

One Kemble Street

London

WC2B 4TS

T: 020 7210 1169

F: 020 7210 1186

<http://www.justiceinspectorates.gov.uk/hmcpsi/>

10 May 2018

I refer to your request dated 23 March for an internal review with regards to your recent FOI request regarding the joint inspection on disclosure.

As I explained when we met on 17 April 2018, we are a very small department of less than 30 people and in order to ensure the review was independent I had to identify a person at a senior level and external to my organisation to carry this out.  As a result this has taken longer than the 20 working days recommended by the Information Commissioner’s office and I apologise for this delay.

Below is the full report provided by the external person I engaged to carry out this review. I appreciate that this response is written in legal terms but having met with you to discuss the subject I thought you would appreciate seeing the full advice.  However if you would prefer a less legally based/technical response then I would be happy to provide that.

The findings of the review are as follows:

**Freedom on Information Act 2000(FOIA) – internal**

1. I have been asked to conduct an internal review of HMCPSI’s response to the Freedom of Information Act 2000 (FOIA) request, made by James Burley of the Centre for Criminal Appeals and dated 18 January 2018. The response was included in letters from HMCPSI of 16 and 22 March.
2. I have been asked to review three aspects of that response:

* the decision to make certain redactions in item 1 of the request;
* the decision to withhold item 5 of the request; and
* the decision to withhold early drafts of the Making it Fair report

***Decision to redact text at the top of page 25 of the document 2018-03-12 CCA FOI request – item 1 Police focus groups.pdf “Impromptu focus group [REDACTED] 18/02/17”.***

1. The request asked for:

*“Available transcripts or notes from the “police focus groups” referred to at paragraph 4.6 of the report, with any personal data (such as names of the participants) redacted”.*

1. The redaction was among those made on basis that the reacted material was exempt from disclosure under sections 40(2), 41(1) and 33(2) of FOIA.

Section 40(2) - Personal Data

1. It is clear from the context that the redacted text contains the name of the police force from which the members of the focus group belonged. The name of the police force is not personal data, so s40(2) is not relevant in the case of this particular information.

Section 41 – Duty of Confidence

1. For this exemption to apply, there are a number of requirements which must be met.
2. Firstly, there must be an obligation of confidence: The officers who took part in the focus group were told that “*their contributions will not be attributed to them personally or the area/unit/force within which they operate” (HMCPSI Letter of 16 March).*
3. Secondly, section 41(1) requires that disclosure will cause detriment to the confiders. It is clear from case law that this detriment can be inferred – and that the detriment need not be financial. In this case, it can be inferred that disclosure of the identity of the police force would make the identification of the officers more likely, and/or impact on the reputation of any officers of that police force, even if they were not personally identified. On this basis I agree with HMCPSI (and disagree with Mr Burley) that disclosure of information as to which police force the officers are from would constitute a breach of confidence.
4. Thirdly, as set out in Mr Burley’s letter, to rely on section 41(1), a legal action for a breach of confidence by the police constables must be likely to succeed. Although s41 is an absolute exemption, so there is no public interest test to be carried out under FOIA, a breach of confidence won’t succeed, and therefore won’t be actionable, in circumstances where a public authority could rely on a public interest defence to the duty of confidentiality, for example if the information would bring to light evidence of misconduct, illegality or gross immorality. The record of the focus group include comments from police officers which suggest that they have wrongly listed potentially exculpatory evidence on the sensitive unused material, to hide it from the defence, and that they have at some point been trained to do this. Given the nature of this information, I agree that a public interest defence would be available to HMCPSI, so it follows that section 41 is not available here.

Prejudice to audit functions- Section 33

1. Section 33(2) applies where disclosure would, or would be likely to, prejudice the exercise of any of the authority’s functions, in relation to any of the matters referred to in section 33(1). It is accepted that HM Crown Prosecution’s Service Inspectorate’s function falls within section 33(1).
2. The exemption is prejudice-based. It only applies if disclosure of the requested information “would, or would be likely to, prejudice the exercise of any of the authority’s functions in relation to any of the matters referred to in subsection (1)”. There must be at least a real and significant likelihood of prejudice occurring, on the facts of the case. Mr Burley does not request me to review the question whether the threshold for prejudice has been met in this case. However, it seems to me to be clear that there is a real and significant likelihood of prejudice to the exercise of HMCPSI’s functions if it discloses information which identifies a police force at which bad practice is allegedly taking place, which was given voluntarily on the basis that the police force would not be identified.
3. Section 33 is a qualified exemption and requires HMCPSI to carry out a public interest test to consider whether the balance of interest lies in releasing or withholding the information. Mr Burley asks me to direct my review, as it applies to the section 33 exemption, to this issue. I have considered afresh the public interest factors in favour and against disclosing the name of the police force whose officers made the statements at the focus group, bearing in mind the ICO’s guidance on the public interest test.

*Arguments in favour of disclosure:*

1. First, there is clearly a public interest in transparency, particularly in relation to alleged wrongdoing by a public authority. It is important that the public and policymakers having a full picture of the disclosure problems in our criminal justice system. The fact that the HMCPSI Report discloses the fact of the alleged wrongdoing, though not the name of the police force, goes some way to meet this interest, but there is also an interest in transparency as to the identity of the force because:
   * Disclosure of the force’s name would enable the public to reconsider, and possibly challenge, the conduct of criminal proceedings initiated by that force. There is a clear public interest in possible victims of miscarriages of justice and victims of crime knowing that at a particular police force, officers have allegedly been trained to withhold evidence from the defence wrongly. In my view this is relevant even though the information does not identify failings in relation to any particular officer or any particular investigation.
   * Disclosure of the force’s name would enable the further legitimate investigation of the extent and implications of the incorrect training, and enable the public and press to hold the authority in question to account.

*Arguments against disclosure:*

* + The main argument against disclosure is that the disclosure would prejudice the conduct of the HMCPSI’s functions by making it more difficult to obtain voluntary information. In considering the weight to be given to these arguments, I have looked in particular at 4 factors identified in the ICO Guidance “Impact of disclosure on the voluntary supply of information”
    1. The timing of the request- the information would be disclosed after the conclusion of the HMCPSI investigation, but still relatively soon after it- it is likely for instance that the officers giving the information are still working in the police force in question, so there is a continuing reputational risk to the police force which may be likely to deter organisations from co-operating on a voluntary basis.
    2. The fact that HMCPSI has statutory powers under the Crown Prosecution Service Inspectorate Act 2000) to require the provision of documents from a body it inspects. However I note that HMCPSI relies for a fully informed view on information voluntarily given by lawyers/staff, in an informal setting such as a focus group, on the basis that it will not be attributed to their particular police force. So the kind of information given here would probably be less likely to be available to HMCPSI, and thus less likely to be available to the public, if it had to rely only on information given compulsorily.
    3. Incentives that encourage third party engagement – there is no general requirement on police forces to cooperate with HMCPSI, though presumably in is in their interests to do so.
    4. The nature of the damage caused by disclosure to the officers, and the police force in question– in this case reputational damage.

*Balance:*

1. As set out above, there are clear public interests both in disclosing the identity of the police force involved, and in maintaining the exemption. The question is of the relative weight of the arguments on each side. On the whole, I consider that the balance of the public interest is in HMCPSI being able to gain the deepest possible understanding of the facts in relation to disclosure in police forces, so that they can make as much information public as possible. If police officers and their forces cannot rely on a promise made by the inspectorate that the information they give will not be attributed to a particular force, it is likely that the quality of the information provided would be lower. I think this outweighs the public interest in disclosing the identity of the force concerned in this particular case.

***Decision to withhold item 5***

1. The second aspect of NCPSI’s response which I am asked to review is the decision to withhold item 5 of the request-

*“The names of the police forces who reported “that they have previously engaged experts who have provided training which was subsequently shown to be wrong” (paragraph 10.4) and the text of these reports”.*

1. This information was also withheld under section 33(2) (but not the other provisions cited in relation to the first redaction). The public interest issues are similar to those set out above- the relative weight of the public interest in disclosing information which connects allegations to misconduct to a particular police force, as against the weight of the public interest in protecting the functions of HMCPSI from prejudice by revealing information provided voluntarily. Again, I consider that the balance of public interest lies in not disclosing the identity of the police force concerned. There may well be a public interest in disclosing further details of the deficiencies in the training and in the effect the training has had, including whether it resulted in any miscarriage of justice, and how that was mitigated. And it is true that one way of facilitating the disclosure of further details, would be to disclose the identity of the police forces involved, which would facilitate further investigation which could reveal this information. But any link between the training and a substantive miscarriage of justice is indirect, and the words in the report do not suggest that the police force as a public authority has been guilty of misconduct, only that they procured a service which turned out to be substandard in a very important way.
2. Against this is the clear public interest in HMCPSI maintaining its relationship of engagement with police forces so that it can continue to obtain and transmit information about issues such as this.

***Decision to withhold early drafts of the Making it Fair report***

1. The decision to withhold the early drafts of the report is again based on section 33(2) of FOIA, and again the issue to be reviewed in particular is the balance of the public interest considerations. Again there are arguments on both sides, in particular:

*Arguments in favour of disclosing the earlier drafts –*

* Furthering public understanding of the inspection process - disclosure of the early drafts would be likely to increase public understanding of why the inspection process reached the conclusions and recommendations that it did.
* Promoting accountability and transparency in relation to decision making;

*Argument for upholding the exemption-*

* + Ensuring that inspectors can effectively carry out their duties; in particular providing a “safe space” for them to put forward findings, evaluations and their own judgments, particularly in relation to joint inspections between police and CPS.

1. There are 49 draft reports. Some involve minor drafting changes. It seems to me that while the public interest in releasing these drafts is not very great, it is also less likely that their release will severely prejudice the functions of HMCPSI, because the “chilling effect” on the scope for inspectors and others involved in drafting the report to put forward views in a safe space will not be very great.
2. Other drafts involve more substantive comments, for example from CPS, and discussion about the extent to which the evidence supports the conclusions in the report. While the public interest in disclosing these drafts is probably greater (because more can be learned about the process whereby the report came to say what it did), releasing these drafts potentially creates a greater risk of prejudice, because it would have a greater chilling effect on the scope for frank exchange of views, especially between the agencies responsible for producing a joint report.
3. Other drafts, which do not show drafting changes, are clearly preliminary drafts made at an early stage in the process. There is some public interest in disclosing these drafts, there would also be a clear potential for prejudice to the scope for the drafter to form their views.
4. Having reviewed the drafts, I consider that there are no drafts where the balance of public interest in disclosure outweighs the public interest in keeping them private. I therefore consider that the decision not to disclose the draft reports should be maintained.

You will see that the person conducting the internal review did not entirely agree with the application of all of the exemptions cited in the response from Nicola Saunders.  However they did find that we were not obliged to release any further information.

Based on this review I will not be releasing any further material in relation to your request.

If you are unhappy with this response your next step is to approach the Information Commissioner's Office for a decision. The Information Commissioner can be contacted at:

Information Commissioner’s Office   
Wycliffe House   
Water Lane   
Wilmslow   
Cheshire   
SK9 5AF