

**Freedom of Information Act 2000 (FOIA)  
Decision notice**

**Date:** 23 June 2022

**Public Authority:** The Office of the West Midlands Police & Crime Commissioner

**Address:** Lloyd House,  
Colmore Circus  
Queensway  
Birmingham  
B4 6NQ

**Decision (including any steps ordered)**

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1. The complainant has requested copies of the application forms for successfully appointed applicants to the position of Legally Qualified Chair (LQC) for Police Conduct Panels for the last 10 years.
2. The Commissioner's decision is that West Midlands Police and Crime Commissioner (WMPCC) has correctly cited section 40(2) in response to the request.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

**Request and response**

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4. On 29 June 2021, the complainant wrote to WMPCC and requested information in the following terms:  

"I am aware that the actual decision to appoint a chair is posted online but I cannot find posted online any of the actual applications made by persons who were subsequently appointed as a chair and could you please provide copies of those applications for the past 10 year period."
5. WMPCC sought clarification the same day on "are you able to clarify whether you are referring to a Chair appointed to a hearing, or our

appointment process to select people to sit on the list of Legally Qualified Chairs? "

6. The complainant wrote to WMPCC again the same day stating:

"I requested copies of the applications made by the persons who actually ended up being appointed as a chair during the past 10 year period and that would of course include all those appointed.

I did not ask for a list of potential chairs.

Please now deal with the request."

7. On 1 July 2021 WMPCC asked the complainant to make contact by telephone to discuss the request. The complainant advised that he wished all communication to be via email.

8. WMPCC provided a response on 14 July 2021 stating:

"In response to your request, I can confirm that each year there are up to 20 misconduct hearings. The Office of the Police and Crime Commissioner (OPCC) has a Panel of independent people, and one of the Panel is selected for each hearing. As a result, there is not a Chair, but rather a list of potential Chairs, and one is selected for each hearing. We also take into account their availability. The individuals on the Panel do not apply, Chairs are selected by the OPCC and so unfortunately there is not an application that we can share. The OPCC therefore cannot provide the application of the person who has been Chair for the last 10 years because that position does not exist.

If your request is referring to the OPCC's appointment process to select individuals to sit on the list of Legally Appointed Chairs, I can advise that this would classify as personal information and therefore is exempt under Section 40 (2) of the Freedom of Information Act, as complying with the request would breach any of the principles in the UK General Data Protection Regulation. This is because they are in the form of an application form. We also consider that applications for the appointment process are given to us with a reasonable assumption from the applicant that they are provided to us in confidence."

9. Following an internal review WMPCC wrote to the complainant on 30 July 2021 advising:

"Having considered your request and the response that has been provided to you, I think that this was a reasonable response and it answered the question as fully as we are able to do so, whilst explaining why we could not provide applications for each hearing. It explained the overarching process and gave an explanation of how the system works, and also explained that we could not provide copies of applications for

each process over the last 10 years (as you requested) simply because such applications do not exist. LQCs do not apply to Chair the panels. It also seems reasonable to me that your request was dealt with under the Freedom of Information Act, and I can't think of any detriment you have suffered as a result of this. I and maintained its position."

## Scope of the case

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10. The complainant contacted the Commissioner on 30 July 2021 to complain about the way his request for information had been handled and stated:

"The complaint is that the information request I made by e mail on the 29 June 2021 of the West Midlands PCC was inappropriately dealt with under the FOI Act and despite it being crystal clear what I had requested - which was nothing more than copies of the actual completed applications for the post of Legally Qualified Chair (LQC) of applicants who were subsequently appointed as an LQC - the responses I received appeared to amount to deliberate attempts to misinterpret the information request in order to avoid complying with it (it having in any event been incorrectly dealt with under the FOI Act instead of the DPA)."

11. The Commissioner considers the scope of his investigation to be to determine if WMPCC was correct to cite section 40(2) in response to the request. In doing so he is mindful of a previous decision notice issued on 4 May 2022<sup>1</sup> relating to an identical request to the OPCC for Cambridgeshire and Peterborough from the same complainant.

## Reasons for decision

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### Section 40(2) – Third party personal data

12. Section 40(2) provides 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.

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<sup>1</sup><https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4020345/ic-129110-r4l8.pdf>

13. In this case the relevant condition is contained in section 40(3A)(a)<sup>2</sup>. 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'), asset out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
14. 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.
15. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

### **Is the information personal data?**

16. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living 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.
18. 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.
19. 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.
20. 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.

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<sup>2</sup> As amended by Schedule 19 Paragraph 58(3) DPA

21. 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.
22. The most relevant DP principle in this case is principle (a).

**Would disclosure contravene principle (a)?**

23. 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”.

24. 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**

25. 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.
26. 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”<sup>3</sup>

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<sup>3</sup> 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”.

27. 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:-
- 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.
28. 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**

29. 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.
30. 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.
31. WMPCC stated it cannot identify any legitimate interest in the release of the withheld information. It considers the candidates have an expectation that their information would be confidential to the application process.
32. However, the Commissioner acknowledges that the complainant likely has a private legitimate interest and they consider there is also a wider legitimate public interest in ensuring those appointed as LQCs have the appropriate qualifications and merits to fulfil those duties. Nevertheless, the Commissioner is not persuaded that this is sufficient to outweigh the rights and freedoms of the individuals concerned.

**Is disclosure necessary?**

33. '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.
34. The Commissioner considers that the complainant's identified legitimate interests have been met by publication of the blank application form online as referred to in the previous decision notice. 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 OPCCs in relation to the complainant's request to see the questions applicants were asked.
35. The Commissioner accepts that information on application forms completed by the candidates includes personal information and views they would not have any expectation of being disclosed and that were part of an application process.
36. 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 WMPCC.
37. As the Commissioner has decided in this case that further disclosure is not necessary to meet the legitimate interest, 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).
38. 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.
39. The Commissioner has therefore decided that the WMPCC was entitled to withhold the information under section 40(2), by way of section 40(3A)(a) of FOIA.

## Right of appeal

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40. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

41. 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.
42. 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



**Susan Duffy**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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