

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 August 2018

Public Authority: Police and Crime Commissioner for Warwickshire

Address: Warwickshire Office of the Police and Crime Commissioner
3 Northgate Street
Warwick
Warwickshire
CV34 4SP

Decision (including any steps ordered)

1. The complainant has requested correspondence and emails about the resignation of the Deputy Crime Commissioner from the Office of the Police and Crime Commissioner for Warwickshire (the "OPCC"). The OPCC disclosed some information but withheld the remainder citing section 40(2) (personal information) of the FOIA as its basis for doing so. The Commissioner's decision is that section 40(2) is properly engaged. No steps are required.

Background

2. Although it postdates the request, it is of direct relevance that, on 10 July 2018, Staffordshire Police released the following press statement:

"Following an independent investigation by Staffordshire Police into an allegation of assault against the former Deputy Police and Crime Commissioner for Warwickshire, Rob Tromans, no charges are to be brought.

A file was submitted to the CPS who, having considered the evidence, concluded that there was insufficient evidence to support a prosecution".

Request and response

3. On 5 April 2018 the complainant wrote to the OPCC and requested information in the following terms:

"Please could you provide the content of all email, text message, Whatsapp, written or other relevant communications between the former Deputy PCC Rob Tromans and the PCC Philip Seccombe over the past four weeks".

4. The OPCC responded on 25 April 2018. It provided some information but withheld the remainder citing section 40(2) of the FOIA as its basis for doing so.
5. Following an internal review the OPCC wrote to the complainant on 11 May 2018. It maintained its position regarding section 40(2), adding that section 41 of the FOIA may also be appropriate.

Scope of the case

6. The complainant contacted the Commissioner on 14 May 2018 to complain about the way his request for information had been handled. He asked her to consider the citing of section 40 of the FOIA and drew her attention to an article on the BBC website¹.
7. The Commissioner will consider the citing of section 40 below.

Reasons for decision

8. The Commissioner has viewed the withheld information in its entirety. It concerns two meetings, three emails and a letter. She has also considered representations she has received from the complainant and the OPCC.

Section 40 – personal information

9. 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.
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¹ <http://www.bbc.co.uk/news/uk-england-coventry-warwickshire-44067327>

Is the information personal data?

10. The first step for the Commissioner to determine is whether the requested information, if held, constitutes personal data, as defined by the Data Protection Act 1998 ("DPA"), the legislation which was in force at the time of this request. If it is not personal data, then section 40 cannot apply.

11. The DPA defines personal data as:

*"...data which relate to a living individual who can be identified
a) from those 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."*

12. 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.

13. The requested information clearly relates to a specified named party and therefore any information held is his personal data.

Is the information sensitive personal data?

14. Sensitive personal data is personal data which falls into one of the categories set out in section 2 of the DPA. The Commissioner considers the relevant category in this instance is:

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

15. In this case, the request relates to an alleged assault committed by the named party. The Commissioner is satisfied that the information held in respect of the two meetings falls under sub-section 2(g) in relation to the named individual.

16. Having accepted that the request is for the personal data, including the sensitive personal data, of living individuals other than the applicant, the Commissioner must go on to consider whether confirming or denying if the information is held would contravene any of the data protection principles.

Would confirmation or denial breach the first data protection principle?

17. The first data protection principle states -

"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, and
(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

18. 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 fair, lawful and would meet one of the DPA Schedule 2 conditions. If disclosure would fail to satisfy any of these criteria, then the information is exempt from disclosure. The Commissioner has first considered whether disclosure would be fair.

19. 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);
- any legitimate interests in the public having access to the information; and,
- and the balance between these and the rights and freedoms of the individuals who are the data subjects.

20. The Commissioner recognises that staff would have an instinctive expectation that the OPCC, in its role as a responsible data controller, will not disclose certain information about them and that it would respect their confidentiality. In that respect, in its refusal notice the OPCC advised the complainant as follows:

"There is a duty of confidence owed to an employee in relation to matters of a confidential nature. Rob Tromans was an employee of the OPCC, and it would have been in his reasonable expectation that confidential contacts between himself and his employer would remain confidential. Disclosure could cause an employee distress as this is likely to be an unwarranted invasion of privacy".

21. When requesting an internal review the complainant said:

"The role of the Deputy PCC is a public role. The ability of the person performing that role to undertake it, and any reasons why they may no longer be able to, are clearly in the public interest.

What is also in the public interest is how much knowledge the Conservative PCC had of events leading up to Mr Tromans' resignation, and whether he played an active role in keeping the detail away from the public in the lead up to the local elections – elections where Mr Tromans is standing as a Conservative candidate.

I believe public confidence in the office of the PCC will be undermined if the requested information is not voluntarily disclosed. The reason for the resignation should play a part in the final decision of whether to disclose the details...

... There is clearly a great deal of speculation around his departure, and the reasons for it. Releasing the details of his resignation would help to quell that.

If releasing the information behind the resignation is not in Mr Tromans' interest, because it calls into question his character / conduct, it's clearly in the public interest for it to be disclosed – and in the interest of the PCC's Office to show it volunteered this information rather than being complicit in any attempted cover up”.

22. In its internal review the OPCC responded saying:

“Mr Tromans has an expectation that information about his resignation is kept confidential. Although he held a senior role in which there is generally a greater level of expectation of accountability and disclosure, the information relates to his personal life and he would therefore not expect this information to be publically disclosed. This is a reasonable expectation for an employee to have.

The disclosure could have an unjustified adverse effect upon Mr Tromans and cause him distress, given his expectation of privacy. I cannot include further information about the adverse effects and distress to Mr Tromans without revealing some of his personal information”.

23. The Commissioner considers that, in most cases, the very nature of personal matters such as reasons behind a resignation means it is more likely than not that disclosing it will be unfair. The reasonable expectation of the data subject is that such information would not be disclosed and that the consequences of any disclosure could be damaging or distressing to them. Furthermore, she considers that such matters will carry a strong general expectation of privacy for the party concerned.

24. As to the consequences of disclosure upon a data subject, the question – in respect of fairness - is whether disclosure would be likely to result in unwarranted damage or distress to that individual.
25. 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.
26. Given the sensitivity of the subject matter, the Commissioner considers that disclosure in this case could lead to an intrusion into the private life of the individual concerned and the consequences of any disclosure could cause damage and distress to that party.
27. Notwithstanding a data subject's reasonable expectations or any damage or distress caused, it may still be fair to disclose information if there is a more compelling public interest in doing so. Therefore the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in disclosure of the information held.
28. The Commissioner would stress that this is a different balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Given the importance of protecting an individual's personal data the Commissioner's 'default position' is in favour of protecting the privacy of the individual. The public interest in confirming if information is held must outweigh the public interest in protecting the rights and freedoms of the data subject if disclosure is to be considered fair.
29. The interest in disclosure must be a public interest, not the private interest of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.
30. In this respect the OPCC has advised:

"... I have considered whether there is a wider public interest justifying disclosure. A Deputy PCC as well as being an employee, holds a public office role and, as such, there is a public interest in relation to the discharging of that role including matters such as the resignation from that role.

The OPCC recognised that there was a public interest in disclosing information about the resignation ... and issued a press release on 29 March 2018. The press release contained as much information as the OPCC was able to disclose without breaching either data protection principles or the common law duty of confidence.

We believe that the OPCC has satisfied public interest considerations through the disclosure of the press release and that there are no legitimate interests in disclosure and for the arguments set out above, any further disclosure would not be fair”.

31. The Commissioner acknowledges that the integrity of staff at a high level such as the data subject in this case is of genuine public interest. Their actions need to be lawful and their individual conduct is of considerable importance to the maintenance of the public's trust in a public authority. However, as mentioned above, she has viewed the withheld information and decided that there is nothing to suggest any inappropriate action on behalf of the parties concerned.
32. If there had been any genuine grounds for concern about the former Deputy PCC's conduct in respect of an alleged assault then it would have been for the appropriate bodies to have taken these forward, namely the police followed by the CPS. The appropriate authorities were clearly made aware of any related concerns and have since dealt with them; they have not been pursued due to lack of evidence (albeit the review of the evidence had not been completed until after the request). Had premature disclosure been made as a result of this request under FOIA then it is likely that this would have impacted on the integrity of those investigations and could have resulted in an inappropriate disclosure of information prior to the issues having been dealt with in the correct manner. Non-premature disclosure in this case has therefore ensured that any alleged crime-related issues were resolved via the appropriate channels rather than through disclosure to the world via the FOIA. If any action had been deemed necessary then this would have been taken. As it stands, a subsequent disclosure of a press release (as in "Background" above) ultimately informed the public that the CPS had deemed that no action was necessary. This later disclosure was made in a carefully managed way, outside the terms of the FOIA.
33. In light of the nature of the information and the reasonable expectations of the individual concerned, the Commissioner is satisfied that disclosure at the time of the request would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the data subject; she considers these arguments outweigh any legitimate interest in disclosure. She therefore finds that disclosure would be unfair and the exemption at section 40(2) of the FOIA is properly engaged.
34. As the Commissioner has determined section 40(2) is engaged she has not found it necessary to consider the application of section 41 of the FOIA (information provided in confidence) to the request.

Right of appeal

35. 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

36. 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.
37. 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

Carolyn Howes
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