

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 August 2022

Public Authority: Office of the Police & Crime Commissioner for Cheshire

Address: Cheshire Constabulary HQ
Clemonds Hey
Oakmere Road
Winsford
CW7 2UA

Decision (including any steps ordered)

1. The complainant has requested from the Office of the Police and Crime Commissioner for Cheshire ('the OPCC'), information about the number of frontline police officers in Cheshire Constabulary. The OPCC said that it did not hold the requested information. It also argued that the request was not a valid request for information under FOIA.
2. The Commissioner's decision is that the request met the requirements of section 8 (Requests for information) of FOIA and thus it constituted a valid request for information. He is also satisfied that, on the civil standard of the balance of probabilities, the OPCC does not hold the information described in the request. However, by failing to confirm that it did not hold the requested information within the statutory time for compliance, the OPCC breached section 1(1)(a) (General right of access) and section 10 (Time for compliance) of FOIA.
3. The Commissioner requires no steps as a result of this decision.

Request and response

4. On 17 May 2021, the complainant wrote to the OPCC and requested information in the following terms:

"The purpose of this email is to gain clarification on a statement in the press release of 13th May 2021 on www.cheshire-pcc.gov.uk

It states that you are "committed to recruiting 240 more frontline police officers, taking our establishment to 2,320 by 2024."

By simple subtraction, that means that you believe Cheshire Constabulary already has 2080 frontline officers. How and where is "frontline police officer" defined, and how have you determined that there are already 2080 frontline offices [sic] in Cheshire Constabulary at 13th May 2021?"

5. The Police and Crime Commissioner ('the PCC') responded on behalf of the OPCC on 25 June 2021. He said:

"You have asked what is meant by 'frontline police officer'. Quite simply all police officers are front line officers as they can be deployed by the Chief Constable in whatever way allows him to properly address the issues he is facing".

6. As to the number of frontline officers employed by Cheshire Constabulary, he said:

"The actual number of officers in the establishment...fluctuates daily. However, you may wish to know that I am committed to ensuring that Cheshire Constabulary has an establishment of 2,320 officers by 2024".

7. The complainant replied on 6 July 2021. He requested answers to the two specific questions he had asked. He also complained that when responding, the OPCC had exceeded the statutory time for compliance permitted under FOIA.

8. The PCC responded again, on 8 July 2021, stating "I should make it clear that your email dated 17 May was not treated as an FOI request". He commented that he considered the complainant was asking for comment or for clarification, rather than for recorded information. As such, he did not consider the request to be a valid request for information under FOIA.

9. The complainant replied on 12 July 2021, asserting that both questions were valid requests for information under FOIA. He requested that the OPCC conduct an internal review of its handling of the request.
10. The OPCC acknowledged the request for an internal review on 13 July 2021, saying it would reply within 20 working days.
11. The OPCC responded to the complainant on 6 August 2021. It said:

"I am satisfied that the Office of the Police & Crime Commissioner's decision to treat your initial correspondence as an informal request and attempt to provide a better customer service by ensuring the Police & Crime Commissioner responds personally, was not only correct, but reasonable and proportionate in the circumstances. You have subsequently received a response from the Police & Crime Commissioner, although I acknowledge that you do not agree the response provided. As such, your request for an internal review is not upheld."
12. However, it noted that were the request to be considered under FOIA, the OPCC's response to the two questions would be "no information held". It commented that the definition of "frontline officer" may be information which was held by Cheshire Constabulary, and it provided an email address for the Constabulary.

Scope of the case

13. The complainant contacted the Commissioner on 27 August 2021 to complain about the way his request for information had been handled. He believed that the OPCC was incorrect to refuse to deal with his request under FOIA.
14. The Commissioner has considered whether the request was a valid request for information under section 8 of FOIA. Having determined that it was, he has considered whether, on the balance of probabilities, the OPCC holds the requested information (section 1 of FOIA). He has also considered the time the OPCC took to respond to the request (28 working days) under section 10 of FOIA. He has commented on the OPCC's handling of the request as a customer enquiry in the 'Other matters' section of this decision notice.
15. 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 FOIA. FOIA is concerned with transparency and provides for the disclosure 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. 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 8 – request for information

16. Section 8(1) of FOIA defines a valid request for information under FOIA as a request which:
 - (a) is in writing,
 - (b) states the name of the applicant and an address for correspondence, and
 - (c) describes the information requested.
17. To be valid, requests do not need to mention FOIA, or be submitted to a designated member of staff. It is for public authorities to recognise them as FOIA requests and to deal with them as such.
18. Section 84 (Interpretation) of FOIA defines “information” as: “...information recorded in any form”.
19. Therefore, in order to constitute a valid request for information under FOIA, not only must the complainant’s request satisfy the criteria in section 8 of FOIA, but it must also be a request for **recorded** information.
20. FOIA only provides a right of access to information that is ‘held’ by public authorities. A public authority is not required to create new information in order to comply with a request for information under FOIA. Public authorities are not required to answer a question or give an opinion if they do not already hold that information in recorded form.
21. The Commissioner’s guide to freedom of information¹ states:

¹ <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/receiving-a-request/>

"Almost anything in writing which asks for information will count as a request under the Act...a question can be a valid request for information...Under the Act, if you have information in your records that answers the question you should provide it in response to the request. You are not required to answer a question if you do not already have the relevant information in recorded form.

The Information Commissioner's Office (ICO) recognises that some public authorities may initially respond to questions informally, but we will expect you to consider your obligations under the Act as soon as it becomes clear that the applicant is dissatisfied with this approach. Ultimately, if there is a complaint to the ICO, the Commissioner will make their decision based on whether recorded information is held and has been provided."

22. The request in this case was made in writing and the complainant provided his name and an address. It follows that the only issue remaining for the Commissioner to consider is its validity in terms of whether it describes recorded information.

23. The Commissioner has considered whether the following 'questions' describe information which could be responded to with recorded information (if held):

"How and where is "frontline police officer" defined, and how have you determined that there are already 2080 frontline offices [sic] in Cheshire Constabulary at 13th May 2021?"

24. The OPCC said that this constituted a request for the PCC's personal opinion, as it related specifically to a statement he had made, which the complainant said he required "clarification" on. However, the Commissioner is satisfied that it is possible to identify within each question a request which might be responded to with recorded information (that is, the definition of "frontline officer" and the source for the implied number of frontline officers as at 13 May 2021), assuming that the OPCC holds such information.

25. As stated in paragraph 17, a request need not mention FOIA to be valid – the obligation is on public authorities themselves to recognise valid requests and to deal with them in accordance with the legislation. Whilst, in this case, the Commissioner accepts that there might have been some initial confusion as to who the request was directed at (the PCC personally, or the OPCC), the complainant subsequently made it clear that he expected the request to be dealt with under FOIA.

26. The Commissioner is therefore satisfied that the questions do meet the requirement in section 8(1)(c) to describe recorded information and that the request was a valid request for information under FOIA.
27. Although the OPCC continued to disagree that the request fell to be dealt with under FOIA, and it explicitly said to the complainant in paragraph 19 of its letter of 6 August 2021 that, "...your request for an internal review is not upheld", the Commissioner considers that letter was an internal review of its handling of the request in all but name, and he has considered the OPCC's position as set out within it.

Section 1 – general right of access

Section 10 - time for compliance

28. Section 1(1) of FOIA states that an individual who asks for information is entitled to be informed:
 - (a) whether the information is held; and
 - (b) if the information is held, to have that information communicated to them.
29. Section 10(1) of FOIA states that on receipt of a request for information a public authority should respond to the applicant within 20 working days.
30. The complainant requested information on 17 May 2021 and the OPCC responded on 25 June 2021, 28 working days later. Furthermore, it did not confirm that it did not hold the requested information until 6 August 2021. The OPCC therefore breached sections 1(1)(a) and 10(1) of FOIA.

Section 1 – General right of access

31. As noted above, section 1(1) of 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.
32. In this case, the OPCC says it does not hold the requested information. The complainant has asked the Commissioner to examine this claim.
33. 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.

34. The Commissioner will consider any evidence offered by the complainant. He 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. He 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, he is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.

The complainant's position

35. The complainant has not offered any evidence for believing that the OPCC holds the requested information, beyond the fact that the statement which prompted his request was published on its website.

The OPCC's position

36. The OPCC told the Commissioner that the request concerned a statement by the incoming PCC, published on the OPCC's website on 13 May 2021. The OPCC explained that he was the successful candidate for the PCC election, held on 6 May 2021. He took office on 13 May 2021, and published the statement with which the request is concerned, that day.
37. The OPCC said that the contents of the statement were taken from the PCC's campaign manifesto, which was drawn up while he was campaigning for the position, prior to being elected as PCC. It clarified that his campaign manifesto was neither endorsed nor compiled by the OPCC. All OPCC employees are politically restricted and, therefore, unable to provide support to any candidate, particularly during a pre-election period.
38. The OPCC explained that it had, in collaboration with Cheshire Constabulary, produced a Candidate Briefing Pack prior to the election. This was provided to all official candidates, including the PCC. Although this document included the budgeted police officer numbers for the 2021/22 financial year, it did not provide the number of police officers prior to the election, or, for the avoidance of doubt, the number as it stood on 13 May 2021.
39. The OPCC's position was, therefore, that although the statement was published on its website, the information it contained was compiled by the PCC personally, during his election campaign, and prior to him taking office. The OPCC said it had no part in compiling the information and that it did not hold the information from which it was sourced.

40. Despite being satisfied, for the above reasons, that it did not hold the information described in the request, the OPCC nevertheless conducted searches to check whether it held the information, which it described to the Commissioner. The Commissioner is satisfied that the searches it described would have been capable of locating the requested information, if it was held, and that no information was found.
41. The OPCC also made external enquiries regarding the information specified in the request, in case the information might have been provided to it, at some point, by a third party. However, these enquiries did not result in it being able to identify any third party which held the requested information and which might have supplied it to the OPCC.

The Commissioner's decision

42. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed 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 paragraphs 33 and 34, above, the Commissioner is required to make a finding on the balance of probabilities.
43. The complainant has not offered any explanation as to why he believes that the OPCC holds the requested information, beyond noting that it relates to a statement which appears on its website.
44. The OPCC has responded to that specific point with a clear and cogent explanation. The statement was derived from the PCC's own election manifesto, which was created by him, prior to him being elected and taking office. The OPCC had no involvement with creating the manifesto. The statement was published on the website on the PCC's first day in post, and the complainant made his request for the underlying information a mere four days later.
45. The Commissioner is persuaded by the OPCC's explanation as to why it does not hold the information described in the request (ie the definition of "frontline police" used in the statement, and the source for the implied claim that there were 2080 serving officers as at 13 May 2021). For the reasons set out above, it is not information which the OPCC holds as recorded information, and it relates to independent work the PCC did before he was elected.
46. That being the case, the complainant might argue that the OPCC should ask the PCC for the information described in his request. However, FOIA

does not require a public authority to create information which it does not already hold in order to answer a request. The Commissioner's guide to freedom of information² states:

"The Act does not cover information that is in someone's head. If a member of the public asks for information, you only have to provide information you already have in recorded form. You do not have to create new information or find the answer to a question from staff who may happen to know it."

47. Taking the above into account, and viewed together with the searches that the OPCC conducted, the Commissioner is satisfied that, on the civil standard of the balance of probabilities, the OPCC does not hold the information described in the request.

Other matters

48. During the Commissioner's investigation, the OPCC continued to maintain that it had been correct to handle the request as a customer service matter, noting that its service agreement specified a 10 day period for responding to enquiries. This is quicker than the 20 working days provided for under FOIA.
49. The Commissioner would support such an approach to request handling where it results in the disclosure of the requested information to the requester, faster than if the request had been handled under FOIA. However, in this case the outcome of the request was that no information was disclosed, and the OPCC took longer to respond than would have been permitted under FOIA. It also rejected the complainant's assertion that the request should be dealt with under FOIA.
50. The Commissioner would draw the OPCC's attention to his guidance on this point³:

² <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/what-is-the-foi-act/>

³ <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/receiving-a-request/>

“This doesn’t mean you have to treat every enquiry formally as a request under the Act. It will often be most sensible and provide better customer service to deal with it as a normal customer enquiry under your usual customer service procedures, for example, if a member of the public wants to know what date their rubbish will be collected, or whether a school has a space for their child. The provisions of the Act need to come into force only if:

- you cannot provide the requested information straight away; or
- the requester makes it clear they expect a response under the Act.”

51. The Commissioner has published a request handling flowchart⁴ which provides an overview of the steps to follow when handling a request for information.
52. The Commissioner uses intelligence gathered from individual cases to inform his insight and compliance function. This aligns with the goal in his draft “Openness by design”⁵ strategy 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 systemic non-compliance, consistent with the approaches set out in his “Regulatory Action Policy”⁶.

⁴ https://ico.org.uk/media/for-organisations/documents/1167/flowchart_of_request_handling_under_foia.pdf

⁵ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁶ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

53. 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

54. 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.
55. 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

Samantha Bracegirdle
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