

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 March 2024

Public Authority: Commissioner of the City of London Police
Address: Police Headquarters
Guildhall Yard
East London
EC2V 5AE

Decision (including any steps ordered)

1. The complainant has requested the interviews, and related information, from an investigation undertaken by the City of London Police ("CoLP"). CoLP refused to provide this information, citing sections 30(1)(a) (Investigations and proceedings) and 40(2) (Personal information) of FOIA.
2. The Commissioner's decision is that CoLP was entitled to rely on section 30(1) to withhold the requested information. He does not require any steps.

Background

3. Information about "Club Penguin Unwritten" can be found online¹.
4. Additionally, in response to an earlier FOIA request, the complainant was advised by CoLP:

¹ <https://www.bbc.co.uk/news/technology-61107939>

"The outcome of this investigation was that conditional cautions were issued to four suspects. The condition, which was adhered to, was that the domain name for Club Penguin was provided to the City of London Police and that all consented to their devices being wiped of anything that related to Club Penguin.

...The Decision was made by Police and was not sent to CPS as it was believed this disposal option was open to Police to make this decision.

...The investigation was referred to the City of London Police by the Motion Picture Association of America on behalf of Disney.

...Total value obtained by the four suspects - £267,341.071. This is the economic benefit, the loss to industry is hard to quantify in terms of a financial loss. The harm is the most impactful element as Club Penguin Rewritten has the risk of not being regulated and being used as a platform to initiate grooming or cyber bullying".

5. CoLP also advised the complainant that there had been eight interviews and that the case did not go to Court.

Request and response

6. On 28 June 2023, following his earlier request, the complainant wrote to CoLP and requested the following information:

"Please thank those involved for the prompt disclosure in [earlier request], related to the investigation into Club Penguin relevant for a book which I am writing. One of those requests - my request for interview transcripts - was not provided because such transcripts do not exist, though some details of the interviews were provided. I'd like to therefore make two further requests for disclosure, which clarify that a little.

- 1) Please provide a copy of the eight interviews relevant to the Club Penguin investigation (as referenced in [earlier request]).

I had assumed that transcripts would exist, which would make it easier to redact personal or sensitive information. I am happy to receive this in whatever format is most convenient, even if that means redactions made within audio clips. I note the Information Commissioner's guidance which advises that material stored in one format (ie. audio/video) should be extracted and disclosed in another (ie. written transcript): 'If you have the "building blocks" necessary to produce a particular type of information, it is likely that you would hold that information'.

However, I am very conscious of the time that would take to do manually, even if it may technically fall within statutory limits. There are widely used tools which can generate transcripts from audio within minutes, if that is easier than redacting audio, but any format would suffice.

- 2) Please provide copies of any disclosures and items/documents presented in the above interviews, and relevant context as to what they are. I would be grateful for this irrespective of whether (1) can be fulfilled.

I apologise for needing to submit a second request on this to acquire more detail, and I'd like to re-iterate my gratitude for the time spent on it".

7. On 17 August 2023, CoLP responded. It advised that it did not hold the interviews at part (1) of the request. It confirmed that it did hold some information in relation to part (2) of the request, but refused to provide this, citing sections 40(2) and 30(2) of FOIA.
8. The complainant requested an internal review on 18 August 2023. He disagreed with CoLP's position that the interviews were not held and provided rationale. He disagreed with what he considered to be the 'blanket' application of exemptions in respect of part (2) of the request and advised that any personal information could be redacted. He also noted that:

"With respect to the Section 40(2) exemption, I recognise that there cannot be unlawful disclosure of personal information. Nevertheless, information which would make individuals personally identifiable (eg. names, especially of those who are not associated with committing the offence) could and should be redacted".
9. On 26 February 2024, during the Commissioner's investigation, CoLP provided an internal review. It confirmed that it did hold eight interviews, as well as further information, but advised that this was fully exempt by virtue of sections 40(2) and 30(1)(a)(b) and (c) of FOIA.
10. CoLP later confirmed to the Commissioner that it was relying on 30(1)(a) and 40(2) of FOIA.

Scope of the case

11. The complainant initially contacted the Commissioner on 19 October 2023 to complain about the way his request for information had been handled, prior to receiving an internal review. Once the internal review

had been provided, the Commissioner asked the complainant for his remaining grounds of complaint.

12. The complainant was dissatisfied with the general handling of his request by CoLP. He disagreed with the citing of section 30. He also asked for the Commissioner to consider the citing of section 40, saying:

“...my grounds have changed - I now argue that there are two legitimate pathways to disclosure, irrespective of redaction: consent processing based on the case which I cited that found this existed for interviews, and disclosure relating to unlawful acts for the special purposes [ie writing a book]”.

13. The complainant did not provide the reference for the case he referred to, but the Commissioner has presumed it is EA/2016/0011, in which the First-tier Tribunal determined that a small amount of personal information could be disclosed, going against the Commissioner's original decision. However, while instructive, it is noted that this was a First-tier Tribunal finding, which is not legally binding and the Commissioner will consider each case on its own merits.
14. Furthermore, the Commissioner's findings here are based on what the complainant stated when asking for an internal review, ie that any personal information “could and should be redacted”, which is what was initially agreed when commencing this investigation. The Commissioner will therefore not reintroduce the application of section 40 at this late stage. However, by way of assistance to the complainant, he has provided an analysis of what his views would be in such circumstances in “Other matters” at the end of this notice.
15. The Commissioner has viewed the documents concerned which consist of written disclosures, prepared statements, four transcribed interviews and four risk assessments. There are also four interviews, which have not been transcribed, so the Commissioner has listened to the recordings.
16. The Commissioner will consider the citing of section 30(1) below.

Reasons for decision

Section 30 – Investigations and proceedings

17. Section 30(1)(a) provides that information held by a public authority is exempt information if it has, at any time, been held by the authority for the purposes of:

“(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained—
(i) whether a person should be charged with an offence, or
(ii) whether a person charged with an offence is guilty of it”.

18. The Commissioner considers that the phrase “at any time” means that information can be exempt under section 30(1) of FOIA if it relates to a specific ongoing, closed or abandoned investigation.
19. Consideration of section 30(1) is a two-stage process. Firstly, the exemption must be shown to be engaged. Secondly, as section 30 is a qualified exemption, it is subject to the public interest test.

Is the exemption engaged?

20. The first step is to address whether the requested information falls within the class specified in section 30(1) of FOIA.
21. The Commissioner has published guidance on section 30 which states that section 30(1) can only be claimed by public authorities that have a duty to investigate whether someone should be charged with an offence.
22. The Commissioner’s guidance² describes the circumstances in which the subsections of section 30(1) might apply. With respect to section 30(1)(a), the guidance says:

“The exemption applies to both investigations leading up to the decision whether to charge someone and investigations that take place after someone has been charged. Any investigation must be, or have been, conducted with a view to ascertaining whether a person should be charged with an offence, or if they have been charged, whether they are guilty of it. It is not necessary that the investigation leads to someone being charged with, or being convicted of an offence...”.

23. The request clearly relates to a specific criminal investigation and the Commissioner is therefore satisfied that the exemption is engaged.

The public interest test

24. Section 30(1)(a) is subject to a public interest test. This means that even though the exemption is engaged, the information may only be

² <https://ico.org.uk/media/for-organisations/documents/1205/investigations-and-proceedings-foi-section-30.pdf>

withheld if, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

25. In accordance with his guidance, when considering the public interest in maintaining exemptions the Commissioner considers that it is necessary to be clear what they are designed to protect.
26. The purpose of section 30 of FOIA is to protect the Police's (and other applicable public authorities) function of carrying out effective investigations.

Public interest arguments in favour of disclosure

27. The complainant clearly has a personal interest in the requested information and wishes to have it to assist with a book he is authoring.

28. When requesting an internal view he also referred to:

"the principle of open justice, for which transparency is essential, including for investigations of copyright infringement. That being said, my appeal broadly seeks to demonstrate that the factors against disclosure have been overstated rather than the factors supporting disclosure being understated".

29. CoLP has argued:

"Disclosure of the interview recordings would enable the public to assess the fairness, integrity and conduct of the interviews ensuring that current guidance has been complied with".

30. It also advised the Commissioner:

"We recognise that there is a public interest in Police investigations but consider that the degree of public interest is proportionate to the gravity of the offence being investigated and its significance in respect of public issues subject to high profile media attention. For example, we consider the investigation of Wayne Couzens for the rape and murder of Sarah Everard to be of the most significant public interest. By contrast, an investigation relating to a low value theft would have a much more limited public interest.

In respect of the Clun [sic] Penguin investigation, there is some degree of public interest. An internet search has identified a short report by the BBC, together with a number of other reports from the tech and gaming communities".

Public interest in favour of maintaining the exemption

31. CoLP has argued:

“Whilst we have confirmed that no comment was made in respect of questions posed in the interviews, disclosure of the questions themselves to the public domain would give a very clear indication of the information that the interviewing officer was seeking. This in turn would effectively provide advance notification of the questions likely to be posed in a copyright offence investigation and transfer any tactical advantage from the interviewing officer to the suspect, thereby prejudicing law enforcement capability”.

The Commissioner's views

32. In reaching a view on where the balance of the public interest lies in this case, the Commissioner has taken into account the nature of the requested information as well as the views of both the complainant and CoLP.
33. The Commissioner understands the complainant's personal interest in gaining access to the requested information to provide material for his book. However, it is important to reiterate that a disclosure under FOIA is a disclosure to the world at large and not just a private transaction between the public authority and the applicant.
34. The Commissioner accepts that it is important for the public to have confidence in the Police's investigative capabilities. Accordingly, there is a general public interest in disclosure of requested information in order to promote accountability and transparency and to maintain confidence and trust.
35. He also recognises that there is a very strong public interest in protecting the investigative capabilities of public authorities. Disclosure would reveal the techniques used by CoLP in these particular investigations as it would show the lines of questioning and methods used. The Commissioner considers that appropriate weight must be afforded to the public interest inherent in the exemption – in this case, the public interest in the Police being able to effectively conduct its function of carrying out criminal investigations.
36. The Commissioner does also have concerns that disclosing information considered as part of a criminal investigation, which identifies individuals who assisted with the investigation, could create a perception among the wider public that sensitive information about criminal investigations may be disclosed to the world at large, even where the evidence and statements have not resulted in prosecution. He considers that there is a real chance this may deter people (including witnesses, complainants and suspects) from coming forward and cooperating with prosecuting

authorities, particularly where criminal offences have been alleged. There is a very significant public interest in avoiding that outcome and it is a factor of some weight in favour of maintaining the exemption in this case.

37. Accordingly, the Commissioner is satisfied that CoLP is entitled to rely on section 30(1)(a) of FOIA to refuse to disclose the requested information.

Other matters

38. Although they do not form part of this notice, the Commissioner wishes to highlight the following matters.

Internal review

39. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of FOIA. Rather, they are matters of good practice which are addressed in the code of practice issued under section 45 of FOIA. However, the Commissioner has issued guidance in which he has stated that, in his view, internal reviews should take no longer than 20 working days to complete, and even in exceptional circumstances the total time taken should not exceed 40 working days.
40. In this case, the internal review was not completed in accordance with that guidance.
41. The Commissioner expects CoLP to ensure that the internal reviews it handles in the future adhere to the timescales he has set out in his guidance.
42. The Commissioner will use intelligence gathered from individual cases to inform his insight and compliance function. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our FOI and Transparency Regulatory Manual³.

³ https://ico.org.uk/media/about-the-ico/documents/4020912/foi-and-transparency-regulatory-manual-v1_0.pdf

Section 40 – Personal information

43. Although, due to the initial grounds provided by the complainant and his findings above, it is not necessary for the Commissioner to consider the citing of section 40, he has nevertheless used his discretion to clarify his views on the application of that exemption for the complainant. The position is based on the complainant's views that redaction is not necessary, as per the grounds in paragraph 12.
44. Section 40(2) of FOIA 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.
45. In this case the relevant condition is contained in section 40(3A)(a)⁴. 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'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
46. 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 FOIA cannot apply.
47. 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?

48. Section 3(2) of the DPA defines personal data as: "any information relating to an identified or identifiable living individual".
49. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
50. 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.

⁴ As amended by Schedule 19 Paragraph 58(3) DPA.

51. 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.
52. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the four suspects concerned. He is satisfied that this information both relates to and identifies them by name. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
53. 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.
54. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

55. 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".
56. 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.
57. 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.
58. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.
59. Furthermore, if the requested data is criminal offence data, in order for disclosure to be lawful and compliant with principle (a), it must also meet the requirements of Article 10 of the UK GDPR.

Is any the information special category data?

60. Information relating to special category data is given special status in the UK GDPR.
61. Article 9 of the UK GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.

62. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that some of the requested information does include special category data. He has reached this conclusion on the basis that four of the documents are Voluntary Risk Assessment Form 245Bs which contain medical details about the subjects.
63. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 95 can be met.
64. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
65. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
66. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

Is any of the information criminal offence data?

67. Information relating to criminal convictions and offences is given special status in the UK GDPR.
68. Article 10 of the UK GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to:
 - (a) The alleged commission of offences by the data subject; or

⁵ [https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/lawful-basis/special-category-data/what-are-the-conditions-for-processing/#:~:text=Article%209\(2\)\(f,or%20an%20appropriate%20policy%20document.](https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/lawful-basis/special-category-data/what-are-the-conditions-for-processing/#:~:text=Article%209(2)(f,or%20an%20appropriate%20policy%20document.)

(b) Proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.

69. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the remaining information comprises criminal offence data. He has reached this conclusion on the basis that all of the remaining information concerns the statements and interviews of those parties in connection with criminal proceedings.
70. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.
71. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under FOIA are the conditions at Part 3 paragraph 29 (consent from the data subject) or Part 3 paragraph 32 (data made manifestly public by the data subject).
72. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
73. As none of the conditions required for processing criminal offence data are satisfied there is no legal basis for its disclosure. Processing this criminal offence data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

Right of appeal

74. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

75. 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.

76. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF