

Appeal ref: 455

20th July 2018

Dear Member of the public

Ref: Review of FOIA decision relating to your request dated 5th April 2018

1. Background

1.1 The Chief Executive of the Office of the Police and Crime Commissioner for Cambridgeshire and Peterborough appointed me to review your FOI request following your email of 5 April 2018 to the OPCC.

1.2 Your initial request was for information concerning a person (referred to throughout this document as “the data subject”), the former Cambridgeshire Deputy Police and Crime Commissioner:

- 1) A complete copy of the referral that was made by the Police and Crime Panel to the IPCC;
- 2) complete copies of all documents held by the Office of the Police and Crime Commissioner for Cambridgeshire and Peterborough and the Police and Crime Panel on this matter;
- 3) complete copies of all correspondence between the IPCC and the Office of the Police and Crime Commissioner for Cambridgeshire and Peterborough/the Police and Crime Panel relating to this matter.
- 4) A schedule of documents which are relevant to your request, (a brief description of each relevant document, the date of the document, and whether the document is being released or not).

1.3 The OPCC, responded to your request on 30 April 2018 determining that the information that you requested would not be released and relied upon two exemptions contained within the FOIA.

1.4 Those exemptions were FOIA S36 and S40(1). In your response of 18 June 2018 you have indicated that you disagree that these are applicable in this case and have asked for the original decision to be reviewed.

1.5 Before commencing the review, it may be helpful to provide some background information.

Deputy Police and Crime Commissioner (DPCC) for Cambridgeshire and Peterborough was confirmed by the Cambridgeshire Police and Crime Panel on 29 June 2016.

On 15 May 2017 the Chief Executive (and Monitoring Officer) of the Office of the Police and Crime Commissioner (OPCC) made a voluntary referral to the IPCC concerning this person and media reports over the preceding weekend.

On 15 May 2017 Andy Coles resigned from his post as DPCC for Cambridgeshire and Peterborough.

On 31 January 2018 the Cambridgeshire Police and Crime Panel (the Panel) determined that following a report from the IPCC, that there was no further action required by the Panel.

2. Review

2.1 As the review officer, Information Commissioner’s Office (ICO) guidance indicates that my role is to “make a fresh decision based on all the available evidence that is relevant to the date of the request, not just a review of the first decision”.

2.2 I have reviewed your request, any material that we may hold that is relevant to your request and whether the exemptions that were used to withhold the information are indeed justifiable.

2.3 Having reviewed the information held, in my opinion, the S36 exemption is more applicable to other areas of information that are not personal data related. Whilst S40(1) is an exemption, it does

not relate to third party applications for personal data. On behalf of the OPCC, I would like to apologise for any inconvenience that wrongly citing S36 and S40(1) in our initial response may have caused.

3. "Fresh Decision"

3.1 In my opinion (see 3.6), the information that you requested in your original FOI request falls within the Data Protection Act definition of personal data. The ICO have published guidance relating to "Requests for personal data about public authority employees." In order to assist, I have provided a link below:

https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

3.2 The role of the DPCC is an unusual one in terms of determining whether the holder of the Office is an "employee." Whilst it is a political appointment and not secured through an open selection process, the role does carry a salary and pension, is not an elected position, and is subject to dismissal. For the purposes of interpreting the FOIA and the ICO guidance I have, therefore, done so on the basis that the DPCC is, to all intents and purposes, an employee.

3.3 There is ICO "general" guidance in the application of FOIA to personal data, which is consistent with my reasoning below, ie whether or not the DPCC is in strict definitional terms an employee or not, the thought processes below are still valid.

3.4 For simplicity and clarity, I have copied in full the "Overview" section of the "Requests for personal data about public authority employees" document as it will help to explain my determination in respect of your request:

When a public authority receives a request for information that constitutes personal data about its employees, it must decide whether disclosure would breach Principle 1 of the Data Protection Act (the DPA), ie whether it would be fair and lawful to disclose the information.

Whether the disclosure is fair will depend on a number of factors including:

- *Whether it is sensitive personal data;*
- *The consequences of disclosure;*
- *The reasonable expectations of the employees; and*
- *Whether there is a legitimate interest in the public or requester having access to the information and the balance between this and the rights and freedoms of the data subjects.*

If the public authority decides that it would be fair, the disclosure must also satisfy one of the conditions in Schedule 2 of the DPA.

In addition, if the information constitutes sensitive personal data, the disclosure must also satisfy one of the conditions in Schedule 3 of the DPA.

In some circumstances the authority may neither confirm nor deny that it holds the requested information.

This general approach can be applied to various types of employee information, including:

- *Salaries and bonuses*
- *Information about termination of employment and compromise agreements*
- *Lists and directories of staff*
- *Names in documents*
- *Registers of interests*

Where employees request their own data, this is exempt under FOIA and the public authority should instead handle this as a subject access request under the DPA.

Employees do not have a right under the DPA to request personnel information that falls into 'category (e)' of the definition of personal data. If the information is requested by others the exemption is qualified, rather than absolute.

It may be fair to disclose the names of people representing other organisations.

If the information requested is environmental information, the public authority must deal with the request under the EIR. The provisions in the EIR relating to personal data correspond to those in FOIA.

3.5 In the main body of the guidance, the determination process follows the stages articulated above. These are complex issues to consider and for ease of reading, I have therefore provided a summary of my considerations following the format of the ICO guidance document. The italicised element is from the guidance document, my determination of applicability then follows each section.

FOIA section 40 provides an exemption from the duty to disclose information where it constitutes personal data, as defined in the DPA section 1(1). FOIA section 40(2) provides an exemption when the requester is asking for someone else's personal data – in this case personal data relating to the public authority's employees. The exemption is engaged when a condition in section 40(3) or 40(4) applies; most commonly, this means situations under section 40(3)(a)(i) when disclosing the information would contravene one of the data protection principles in the DPA Schedule 1. This is an absolute exemption; unlike qualified exemptions it does not require a public interest test, but it may involve balancing the rights and freedoms of the employees with any legitimate interest in disclosure.

3.6 Is the request related to personal data as defined in DPA section 1(1)? The request is for material relating to a named person and as such, in my opinion, this constitutes personal data.

3.7 Is the requester asking for someone else's personal data? – Yes, and therefore, it is my determination that S40(2) applies, subject to S40(3) or S40(4) applying.

3.8 Is a condition under S40(3) or S40(4) engaged? - The wording in the FOIA for S40(3) is as follows:

(3) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

3.9 I have determined that condition S40(3)(a)(i) does apply and the first data protection principal of fairness is engaged.

3.10 S40(2) is an absolute exemption and does not require a public interest test. However, further consideration is required as to whether any legitimate interest in disclosure outweighs the rights and freedoms of the employee.

3.11 The ICO guidance relating to requests for personal data regarding employees states:

When a request is for personal data about an authority's employees other than the requester, it is exempt under section 40(2) and section 40(3)(a)(i) if it would contravene any of the data protection principles to disclose it. The principle that is most likely to be relevant is the first principle; the processing (in this case the disclosure) must be fair. If disclosure would not be fair, then it would contravene the first DPA principle, and the information is exempt under FOIA section 40(2). If it is decided that it would be fair to disclose the information, it is then necessary to establish that the disclosure would also satisfy one of the conditions in the DPA Schedule 2. If the information is sensitive personal data as defined in the DPA section 2, the disclosure must also meet one of the conditions in the DPA Schedule 3. Finally, in order to satisfy the first DPA principle, the disclosure must also be lawful. Therefore, the first question to answer in deciding whether employee information is exempt under section 40(2) is, would it be fair to disclose it?

3.12 Would it be fair? There are a number of considerations:

Whether it is sensitive personal data,

The consequences of disclosure,

The employees' reasonable expectations and

The balance between their rights and the legitimate interests of the public and the requester in disclosure.

3.13 Sensitive personal data

ICO guidance re sensitive data states:

If the information is sensitive personal data, as defined in the DPA section 2, disclosure is unlikely to be fair. This data is likely to relate to the most personal aspects of employees' lives, for example their

health or sexual life, rather than their working life. Employees would have a reasonable expectation that this data would not be made public. Furthermore, such a disclosure would also have to meet a condition in both Schedule 2 and Schedule 3 of the DPA.

3.14 Consequences of disclosure

ICO guidance regarding the consequences of disclosure states:

Disclosure is unlikely to be fair if it would have unjustified adverse effects on the employees concerned. Although employees may regard the disclosure of personal information about them as an intrusion into their privacy, this may often not be a persuasive factor on its own, particularly if the information relates to their public role rather than their private life. If an authority wishes to claim that disclosure would be unfair because of the adverse consequences on the employees concerned, it must be able to put forward some justification for this claim.

In considering this point, I have reviewed other decision notices by the ICO to understand how the FOIA is applied in practice.

ICO Decision notice refers:

https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1625417/fs_50633226.pdf

This case concerned councillors of Kettering Borough Council during their tenure in office. The Commissioner upheld the decision not to disclose the information stating: "In this case, the Commissioner considers that disclosure of the requested councillors' names under the FOIA would be likely to lead to renewed media interest in the issue.... The Commissioner also considers that disclosure could have an adverse impact on the councillors' family members."

I am of the opinion that this line of reasoning is applicable to the current request.

3.15 The employee's reasonable expectations

The ICO guidance states:

A key issue to consider in assessing fairness is whether employees have a reasonable expectation that their information will not be disclosed. This will depend on a number of factors:

Whether the information relates to the employee in their professional role or to them as individuals
Seniority

Public facing roles

Any general policy followed by the authority or other prior indication as to what may be disclosed

3.16 I have reviewed a number of ICO decision notices relating to this consideration.

3.17 <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2258816/fs50681659.pdf>

In this case a number of points are made in the ICO decision notice, "It may still be fair to disclose information if there is a compelling public interest in doing so which outweighs the rights and freedoms of the data subjects." "Given the importance of protecting individuals' personal data, the Commissioner's 'default position' is in favour of protecting the privacy of the individuals."

The DPCC role is indeed senior and public facing, to the extent that there is specific legislative provision relating to complaints and referral procedures in The Elected Local Policing Bodies (Complaints and Misconduct) Regulations 2012. I have provided the link below to assist:

3.18 <http://www.legislation.gov.uk/uksi/2012/62/made>

As regards the general functions of the (then) IPCC, the statutory instrument specifies:

(c) To secure that arrangements maintained with respect to those matters comply with the requirements of these Regulations, are efficient and effective and contain and manifest an appropriate degree of independence;

(d) To secure that public confidence is established and maintained in the existence of suitable arrangements with respect to those matters and with the operation of the arrangements that are in fact maintained with respect to those matters;

The functions of the IPCC in this respect are, I believe, relevant to the whole matter of "fairness" and whether there is a compelling reason to disclose personal data. These are specific legislative arrangements for the PCC/DPCC roles to ensure that public confidence is secured and maintained and that complaints and misconduct matters are handled efficiently, effectively and independently.

3.19 The Cambridgeshire Police and Crime Panel have also published a complaints procedure document, link below to assist:

<http://democracy.peterborough.gov.uk/documents/s19668/Complaints%20Procedure.pdf>

Of particular note within that procedural document is *“The Panel take the view that transparency in relation to all complaints is of crucial importance in order to maintain public confidence.”* In addition it states the requirement *“To provide an update report to each quarterly scheduled meeting of the Panel (the frequency of reporting to be reviewed after 12 months) about all Complaints and other matters concerning the conduct of the PCC/DPCC covered by the Regulations...”*

The procedural document does not indicate what level of detail regarding any allegation/referral will be published and neither does it indicate what level of detail will be published at the conclusion of any complaint/referral. Neither does it indicate what considerations may be taken into account in determining on a case by case basis what information will be published.

3.20 The following ICO decision notice is, I think, also relevant as it describes a disciplinary case where there were independent procedures in place to review matters and the Commissioner supported non-disclosure:

https://ico.org.uk/media/action-weve-taken/decision-notice/2011/665814/fs_50391625.pdf

3.21 Regarding expectations of privacy and the greater scrutiny attached to a high profile public role, in the case in question, the publication of the fact of an IPCC referral and the publication by the Police and Crime Panel of an extract of the IPCC report following that referral is a reflection of that increased transparency and reduced privacy associated with the role. Such disclosures in the cases of many/most other employees would, in my opinion, undoubtedly breach the fairness principal. Occupation of such a role as the DPCC does not negate the DPA principal of fairness nor entail full disclosure, but, as has happened already in this case, it has resulted in personal data having been disclosed that would otherwise not have been for a lower profile post.

3.22 I am of the opinion, taking all of the above into account and under the circumstances in question, the data subject would have a reasonable expectation of confidentiality given the independence of the IPCC and the Police and Crime Panel to consider any matters referred to them and the fact that the Panel has concluded that no further action by them is required.

3.23 Balancing rights and freedoms with legitimate interests

The ICO guidance states the following:

*Under the DPA the exercise of balancing the rights and freedoms of the employees against the legitimate interest in disclosure is different to the public interest test that is required for the qualified exemptions listed in section 2(3) FOIA. In the public interest test, there is an assumption in favour of disclosure because the public authority must disclose the information unless the public interest in maintaining the exemption outweighs the public interest in disclosure. **In the case of section 40(2) the interaction with the DPA means the assumption is reversed; a justification is needed for disclosure.*** (My emphasis added)

3.24 In simple terms in the instance under review, a voluntary referral was made to the IPCC and for transparency purposes the fact of this was disclosed through publishing. Some of the content of the response from the IPCC was also disclosed by the Panel through publishing:

<http://democracy.peterborough.gov.uk/documents/s33473/V2%20Report%20to%20PCC%2031%20January%202018%20IPCC%20consideration%20of%20referral%20of%20conduct%20matter.pdf>

3.25 The following points I find significant:

The Panel report indicates that the referral related to “historical conduct” rather than conduct during tenure as DPCC.

The Panel Monitoring Officer’s report for the Panel states “I have to advise members that once the IPCC has concluded there is no conduct issue to investigate then there is also no conduct matter to refer to members. In essence that concludes the conduct questions and there is no matter to refer to the panel”.

3.26 Given the reversed assumption in the case of S40(2), I find it difficult to see a justification for disclosure under these circumstances.

3.27 I have reviewed a number of decision notices published by the ICO that are relevant.

3.28 https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1625417/fs_50633226.pdf

This case related to elected local councillors, the case also relates to the conduct of those councillors and the investigation of it. Whilst the DPCC is not an elected position, as a political appointment and with so little precedence regarding this role, the above case is a useful aid to assessing the expectation of confidentiality on the part of the data subject. In this case the decision notice states: "The Commissioner recognises that information relating to investigations against individuals carries a strong general expectation of privacy due to the likelihood that disclosure could cause the data subjects' distress..."

"In this case, the Commissioner considers that disclosure of the requested councillors' names under the FOIA would be likely to lead to renewed media interest in the issue.... The Commissioner also considers that disclosure could have an adverse impact on the councillors' family members."

3.29 The Information Tribunal in the case of Rob Waugh v Information Commissioner and Doncaster College indicated:

"In addition there is a recognised expectation that the internal disciplinary matters of an individual will be private. Even among senior members of staff there would still be a high expectation of privacy between an employee and his employer in respect of disciplinary matters."

3.30 A further case of note is:

<https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2014617/fs50660230.pdf>

However, given the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) has been cited is in favour of protecting the privacy of the individual. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure which would make it fair to do so."

3.31 In my opinion, the conclusions in the above cases are consistent with my review finding that there is no compelling justification for disclosure within the FOIA S40(2) exemption as interpreted within the DPA.

3.32 Summary of fairness considerations

3.33 In summary, as regards "fairness" of all the factors that I have considered, some lend themselves to disclosure, particularly the need for transparency in politically appointed roles and the likely lower expectation of confidentiality by holders of those posts. That said, disclosures have already been made that, in my opinion, for a lower profile role would not have been.

3.34 However, what I do find compelling is that a statutory complaint/referral process has been followed which provides public reassurance that such matters have been dealt with appropriately and independently. The conclusion of which is the Panel Monitoring Officer's report stating "I have to advise members that once the IPCC has concluded there is no conduct issue to investigate then there is also no conduct matter to refer to members. In essence that concludes the conduct questions and there is no matter to refer to the panel." The Panel accepted that recommendation.

3.35 Given the reversed assumption concerning release of personal data, in my opinion there is no compelling legitimate interest to release further information. On that basis the information requested will not be disclosed as FOIA exemption S40(2) is engaged here.

3.36 I have considered the decision in the first tier tribunal Appeal No: EA/2012/0145, and believe that a number of the factors relating to that decision are persuasive in this case and support my conclusion.

3.37 I have considered whether redacted material could be disclosed. Given that the request is about a named individual, I do not believe that is possible as any material would, by definition, relate to him.

3.38 If you are still dissatisfied with this decision, you may make an application to the Information Commissioner for a decision on whether the request for information has been dealt with in accordance with the requirements of the Act. For information on how to make a complaint to the Information Commissioner please visit their website at www.ico.gov.uk alternatively, phone or write to:

Information Commissioner's Office

Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF

Helpline: 0303 123 1113

Regards

Office of the Police and Crime Commissioner