

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 November 2020

Public Authority: Chief Constable of Sussex Police
Address: Sussex Police Headquarters
Malling House
Church Lane
Lewes
East Sussex
BN7 2DZ

Decision (including any steps ordered)

1. The complainant has requested details about an event involving an MP from Sussex Police (SP). Having initially refused the request citing sections 30(1) (Investigations and proceedings) and 40(2) (Personal information), SP subsequently disclosed the requested information with redactions for personal information under section 40(2) of the FOIA. The complainant did not dispute the redactions, but he believed further information was held.
2. The Commissioner's decision is that, on the civil standard of the balance of probabilities, no further information is held. No steps are required.

Request and response

3. On 8 October 2019, the complainant wrote to SP and requested information in the following terms:

"I would like information on any investigation, either completed or in progress, about complaints of threatening and intimidatory behaviour in relation to Chris Williamson MP's event in Brighton on 8/8/19, involving any of the following venues:

The Brighthelm Centre,

The Holiday Inn,

Friends Meeting House.

I would also like information on any investigation, completed or in progress, on complaints of threatening and intimidatory behaviour at Brighton Waterstones shop on 23/9/19 at the 'Bad News for Labour: a discussion' event".

4. SP failed to respond to the request. On 5 March 2020, in late compliance with decision notice FS50898331¹, SP responded. It refused to provide the requested information citing the following sections of the FOIA: 30(1) (investigations and proceedings) and 40(2) (personal information).
5. The complainant requested an internal review on 6 March 2020. This was not completed and, due to the delays already experienced by the complainant with SP, the Commissioner agreed to investigate the complaint without an internal review.
6. SP failed to respond to the Commissioner's investigation enquiries. On 9 September 2020, the Commissioner issued an Information Notice formally requiring SP to respond.
7. On 20 October 2020, in late compliance with the information Notice, SP revised its position. It disclosed some information to the complainant, redacting personal information under section 40(2).
8. The complainant did not accept that SP had provided all the information that it held; he did not dispute the citing of exemptions.

Scope of the case

9. The complainant initially contacted the Commissioner on 17 December 2019 to complain about the lack of a response to his information request; the Commissioner issued the decision notice referred to in paragraph 4 above to require a response. SP then failed to conduct an internal review, so the complainant wrote to the Commissioner again, on 5 May 2020, to complain about the way his request for information had been handled.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617166/fs50898331.pdf>

10. During the Commissioner's investigation, SP revised its position and disclosed some information with personal data redacted under section 40(2) of the FOIA. The Commissioner subsequently contacted the complainant for his views.
11. The complainant advised that he did not believe that SP had disclosed all the information held (he did not dispute the citing of section 40 and is happy for personal data to be withheld). He provided the Commissioner with extracts from some emails which he held, and a newspaper article, which he believed evidenced that SP should hold further information. The Commissioner queried whether he was sure that the matters referred to in these emails had actually been reported to SP as, if they had not, then SP would not hold any further information. The complainant did not know whether they had been reported, nevertheless, he asked the Commissioner to continue her investigation and make a determination.
12. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the FOIA. The FOIA is concerned with transparency of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held by public authorities. The FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.

Reasons for decision

Section 1 – general right of access

13. Section 1 of the FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds that information and, if so, to have that information communicated to them.
14. In this case, the complainant suspects that SP holds further information from which it could answer the request. SP's position is that it does not. In cases where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner – following the lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.

15. The Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the public authority to check whether the information is held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.
16. Therefore, the Commissioner has sought to determine whether, on the balance of probabilities, SP holds any further recorded information within the scope of the request.

The complainant's view

17. As written in paragraph 11 above, the complainant considered that SP should hold further information based on some emails and a newspaper article in his possession. However, he was unable to confirm whether or not the matters in those emails had actually been reported to SP.

Sussex Police's view

18. The Commissioner asked SP to explain what enquiries it had made in order to reach the view that it did not hold any further information.
19. SP confirmed that it had undertaken searches of its Command & Control System. It advised that this system: " ... records reports of incidents and allegations received in Control Centre (999 and 101 telephone calls)".
20. It confirmed that any information would be held electronically on its networked resources. It also advised that it had undertaken searches using the MP's name, the dates and the venues named in the request and had located the incidents which had been disclosed to the complainant.
21. It confirmed that these type of records would be held for 7 years under Management of Police Information (MOPI) rules and that any data would not therefore have been destroyed.

The Commissioner's conclusion

22. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in the paragraphs, above, the Commissioner is required to make a finding on the balance of probabilities.

23. When dealing with a complaint to her under the FOIA, it is not the Commissioner's role to make a ruling on how a public authority deploys its resources, on how it chooses to hold its information, or the decisions it makes to hold some, but not other, information. Rather, in a case such as this, the Commissioner's role is simply to decide whether or not, on the balance of probabilities, the public authority holds the requested information.

24. While appreciating the complainant's frustration that SP does not hold further information within the scope of his request, the Commissioner is mindful of the comments made by the Information Tribunal in the case of *Johnson / MoJ* (EA2006/0085)² which explained that the FOIA:

"... does not extend to what information the public authority should be collecting nor how they should be using the technical tools at their disposal, but rather it is concerned with the disclosure of the information they do hold".

25. The Commissioner considers that SP searched the relevant system, using appropriate search terms, to ascertain whether or not any further information was held in respect of the request. Based on the information provided she is satisfied, on the balance of probabilities, that no further recorded information within the scope of the request is held. She is therefore satisfied that SP has now complied with the requirements of section 1 of the FOIA in this case.

Other matters

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

Section 45 – internal review

27. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. However, it is good practice to offer an internal review, and, where a public authority chooses to do so, the code of practice established under section 45 of

²<http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i90/Johnson.pdf>

the FOIA³ sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales.

28. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
29. The complainant asked for an internal review on 6 March 2020. However, Sussex Police did not conduct an internal review and, although asked to, it has not provided the Commissioner with any explanation of why it failed to do so.
30. By failing to conduct an internal review, when it had previously offered to engage with the complainant about the request, Sussex Police has failed to act in accordance with the section 45 code.

General engagement

31. This request has taken an inordinate amount of time to be complied with by SP and the Commissioner considers it is worthy of further commentary.
32. It is not a complex or lengthy request, yet it has taken over a year for the complainant to receive the information he requested. Not only is the Commissioner concerned about the time SP has taken to respond fully to the complainant, she is also concerned about SP's engagement with her casework staff in this case. She has now issued three formal notices to conclude matters for the complainant (two decision notices and one information notice), and of even greater concern is the fact that the two notices issued previously on this case were both complied with late, placing SP at risk of being held in contempt of court.
33. The previous decision notice in this case is available on the Commissioner's website and the information notice will also be published on the website.
34. 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 strategy⁴ to improve standards of

³https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

⁴ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

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 our Regulatory Action Policy⁵.

35. The Commissioner notes that these comments build on those she made in the Other Matters section of a previous decision notice against SP⁶. She therefore reiterates that this case may be revisited with SP should timeliness and engagement continue to be an issue.

⁵ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

⁶ IC-46035-P5N6 <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2618150/ic-46035-p5n6.pdf>

Right of appeal

36. 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

37. 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.
38. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF