

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 October 2019

Public Authority: Commissioner of the Metropolitan Police Service

Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant has requested information about its procurement of a new IT system from the Metropolitan Police Service (the "MPS"). The MPS advised the complainant that it considered the request to be vexatious under section 14(1) of the FOIA. The Commissioner has concluded that the MPS can refuse to comply with the request on the basis of section 14(1) of the FOIA. No steps are required.

Background

2. This request relates to the replacement of an IT system. The MPS has explained to the Commissioner:

"From January 2005-October 2018, MetRIC (Met Requests for Information and Correspondence) was used by the MPS to process and record all requests for information relating to the Data Protection Act (DPA), Freedom of Information Act (FOIA) and Environmental Information Regulations (EIR). It was also used to record items of correspondence and record deletion requests received from the general public. A business case to replace MetRIC was approved in April 2018 which led to the procurement of CycFreedom which the MPS have been using to process FOIA, DPA and EIR requests since November 2018.

Further information relating to the background of the procurement and implementation of software to replace MetRIC can be found via the links below:

<https://www.london.gov.uk/what-we-do/mayors-office-policing-and-crime-mopac/governance-and-decision-making/mopac-decisions-0/replacement-metric-system>

https://www.london.gov.uk/sites/default/files/pcd_380_part_1_metric_replacement.pdf

Request and response

3. Following a request made on 8 November 2018, which was refused on the grounds of cost of compliance (which the Commissioner investigated under reference FS50838326 and found was properly refused on those grounds), the complainant made the following refined request on 13 December 2018:

"... I will help you bring the request to under the cost limit. Can you limit your searches to all internal email correspondence sent or received by [name redacted] concerning the procurement and implementation of software to replace the metric system in the period 1 September 2017 to 8 November 2018".

4. On 14 January 2019 the MPS responded and refused to provide the requested information saying that to do so would exceed the cost limit at section 12 of the FOIA.
5. The complainant requested an internal review on 14 January 2019.
6. The MPS provided an internal review on 4 March 2019 in which it revised its position, advising that it considered the request to be vexatious under section 14(1) of the FOIA on the basis that to comply with it would be burdensome.

Scope of the case

7. The complainant contacted the Commissioner on 18 April 2019 to complain about the way his request for information had been handled. He asked the Commissioner to consider whether or not the request is vexatious.
8. The Commissioner will consider whether or not the request is vexatious below.

Reasons for decision

Section 14 – vexatious requests

9. Section 14(1) of FOIA allows a public authority to refuse to comply with a request if it is considered to be vexatious.
10. The term 'vexatious' is not defined in FOIA. The Upper Tribunal (Information Rights) considered in some detail the issue of vexatious requests in the case of the *Information Commissioner v Devon CC & Dransfield* (GIA/3037/2011). The Tribunal commented that vexatious could be defined as the "*manifestly unjustified, inappropriate or improper use of a formal procedure*". The Tribunal's definition clearly establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
11. In the *Dransfield* case, the Upper Tribunal also found it instructive to assess the question of whether a request is truly vexatious by considering four broad issues: (1) the burden imposed by the request (on the public authority and its staff); (2) the motive of the requester; (3) the value or serious purpose of the request and (4) harassment or distress of and to staff.
12. The Upper Tribunal did however also caution that these considerations were not meant to be exhaustive. Rather, it stressed the:

"importance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests" (paragraph 45).
13. The Commissioner has identified a number of "indicators" which may be useful in identifying vexatious requests. These are set out in her published guidance on vexatious requests¹. In brief these consist of, in no particular order: abusive or aggressive language; burden on the authority; personal grudges; unreasonable persistence; unfounded accusations; intransigence; frequent or overlapping requests; deliberate intention to cause annoyance; scattergun approach; disproportionate effort; no obvious intent to obtain information; futile requests; frivolous

¹ <https://ico.org.uk/media/for-organisations/documents/1198/dealingwith-vexatious-requests.pdf>

requests. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious.

14. In the Commissioner's view, section 14(1) is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress. This will usually involve weighing the evidence about the impact on the authority and balancing this against the purpose and value of the request. This should be judged as objectively as possible; in other words, would a reasonable person think that the purpose and value are enough to justify the impact on the public authority.
15. In particular, the Commissioner accepts that there may be cases where a request could be considered to be vexatious because the amount of time required to review and prepare the information for disclosure would place a grossly oppressive burden on the public authority. This is the position adopted by the MPS in this case.
16. The Commissioner believes that there is a high threshold for refusing a request on such grounds. This means that a public authority is most likely to have a viable case where:
 - the requester has asked for a substantial volume of information **and**
 - the authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the Commissioner **and**
 - any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.
17. As well as providing the Commissioner with its grounds for finding the request to be overly burdensome, the MPS has provided supporting arguments in support of other grounds which can be taken into consideration when ascertaining whether or not a request is vexatious, ie purpose and value, scattergun approach, and also history and context; the Commissioner has taken these into consideration.
18. The Commissioner also notes at this point that some of the MPS's submissions refer to details in connection to the background to the request which the MPS considers to be 'sensitive'. These parts of its submission have not therefore been included in the text of this decision notice but the Commissioner has considered them as part of her overall assessment of section 14(1) of FOIA.

The complainant's position

19. In his grounds of complaint the complainant advised the Commissioner that, having had his original request of 8 November 2018 refused on

grounds of cost (see paragraph 6 above) he had revised his request to only include emails related to the project which were sent and received by one individual MPS employee. Having initially been again refused on the grounds of cost, the MPS had revised this to section 14 on the basis of burden. He advised:

"The MP[S] response to the complaint about their response to the amended request appears to be a means to deliberately block access to the information".

And:

"The MPS were stating that the information has been located but that the individual concerned would have to manually read the that information and this would exceed the time limits. But the only reason these documents would need to be read would be to apply exemptions to the information retrieved, an activity which cannot be taken into account when calculating time taken".

20. In respect of the MPS revising its position to section 14 he stated:

"This is outrageous and can only be understood as a blatant attempt to block access to the information. Firstly as indicated in the response of 14 January the information had already been located and the initial justification for refusing to provide the information was spurious as the person dealing with the compliant [sic] recognises hence the change in justification to classify the request as burdensome. Secondly the amended request was a response to the initial refusal to provide information.

... I redefined the request and the MPS firstly tried to apply spurious cost reasons to refuse to supply the information to the amended request and when that was no longer sustainable it classified the request as burdensome even though the request had been redefined in accordance with the Act".

21. The Commissioner firstly notes that a public authority should revisit a request when it undertakes an internal review and it is able to revise its position at this point (something which it is again invited to do when she initiates an investigation). Therefore, when revising its position from citing section 12(1) to 14(1) of the FOIA, it was dealing with the request appropriately.

22. Furthermore, when trying to provide advice and assistance as to how the complainant might be able to refine his original request to keep it within the cost limit, the MPS advised him that it was: *"unable to suggest any practical way in which your request may be modified in order to bring it within the [cost limit]"*. Therefore, whilst the complainant has attempted to refine his request, this has been on his

own interpretation of what might be suitable rather than on a recommendation by the MPS.

The MPS's position

23. In its internal review the MPS advised the complainant as follows:

"In respect of your request for information, I have given due regard to the Information Commissioner's advice on burdensome Freedom of Information Act requests. ICO guidance states the following:

Section 14(1) may be used in a variety of circumstances where a request, or its impact on a public authority, cannot be justified. Whilst public authorities should think carefully before refusing a request as vexatious they should not regard section 14(1) as something which is only to be applied in the most extreme of circumstances.

In determining whether a request is burdensome on a public authority, the ICO provides the following guidance:

Sometimes a request may be so patently unreasonable or objectionable that it will obviously be vexatious.

*In cases where the issue is not clear-cut, the key question to ask is whether the request is likely to cause a **disproportionate** or **unjustified** level of disruption, irritation or distress.*

The review is particularly guided by the following indicator of a request which is exempt by Section 14 of the Act:

Burden on the authority

The effort required to meet the request will be so grossly oppressive in terms of the strain on time and resources, that the authority cannot reasonably be expected to comply, no matter how legitimate the subject matter or valid the intentions of the requester.

Unfortunately, the MPS does not have limitless resources and to extract a member of staff to deal solely with your request would be a disproportionate and unjustified use of these resources.

As advised in our response to you, to comply with your request, a member of staff would have to go through in excess of 1000 Emails to determine which Emails are relevant to your request. Each Email would have to be reviewed and information which the MPS considers harmful to disclose, such as personal information, commercially sensitive information, disclosures which would impact

on the MPS' law enforcement functions etc, would have to be redacted. This would be an extremely burdensome task which would take several weeks to complete".

24. In subsequent correspondence with the Commissioner it clarified the following in respect of the burden imposed:

"Despite the history and context relevant to the request, it is the disproportionate burden of complying with the request that engages section 14(1) in the circumstances of this request. This is due to the:

- *Volume of information held*
- *Potential for one or more FOIA exemptions to apply throughout the requested information*
- *Opportunity cost of the resources required to respond to the request*
- *Purpose and value of the request being disproportionate to the time/cost required to comply with the request".*

25. The MPS explained that the request relates to emails sent or received by a 'Band S' Business Engagement Manager within the Digital Policing directorate of the MPS. It considered that, realistically in the circumstances of this request, it would be incumbent upon that manager herself to personally locate, retrieve and extract information within the scope of the request and then to advise upon any harm in disclosure. This would in itself be resource intensive and impact on the other responsibilities that person holds.

26. The relevant email account holder has advised that they have a 'MetRIC folder' which they have created in their email account which contains in excess of 1,000 emails. They added that this did not take into account emails within the scope of the request that may be held elsewhere within their 'inbox' or 'sent items'. This manager estimated that it would take about 2 weeks to review these emails with a view to identifying all of the information within the scope of the request. It was then noted that further time would be required to consider whether there would be any harm in disclosure and/or whether any FOIA exemptions were applicable.

27. It explained that any consideration of the harm in disclosure would require consultation with relevant stakeholders who would need to view the related information to varying degrees. It said that this would be likely to be individuals employed at a senior level and would also be likely to include third party suppliers in respect of their commercial interests, particularly the successful supplier GSA Ltd which owns the replacement CycFreedom software.

28. The MPS added the following concerns regarding burden:

"There are also a number of issues inherent in requests for email correspondence such as the duplication of correspondence within multiple email chains that may branch off in different directions and/or include multiple attachments. Each email and email chain would contain the names of the sender and any recipients and may contain names within the body of the email, within signatures and within any attachments.

The emails also contain the names of individuals including MPS staff and non-MPS employees in a range of contexts whose names would need to be considered for redaction.

The physical process of redacting information would be a time consuming task and would likely be conducted by staff within the Information Rights Unit.

It is likely that there would be a significant opportunity cost associated with complying with the request. For example, any 'man-hours' spent reading the requested information or performing related tasks would be at the expense of processing other FoIA requests or other duties in support of the law enforcement purposes of the MPS".

The Commissioner's position

29. With regard to the first criterion (see paragraph 16), the Commissioner accepts that, given the breadth of the request, seeking as it does all emails sent or received by a particular individual which relate in 'any way' to the subject in question for a period of 14 months, a considerable amount of information falls within the scope of the request, ie at least 1,000 emails.
30. With regard to the second criterion, given the subject of the matter of request, namely the procurement of a new IT system, the Commissioner accepts that the MPS's concerns about potentially exempt information being caught by the request, such as commercial interests of third parties (section 43 of the FOIA) and personal information (section 40 of the FOIA), are legitimate ones.
31. With regard to the third criterion, the Commissioner is satisfied that the MPS has demonstrated that it would have a real burden in identifying the exempt information and preparing / redacting it for publication. This is likely to involve further liaison with third parties in respect of information they have provided in order to ascertain their views on whether or not disclosure would affect their commercial interests. It would also involve consideration, and redaction where necessary, of the personal data of any parties referred to in those 1,000+ emails.

32. The Commissioner is therefore satisfied that the MPS has demonstrated that the three criteria are met and consequently that the MPS has provided evidence to demonstrate that complying with the request would place a grossly excessive burden on it. Nevertheless, the Commissioner will consider whether the purpose and value of the request are enough to justify the impact on the MPS and here she has taken into account the further arguments which have been provided by the MPS.
33. The MPS said that it recognised that there is an inherent value in the disclosure of information given the associated benefits of openness and transparency, saying: *"The fact that the request relates to the software used by a large high profile public authority to facilitate compliance with information rights legislation may increase the value of transparency"*.
34. It also recognised that because the request relates to a procurement process, transparency may promote competition in procurement by encouraging companies to take part in the process and help them to improve their bids and/or provide greater value for money.
35. The MPS has therefore accepted that there is a legitimate value and purpose in disclosure to the extent that it would demonstrate accountability for the spending of public money, eg purchasing goods and services, and that disclosure may improve public understanding of a procurement process and/or enable individuals to make more informed challenges to the spending of public money, which the Commissioner accepts.
36. However, in this case it said that its actions and decisions are already subject to external scrutiny by a number of organisations such as the Commissioner herself, Her Majesty's Inspectorate of Constabularies (HMIC), The Independent Office of Police Complaints (IOPC) and The Mayor's Office for Policing and Crime (MOPAC). It advised that all awards of public contracts for goods and/or services valued at £181,302 or above must be procured in accordance with the Public Contract Regulations 2015, adding:

"The project proposal document in respect of the MetRIC replacement is available on the MOPAC website. A link to this was provided to the applicant in response to his request for an internal review".
37. The Commissioner therefore accepts that some information about the procurement is already available in the public domain to satisfy the public interest, at least to some extent.
38. The MPS has also commented on the request being representative of a 'scattergun approach' because, although it relates to a specific procurement process and type of information (ie emails sent or received

by one person), it has a wide date range and its wording lacks a clear focus and "appears to be 'fishing' for information without any idea of what may be revealed". In this regard it explained:

"As an example, the emails would include correspondence relating to the business justification for the replacement of MetRIC.

The business case is an important tool in corporate governance. It allows decision-makers to understand the issues, examine the options and make an informed decision in the best interests of the MPS. It also serves as an audit trail to evidence that decisions were reached in a proper manner.

All the business case templates follow a common structure based on HM Treasury best practice , designed to ensure that all the proper issues are addressed when making a decision including:

- *The 'Strategic Case' (Why do we need to do this?)*
- *The 'Economic Case' (What are our options?)*
- *The 'Commercial Case' (What are the commercial or procurement considerations?)*
- *The 'Financial Case' (What are the financial implications for the MPS?); and*
- *The 'Management' Case (What happens next?).*

The final version of this document was co-authored by [manager named in request] and there have been at least 14 different versions in total. 25 people across 10 directorates or departments are named in the business case as either having provided assurance or consultation in relation to the business case.

A request for specific documents such as the business case may be manageable and proportionate as the scope of any enquiries would be limited and/or subject to fewer variables whilst potentially satisfying the legitimate purpose and value by demonstrating the rationale for replacing MetRIC although such information may still be subject to one or more FOIA exemptions.

While there may be additional value in viewing earlier drafts and/or the opinions and contributions of various individuals in relation to the business case, the value and proportionality of this information diminishes where this would encompass branching and or repetitive email correspondence. The scope of the request is much wider than this and therefore has an element of adopting a 'scattergun approach' and would encompass information of limited value while imposing a disproportionate burden upon the MPS".

39. The Commissioner accepts this analogy and agrees with the MPS that there does not appear to be any 'focus' to the request which does not seem to identify what information the requestor is trying to locate.
40. The MPS has made a further detailed submission in respect of history and context, which was not previously apparent to the Commissioner. It advised that the requester is directly related to the company that used to provide the MetRIC system to the MPS. It explained that it had had a number of issues with the cost, maintenance and functioning of the MetRIC software and, in early 2018, a business case for the replacement of MetRIC was prepared that identified several potential software solutions. This was approved in April 2018 which led to steps being taken to decommission MetRIC and procure CycFreedom. The complainant was dissatisfied with this outcome and this led to persistent complaints, albeit not in respect of the FOIA (details of which were provided by the MPS as evidence but which have not been included in this notice).
41. The Commissioner accepts that the request may not appear to be outwardly vexatious when considered in isolation, indeed she had no idea about the complainant's personal association with the request until she was informed about this by the MPS in its submission to her. Furthermore, she acknowledges that the requested information may have some limited public interest as it relates to the procurement of a new system for logging, amongst other things, information requests made by members of the public. However, the Commissioner takes the view that whilst this matter may be of significant personal interest to the complainant, there is little evidence to show how the requested information is of wider public interest.
42. The detrimental impact or burden upon the MPS has been described earlier within this correspondence. The large amount of correspondence which would be caught within the scope of the request is also likely to encompass information that is of 'limited value' because of the wide scope of the request; put simply there is no focus to it.
43. Taking all of the factors into consideration, and with the lack of any arguments to the contrary from the complainant for her to consider, the Commissioner does not agree that the purpose and value of the request is sufficient to justify the burdensome impact on the MPS. She therefore finds that the request is vexatious.

Other matters

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

Engagement with the Commissioner

45. Due to a lack of response to her enquiries the Commissioner necessarily issued an Information Notice in this case in order to progress her investigation. This resulted in a significant delay.
46. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft Openness by Design strategy² to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her Regulatory Action Policy³.

² <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

³ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

47. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

48. 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.
49. 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
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