that the requested information constitutes the personal data of living individuals other than the applicant, the Commissioner must go on to consider whether disclosure would breach one of the data protection principles.
36. SP advised that it believes disclosure would breach the first data protection principle.

Would disclosure contravene the first data protection principle?

37. The first data protection principle states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in DPA schedule 2 is met.
38. In the case of a 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 fair, lawful and meet one of the DPA schedule 2 conditions. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.
39. The Commissioner has first considered whether disclosure would be fair. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
- the individual's reasonable expectations of what would happen to their information;
 - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned); and
 - the balance between the rights and freedoms of the data subject and the legitimate interests of the public.

40. In consideration of these factors, SP provided the following arguments:

"Staffordshire Police always get permission from award winners individually before anything would be released in the public domain. In this case the awards were recommended as 'discreet commendations'. There was particular regard to the nature of the work for which the awards were being given, its sensitivities and the relationship with the individuals involved. Therefore, publicity was not considered and obtaining permission from the individuals involved was not applicable.

Furthermore the Management Review Report made recommendations but did not warrant any formal misconduct investigation, therefore at this time the public interest does not outweigh an individual's right to privacy".

41. The complainant has argued:

"As a retired police officer I am well aware that commendations are a way to recognise the good work of officers and staff and are usually given during a public ceremony with details of the 'citation' together with photographs being released to the local media. So what is it that makes these 'citations' so sensitive in this particular case?"

42. The Commissioner recognises that people have an instinctive expectation that a public authority, in its role as a responsible data controller, will not disclose certain information about them and that it will respect their confidentiality. In this case the commendations were all classed as 'discreet' and were awarded with this confidentiality in mind. The Commissioner agrees with SP that, because of this, the recipients will have a high expectation of privacy in respect of these documents. Therefore, the reasonable expectation of the related data subject is that such information would not be disclosed and that the consequences of any disclosure could be damaging or distressing to them.
43. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the withheld information. She will also take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public at large, without conditions.
44. SP has explained that these commendations were 'discreet awards' because of the nature of the work undertaken. The Commissioner is satisfied with its explanation and accepts that, because the individuals would have no reasonable expectations that the details of the commendations - which were awarded several years ago - would be placed into the public domain, their disclosure could be damaging or distressing to them.
45. Additionally, in view of the sensitivity of the case and the media interest in the subject matter, the Commissioner accepts that any related party who was identified could well be sought out by the media. As such she accepts that disclosure could cause damage and distress.
46. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in its disclosure.
47. In considering these 'legitimate interests', such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.
48. The Commissioner acknowledges that the issue under consideration in this case raises issues in relation to accountability and transparency. In respect of this she notes the following arguments put forward by the complainant:

"In this case the Divisional Commanders [sic] were given by Supt. Costello, the author of the recently released "Costello Report", the high controversial document the disclosure of which to the Court of

Appeal led to the acquittal of five men for the murder of Kevin Nunes.

Clearly, as it now appears that some of the officers mentioned within that damning report were then 'commended' by the author of the report, for their work in connection with the same case, the public will be rightly interested to learn why; i.e was Staffordshire Police in truth supportive of the questionable conduct of these officers. The wording of the citations is therefore very important and it is in the public interest to release it".

49. As mentioned above, the Commissioner has viewed the commendations. She has also viewed the associated form which was completed as an application for the awards. Having done so she is able to confirm that the original application was not made by officer named by the complainant. Whilst this officer subsequently made the awards they were not actually initiated by him. Therefore, the complainant's concerns about that point are to some extent misplaced.
50. In the Commissioner's view, SP has already provided sufficient information about Operation Kalmia to meet the legitimate interest of the public without infringing the rights of the parties connected to this sensitive matter.
51. The officers concerned have all been formally dealt with using the appropriate channels. Whilst the complainant may not be satisfied with the outcome, this is not something that the Commissioner can further consider as she does not have jurisdiction on policing matters.
52. In light of her assessment of the nature of the information, and the reasonable expectations of the individuals concerned, the Commissioner is satisfied that release of the withheld information would be an intrusion of privacy and could potentially cause unnecessary and unjustified distress to the data subjects. She considers these arguments outweigh any legitimate interest in disclosure. She has therefore concluded that it would be unfair to disclose the withheld information - in other words, disclosure would breach the first data protection principle. She therefore upholds SP's application of the exemption at section 40(2) of the FOIA.

Section 1 – general right of access

Section 10 – time for compliance

53. Section 1(1) of the FOIA states that anyone making a request for information to a public authority is entitled to be informed whether the public authority holds the information, and if so, to have that information communicated to them.
54. Section 10(1) of the FOIA states that:

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt".

55. Having initially advised the complainant that it did not hold the information at part (4) of his request SP subsequently revised its position. At a late stage it advised him that:

"Staffordshire Police have changed their position in response to this question and are able to reply as follows:

Divisional Commendation x 2 - misconduct, 1 officer serving/1 officer retired.

Chief Constables Commendation x 1 – misconduct, 1 officer retired".

56. The complainant subsequently advised the Commissioner that he did not accept that this complied with his request. He did so on the grounds that the response: *"only responds to the class of Commendation i.e. Divisional Commander of [sic] Chief Constables rather than address each of the commendations given as outlined in the request".*
57. The Commissioner has therefore considered whether or not SP's interpretation of this part of his request is reasonable and if it has provided the information that it holds in compliance with section 1(1)(a) of the FOIA.
58. The complainant has asked for "an indication" in respect of each commendation regarding whether disciplinary action was recommended or would have been recommended if any officer had retired. SP has clearly advised that, in respect of all 3 Commendations, misconduct was recommended. It has also indicated whether or not that officer was retired.
59. The Commissioner is satisfied that, on an objective reading of this part of the request, SP have now fully complied with section 1 of the FOIA. The actual content of the commendations themselves is a different matter and this was withheld under section 40(2) of the FOIA as set out in the analysis above.
60. However, in making the disclosure outside of the statutory time limit for compliance, the Commissioner does find breaches of section 1(1)(a) and 10(1) of the FOIA.

Right of appeal

61. 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

62. 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.
63. 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

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