

References 182, 184, 192, 193, 207, 235, 239

REQUESTS

Lancashire Constabulary investigation report into former Chief Constable Mark Gilmore.

Correspondence (emails) between the Police and Crime Commissioner for West Yorkshire and Lancashire Constabulary where the subject was either Mark Gilmore or Operation Barium.

RESPONSE

Section 17 of the Freedom of Information Act (FOI Act) states that a public authority which, in relation to a request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with Section 1 (1), give the applicant a notice which:

- (a) States the fact
- (b) Specifies the exemptions in question, and
- (c) States (if that would not otherwise be apparent) why the exemption applies.

The information subject to these requests is attached. Some information has been withheld or redacted because the PCC considers that exemptions under the FOI Act apply as described below.

By way of background, the PCC takes the view that he should publish as much information as is possible and lawful in the circumstances, at the same time respecting the rights of the persons mentioned in the report and correspondence.

The exemptions referred to below may apply differently in relation to information regarding Mr Gilmore than they do regarding information about other persons referred to in the report and correspondence. Mr Gilmore was the chief officer of a WYP, a role rightly subject to public scrutiny which has only increased in recent years following amendments to police conduct law. The PCC's functions in relation to misconduct investigations applied to Mr Gilmore but not the other persons referred to.

The PCC is conscious that Mr Gilmore has now been retired since August 2016, but this passage of time has not made the issues being dealt with any more sensitive or private so far as he is concerned. Mr Gilmore's retirement came in the wake of the report and subsequently there were representations and legal proceedings taken by Mr Gilmore which have taken time to resolve. An appropriate form of publication of the report remains necessary to reflect clear public interest considerations. Publication will to some extent also vindicate Article 10 under the Human Rights Act: freedom of

expression, especially the rights of journalists and members of the public to have communicated to them information regarding a police misconduct investigation. The report itself makes clear what it was about, what it was not about, and the position of other organisations such as the Police Service of Northern Ireland and the IPCC regarding their functions.

The PCC has also decided to publish a preamble to accompany publication of the report, to better explain its context, in fairness to **all** concerned.

SECTION 40(2) – PERSONAL INFORMATION

S40(2) of the FOI Act states that information is exempt from disclosure if it is the personal information of some-one other than the person requesting it and if the disclosure would breach any of the data protection principles.

Some information has been redacted or withheld from the documents which are being disclosed because it is personal information (that is, it identifies a living individual) and because its disclosure would breach the first principle of the Data Protection Act (DPA) which requires information to be processed fairly and lawfully.

The following factors have been taken into consideration in reaching this decision:

- Whether consent has been given to disclosure.
- The reasonable expectations of the data subjects.
- The potential consequences of disclosure.
- The legitimate public interest in disclosure.

Information in the Investigating Officer's report relating to the former Chief Constable has been found to be fair to disclose on the grounds that the former Chief Constable would have a reasonable expectation that the information would be disclosed because of his seniority, the information which has already been placed in the public domain (by both the Police and Crime Commissioner and by the former Chief Constable himself) and because of the significant and legitimate public interest in understanding why and how this conduct investigation took place. Disclosure also supports the public interest in allowing press freedom to report on information concerning the conduct of public affairs, transparency and scrutiny of the police misconduct regime and the administration of justice generally, is likely to act as a deterrent for future inappropriate behaviour on the part of senior police officers and is necessary to enhance public confidence. Disclosure in this case, in addition to serving general transparency and accountability, also identifies the actions and decisions taken by a democratically elected public figure.

Information relating to third parties who were not the subject of the conduct investigation has been redacted. This is on the basis that disclosure would be unfair and unlawful and, therefore, in breach of the Data Protection Act. Such disclosure would be unfair as the data subjects would have a reasonable expectation of privacy, particularly as the information was recorded over **three** years ago and no **consent** has

been given to disclosure. The legitimate interest in this case, which relates to the police conduct regime and to the functions of the Police and Crime Commissioner, is met by disclosure of a large amount of information relating to the former Chief Constable himself. Whilst some information was reported in 2014 and also in connection with a judicial review in late 2017 which identified third parties, disclosure of further information in 2018 is likely to lead to more publicity and infringe the rights and freedoms of the data subjects who were not the focus of this investigation.

The Information Commissioner notes that the balancing exercise in relation to disclosure of personal information is different to other public interest tests conducted under the FOI Act in that the 'default position' favours protecting an individual's personal data and privacy. The public interest in disclosure, therefore, must be found to outweigh the public interest in protecting individual's personal information in order for the disclosure to be fair.

In this case and in view of the information which has already been placed in the public domain, it has been found that the public interest in disclosure of information about this investigation has already been met and further disclosure will not add to this given the detriment which will be faced by the third party data subjects as a result of disclosure.

This exemption is absolute and does not require a public interest test.

SECTION 38 - HEALTH AND SAFETY

Section 38 states that information is exempt information if its disclosure under the FOI Act would or would be likely to:

- (a) Endanger the physical or mental health of any individual, or
- (b) Endanger the safety of any individual

Information has been redacted where it is considered likely to endanger the physical or mental health or safety of an individual.

This exemption requires a prejudice test as well as a public interest test.

The prejudice or harm connected with disclosure relates to harm to the mental or physical health and safety of the third parties who are identified in the information (including the right to life under Article 2 of the European Convention on Human Rights). Disclosure would be likely to cause this prejudice because it will identify a connection between the data subjects and the security forces in Northern Ireland and is likely to lead to further media reporting and intrusion into the data subjects' private lives.

Arguments in favour of disclosure relate to general transparency and the fact that some information has previously been reported in the media.

Arguments against disclosure relate to the likelihood of harm as identified above and the fact that the public interest has already been met by way of previous disclosure and reporting and is not necessary at this point given the likelihood of harm.

In engaging this exemption account **has** been taken of a professional, external assessment of harm.

SECTION 31 - LAW ENFORCEMENT

Section 31(1)(g) states that information is exempt from disclosure if disclosure would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection 2. In this case the functions relate to the purpose of ascertaining whether any person is responsible for any conduct which is improper (2(b)).

An exemption under S31 of the FOI Act is relevant to these requests because the Police and Crime Commissioner (PCC) is responsible, by virtue of the Police Reform Act 2002 and the Police Reform and Social Responsibility Act 2011, for dealing with any complaints or conduct matters relating to the Chief Constable and the information is held in connection with an investigation to determine whether the former Chief Constable had a case to answer for misconduct, gross misconduct or no misconduct.

This exemption is subject to a prejudice test and a public interest test.

The prejudice or harm to law enforcement arising from disclosure relates to future confidential reporting of alleged wrongdoing and the confidence of staff and officers in West Yorkshire Police to use the confidential reporting system, to non-cooperation from witnesses in future investigations, to the risk of increased amount of litigation relating to conduct investigations (which are analogous to a criminal investigation where regulations do not provide for routine disclosure of reports) and the risk that methods of investigation would be revealed.

The confidential reporting system is an important way for junior staff and officers to be able to report allegations against the Chief Constable directly to the Police and Crime Commissioner. If individuals felt unable to use the confidential reporting system for fear of their reports becoming public or being subject to public debate this would adversely impact on one of the ways that the PCC can identify and deal with conduct matters. Whilst the reports are made anonymously it may be possible to identify the individuals connected with the reports (either using the information in association with other information which is publicly available or via a mosaic effect of subsequent disclosures). Prejudice would be likely to result from disclosure of further information relating to the anonymous allegations because the disclosure will be reported by media sources.

Non-cooperation of witnesses in conduct investigations or disclosure of the methods of investigation would be likely to hinder the ability of police forces to conduct effective investigations and would hinder the ability of the Police and Crime Commissioner to hold the Chief Constable to account. This would be likely to be detrimental to the

maintenance of professional policing and would damage public confidence in the misconduct regime.

In terms of the public interest test the following factors favour disclosure:

- Transparency with regard to the thoroughness of the conduct investigation which was conducted at public expense.
- Transparency with regard to understanding how the police conduct regulations operate and the role of the PCC.
- Transparency with regard to the actions taken by a publicly elected figure.
- Demonstration of the effectiveness of the whistleblowing system in West Yorkshire Police.

The following factors favour non-disclosure:

- Harm to the future investigative ability of the police service as a result of a reluctance of witnesses to engage with investigations.
- Harm to the effectiveness of the confidential reporting system in West Yorkshire Police resulting from damage to the confidence of officers and staff in making reports of alleged wrongdoing.
- Harm to the ability of the PCC to hold the Chief Constable to account and to the ability of the Chief Constable to hold other officers and staff to account as a result of damage to the confidential reporting system and damage to the investigative process.

The factors against disclosure have been found to weigh heavier than those in favour of disclosure, particularly when account is taken of information which has already been placed in the public domain to satisfy the public interest in transparency.

Some information has been redacted under S31(3) of the FOI Act. This states that the duty to confirm or deny that information is held does not arise if, or to the extent that, confirmation would or would be likely to prejudice any of the matters mentioned in 31(1). This exemption has been applied, for the reasons described above, where it is considered that confirmation or denial that the information is held would prejudice the Police and Crime Commissioner's ability to hold the Chief Constable to account and to deal with future complaint or conduct matters.

SECTION 30 - INVESTIGATIONS AND PROCEEDINGS CONDUCTED BY PUBLIC AUTHORITIES

Section 30 states that information held by a public authority is exempt if it has at any time been held by the authority for the purposes of any investigation which the public authority has a duty to conduct with a view to it being ascertained whether a person

should be charged with an offence... or any investigation **which** is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct...

Section 30 is a class based exemption. It is subject to the public interest test.

The PCC is not a criminal investigator or prosecutor. However, of concern is the fact that some of the information which is the subject of the requests is information provided to the PCC directly from the criminal investigation in Northern Ireland, conducted by PSNI, which PSNI has not published. Further, a police misconduct investigation can result in referral to the Crown Prosecution Service.

Sections 30 and 31 of the FOIA are mutually exclusive, and if section 30 cannot be relied on, section 31 can be. The public interest considerations referred to above in relation to section 31 are adopted here.

SECTION 41 - INFORMATION PROVIDED IN CONFIDENCE

Section 41 of the FOI Act states that information is exempt information if it was obtained by the public authority from any other person (including another public authority) and the disclosure to the public would constitute a **breach of confidence** actionable by any other person.

This exemption has been applied to information which was provided by the Police Service of Northern Ireland and which originates from a criminal investigation.

This is an absolute exemption but does require a **breach of confidence** test to assess whether a breach of confidence is actionable by any other person. This has been carried out as follows:

1. The information has the necessary quality of confidence because **it relates to a criminal investigation**, it was shared in confidence and is not otherwise accessible to the requesters. The information is personal information and strong objections have been received by the data subjects in relation to its disclosure.
2. Disclosure would be likely to lead to an invasion of privacy and may lead to a breach of the data subjects' rights under Article 8 of the European Convention on Human Rights (the right to a family and private life).
3. The public interest in disclosure does not override the competing public interest in maintaining the duty of confidence **in respect of the data** relating to third parties on the following grounds:
 - a. The public interest in disclosure relates to the public interest in general transparency and accountability and demonstration of the effectiveness of police conduct investigations.
 - b. The public interest in maintaining a duty of confidence, however, relates to the impact that **disclosure would** have on the data subjects, the

detriment to police forces to effectively investigate future allegations of misconduct and the damage to public confidence and trust in providing information to the police.

4. It follows, given the balance of public interest favours non-disclosure, that disclosure could give rise to an action for breach of confidence.

SECTION 42 - LEGAL PROFESSIONAL PRIVILEGE

Section 42 of the FOI Act states that information is exempt where a claim to legal professional privilege could be maintained in legal proceedings.

This exemption has been applied to information which is seeking or conveying legal advice. This exemption is subject to a public interest test which has been carried out as follows:

Factors in favour of disclosure include accountability and transparency in a police conduct investigation which was carried out at public expense.

Factors against disclosure include the preservation of lawyer-client confidentiality and the wider public interest in administration of justice.

Factors against disclosure have been found to weigh heavier than those in favour of disclosure.

SECTION 43(2) - COMMERCIAL INTERESTS

Section 43(2) states that information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

Commercial information about discounting of vehicles, prototype design and development and commercial contracts with other bodies has been redacted on the basis that disclosure would prejudice the commercial interests of the motor group concerned.

This exemption is subject to a public interest test which has been conducted as follows:

Factors in favour of disclosure include general transparency and accountability and public understanding of the evidence to support the conclusions of the investigation report.

Factors against disclosure include harm to the commercial interests of third parties referred to in the report because competitors will become aware of the business development intentions and pricing strategies employed by the commercial enterprise.

It has been found that the factors against disclosure weigh heavier than those in favour of disclosure particularly given that this case does not relate to the expenditure of

public funds and is not focussed on the motor group which is referenced in the investigation but on the conduct of a senior police officer.