

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 May 2020

Public Authority: Independent Office for Police Conduct
Address: PO Box 473
Sale
Manchester
M33 0BW

Decision (including any steps ordered)

1. The complainant requested information relating to an investigation into a fatal shooting.
2. The Independent Office for Police Conduct (IOPC) refused the request as vexatious. The Commissioner's decision is that the request was vexatious and therefore the IOPC was entitled to rely on section 14(1) (vexatious request) of the FOIA to refuse it.
3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. On 15 August 2019 the complainant wrote to the IOPC and requested information in the following terms:
*"I would like the IOPC report.
Provide schedule of costs, yours and others you will have to pay, like MPS".*
5. The request, entitled '*Officer W80, R (On the Application Of) v [2019] EWHC 2215 (Admin) (14 August 2019)*', was made using '*whatdotheyknow*', a public website.

6. The IOPC responded on 13 September 2019. It provided some information within the scope of the request, namely costs, but refused to provide the remainder. It cited the following exemptions as its basis for doing so:
 - section 30 (investigations and proceedings);
 - section 40 (personal information).
7. The complainant requested an internal review that same day, 13 September 2019. He told the IOPC:

"I am writing to request an internal review of Independent Office for Police Conduct's handling of my FOI request 'Officer W80, R (On the Application Of) v [2019] EWHC 2215 (Admin) (14 August 2019)'.

How much were your costs?"

8. Following an internal review of that part of the request, the IOPC wrote to the complainant on 17 October 2019. It revised its position with regard to the requested costs, providing further information to answer that part of the request. It additionally cited section 40(2) in respect of other costs associated with the case referred to in the request.

Scope of the case

9. The complainant contacted the Commissioner on 17 October 2019 to complain about the way his request for information had been handled. In contrast to the concerns he had expressed to the IOPC about its handling of the request, he told the Commissioner:

"I want to see the IOPC report, the name of the officer can be redacted if necessary".

10. As is her custom, the Commissioner wrote to both parties setting out the scope of her investigation. While acknowledging that the request comprised two parts, namely *'the IOPC report'* and *'schedule of costs'*, the Commissioner explained that, in light of the complaint, the scope of her investigation was only with respect to the IOPC's handling of that part of the request relating to the report.
11. As it had not previously done so (not having being asked to by the complainant) the IOPC revisited its handling of that part of the request. It told the Commissioner:

"We relied upon exemptions under section 30 and 40 of the FOIA to refuse the investigation report. We are confident that we have

presented robust arguments and rationale and this is presented below for your consideration. However as referred to above, we consider that [the complainant's] pattern of behaviour is indicative of a continued campaign of disruption and consequently wish to revise our decision and instead apply section 14(1) of the FOIA to this request".

12. The Commissioner accepts that public authorities have the right to claim any exemption (including section 12 or section 14) or exception for the first time before the Commissioner or the Tribunal. The Commissioner does not have discretion as to whether or not to consider a late claim.
13. The IOPC confirmed that it had advised the complainant of its revised response, albeit that the correspondence was published under a different '*whatdotheyknow*' thread.
14. The Commissioner wrote to the complainant in light of the IOPC's revised position. She asked the complainant to contact her, within a given timeframe, if there were any outstanding issues that he wished her to consider regarding the IOPC's additional citing of section 14 in this case.
15. That correspondence was neither acknowledged nor responded to.
16. The analysis below considers the IOPC's application of section 14(1) of the FOIA to the requested report, namely the IOPC investigation report into a shooting by a police officer.

Reasons for decision

Section 14 vexatious request

17. Section 14(1) of the FOIA states that section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious. There is no public interest test.
18. The term '*vexatious*' is not defined in the FOIA. The Upper Tribunal considered the issue of vexatious requests in the case of the *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). 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.
19. The Upper Tribunal's approach in this case was subsequently upheld in the Court of Appeal.

20. 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.
21. 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).
22. The Commissioner has published guidance on dealing with vexatious requests¹. That guidance includes a number of indicators that may apply in the case of a vexatious request. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of the case will need to be considered in reaching a judgement as to whether or not a request is vexatious.
23. As discussed in the Commissioner's guidance, the relevant consideration is whether the request itself is vexatious, rather than the individual submitting it. However, a public authority may also consider the context of the request and the history of its relationship with the requester when this is relevant.
24. Sometimes it will be obvious when a request is vexatious, but sometimes it may not be. In that respect, the Commissioner's guidance states:

"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".

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

The complainant's position

25. As noted above, the complainant did not respond when invited to put forward his position with regard to the IOPC's application of section 14 in this case.

The IOPC position

26. In its submission to the Commissioner, the IOPC told her it was '*firmly of the belief*' that refusal under section 14(1) is justified in this case. It explained:

"We consider that this is a further example of [the complainant's] repeated and unreasonably persistent behaviour in requesting information about a high profile and clearly sensitive investigation in which we have been proactive in providing updates on its progress".

27. In its submission, the IOPC told the Commissioner:

"We feel it is pertinent to point out certain nuances in terms of this requester, his correspondence with us, and his complaint to you about this particular request".

28. By way of background, it explained:

"Almost all of his requests to the IOPC are subsequently followed up with an Internal Review although his engagement with us in terms of specifying why he is dissatisfied with our response or providing counter arguments to our application of exemptions is minimal and often completely lacking.

Internal reviews are regularly requested within minutes of us sending our final detailed responses, suggesting that [the complainant] does not fully digest our rationale and complains about it regardless of how we respond".

29. With regard to the request in this case, the IOPC told the Commissioner:

"We consider that [the complainant's] request for "the IOPC report" refers to the final report following the IOPC independent investigation into the shooting. This is the normal and most logical interpretation that we would apply to any similar request; but it is also relevant that due to his volume of requests, [the complainant] is likely to be fully aware of our documentation and the way we work and would therefore understand what he was asking for when referring to the "IOPC report"".

30. The IOPC provided the Commissioner with background to the subject matter of the report. It explained that, in recognition of the public and community interest in the case:

"...we have published on our website a number of statements providing frequent updates in relation to the investigation and our findings and will continue to do so as the case progresses. We consider that this demonstrates our understanding of the interest in this case and our commitment to be transparent in providing as much information as we are able at the appropriate time to serve the public interest".

31. It also advised:

"... the IOPC will consider the publication of all or some of its report when the related proceedings are complete in line with our Publication Policy".

32. The Commissioner recognises that that statement supports what the IOPC told the complainant, namely:

"... A decision on the publication of our investigation report will be made at the conclusion of all associated proceedings [in line with our Publication Policy]".

33. With regard to her guidance that a public authority may take into account the context and history of the request, where this is relevant, the IOPC told the Commissioner:

"We find that this request can be considered as part of an ongoing campaign of disruption to the IOPC that [the complainant] appears to be undertaking by making FOI requests with unreasonable persistence and that have no discernible purpose or value to him or the wider general public".

34. In support of that view, the IOPC provided the Commissioner with details of twenty separate requests submitted by the complainant. Those requests spanned a timeframe from June 2018 to December 2019. The requests variously sought 'all reports into', 'all reports regarding', 'full IOPC report into', and 'all data held relating to'. Of those requests, seventeen preceded the request in this case.

35. The IOPC recognised that the request in this case, when considered in isolation, may not necessarily be construed as vexatious. However, it argued that it becomes so when the complainant's previous requests and associated correspondence are taken into account.

36. In that respect, it told the Commissioner:

"[The complainant] continues to seek information about high profile and clearly sensitive cases without any consideration of the constraints and limitations that are likely to apply to such material. This is in spite of the fact that we have provided detailed explanations. He continues to request internal reviews without any counter arguments, simply maintaining that we are 'wrong'.

This behaviour is particularly relevant when considering this request. He chose not to complain about our refusal of the report even though he challenged other aspects of that response. He then complained to yourselves about the matter, abusing the due process of which he is aware, and around the same time he made a second request to us for the same report.

This behaviour strongly supports our previous conclusions that he is not making FOIA requests for any particular purpose and that the information is of no value to him, to the point where he does not appear to be keeping track of his own requests, nor paying any attention to our very detailed responses and explanations that we provide".

37. The IOPC told the Commissioner that it considered that the complainant "seemingly either ignored, or failed to understand" the significance of there being outstanding proceedings, and the limitations that will have on disclosure of information into the public domain. The IOPC argued that the complainant had been made aware of its stance, and its publication policies "on numerous previous occasions" in regard to similar high profile cases.

38. It told the Commissioner:

"We consider his persistence in continuing to make requests and challenge our responses without any clear or valid counter arguments or purpose to be unreasonable and further evidence of an intransigent mind-set".

39. In particular, the IOPC argued:

"The work involved in assessing [the complainant's] voluminous requests and associated correspondence is placing an unwarranted burden on the IOPC and his pattern of behaviour suggests that he will continue to submit requests on similar themes without taking into account our previous responses and detailed rationale. It appears that he will never be satisfied unless he receives full copies of everything he requests, however unreasonable that may be".

The Commissioner's view

40. In her guidance on dealing with vexatious requests, the Commissioner recognises that the FOIA was designed to give individuals a greater right of access to official information with the intention of making public bodies more transparent and accountable.
41. While most people exercise this right responsibly, she acknowledges that a few may misuse or abuse the FOIA by submitting requests which are intended to be annoying or disruptive or which have a disproportionate impact on a public authority.
42. 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.
43. 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? Where relevant, this will involve the need to take into account wider factors such as the background and history of the request.

Was the request vexatious?

44. As in many cases which give rise to the question of whether a request is vexatious, the evidence in the present case showed a history of engagement. Clearly, the IOPC considered that the particular context and history strengthened its argument that, at the time of the request, the request was vexatious.
45. In her guidance, the Commissioner recognises that the context and history in which a request is made will often be a major factor in determining whether the request is vexatious. She considers that, in practice, this means taking into account factors such as:
 - other requests made by the requester to that public authority (whether complied with or refused);
 - the number and subject matter of those requests;
 - any other previous dealings between the authority and the requesterand, assessing whether these weaken or support the argument that the request is vexatious.
46. In her guidance, the Commissioner acknowledges that:

"A request which would not normally be regarded as vexatious in isolation may assume that quality once considered in context".

47. In that respect, the Commissioner is mindful that the request in this case, although not obviously vexatious in itself, was made in the context of a history of requests.
48. The Commissioner considers that the complainant's previous pattern of behaviour is relevant in this case. She accepts, from the evidence she has seen, that the complainant had made a number of requests to the IOPC prior to the request in this case. Those requests typically involved reports/findings related to high-profile investigations conducted by the IOPC and were typically refused on the basis of sections 30 (investigations and proceedings) and 40 (personal information) of the FOIA, with the IOPC additionally citing section 14 (vexatious request) in more recent cases.
49. The Commissioner also notes that the IOPC was often still in the process of responding to one or more of his earlier requests for information when the complainant submitted a fresh request for information.
50. In terms of burden, the Commissioner gives weight to the IOPC's view that the volume and nature of the complainant's requests and associated correspondence was placing *"an unwarranted and aggregated burden upon the IOPC"*.
51. With respect to the purpose of the request in this case, in her guidance *'Dealing with vexatious requests'*, the Commissioner acknowledges that public authorities cannot insist on knowing why an applicant wants information before dealing with a request. However:

"... this doesn't mean that an authority can't take into account the wider context in which the request is made and any evidence the applicant is willing to volunteer about the purpose behind their request".
52. The Commissioner recognises that most requesters will have some serious purpose behind their request. However, she accepts that in this case, neither she nor the IOPC was able to take into account any comments the complainant may have made in that regard, as he neither provided any context to his request, nor gave any reason for disputing the IOPC's view that the request was vexatious when invited to do so by the Commissioner.
53. With regard to the purpose and value of the request, the Commissioner recognises that there is a public interest in the police complaints process, and that this particular case attracted a lot of media attention.

54. The Commissioner also accepts that complying with the request, in isolation, would not cause a disproportionate or unjustified level of disruption. Indeed she notes that the IOPC initially responded to the request, despite the burden. The Commissioner also recognises that public authorities must keep in mind that meeting their underlying commitment to transparency and openness may involve absorbing a certain level of disruption and annoyance.
55. However, she recognises that the IOPC had previously told the complainant that reports, such as the one requested in this case, are published - once formal procedures have been completed - and that that message has been consistently provided in its responses to his previous requests.
56. Accordingly, the Commissioner gives weight to the IOPC's argument that the complainant would have been aware of its publication policy from his previous dealings with the IOPC. In that respect, she cannot ignore the background and history of the request.
57. The Commissioner also notes that the IOPC's website² clearly states the circumstances in which it publishes information about the cases it investigates. In that respect it variously states:
- "For most of the cases we investigate, we publish anonymised summaries of our reports. ...*
- We publish full investigation reports for the most serious and high-profile incidents...*
- We also publish news releases about our investigations".*
58. In reaching a decision in this case, the Commissioner has balanced the purpose and value of the request against the detrimental effect on the public authority. She has also considered, in light of the nature, and degree, of the dealings between the complainant and the IOPC, whether, at the time, the request crossed the threshold of what was reasonable.
59. To the extent that the subsequent request for the same report, referenced by the IOPC in support of its view that the request under consideration was vexatious, post-dates the request in this case, the Commissioner has not taken it into account in reaching a conclusion in

² <https://www.policeconduct.gov.uk/investigations/our-investigations>

this case. However she considers that it is relevant to the extent that it illustrates the nature of the dealings between the parties.

60. The purpose of section 14 of the FOIA is to protect public authorities and their employees in their everyday business. In her guidance, the Commissioner recognises that dealing with unreasonable requests can place a strain on public authorities' resources and get in the way of delivering mainstream services or answering legitimate requests.
61. Furthermore, these requests can also damage the reputation of the legislation itself.
62. On the basis of the evidence provided, and taking into account the findings of the Upper Tribunal in Dransfield that an holistic and broad approach should be taken in respect of section 14(1), the Commissioner was satisfied that the request was a manifestly unjustified and improper use of the FOIA such as to be vexatious for the purpose of section 14(1).
63. Accordingly, she was satisfied that the IOPC was entitled to apply section 14(1) of the FOIA.

Other matters

64. With regard to the request in this case, the IOPC told the Commissioner it considered that the complainant:

"... had by-passed the due process and complained directly to you about our refusal of the report without giving us the opportunity to internally review our original response".

65. The Commissioner considers that the internal review process enables the requester to put forward their argument to the public authority as to why the information they request should be released. The Commissioner is extremely keen to encourage this interaction and would recommend that approach to all requesters when requesting an internal review.

Right of appeal

66. 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

67. 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.

68. 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

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