

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 February 2012

Public Authority: The Chief Constable of Hampshire Constabulary
Address: Police Headquarters
West Hill
Romsey Road
Winchester
Hampshire
SO22 5DB

Decision (including any steps ordered)

1. The complainant requested information relating to the retention of human tissue samples.
2. The Information Commissioner's decision is that Hampshire Constabulary incorrectly applied section 12 (the costs exemption).
3. The Information Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - reconsider the request and either comply with section 1(1) of the FOIA (by disclosing the requested information) or issue a refusal notice compliant with section 17.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. The complainant wrote to Hampshire Constabulary (the Constabulary) on 12 September 2011 and requested information in the following terms:

"1, Has your police force retained any human tissue samples or body parts during the past 25 years without the knowledge of families? (a simple yes/no is required for this question).

2, Please tell me the number of samples which have been kept. If possible, please break this down by year. (Please answer a total number here)

3, Please categorise what kinds of tissue samples or body parts have been kept by your force. (Break down the types of samples kept)

4, Please tell me if you have had any complaints about this practice from families of victims.

5, If yes to Q4, please tell me how many complaints you have had and the nature of these complaints."

6. Hampshire Constabulary responded on 30 September 2011. It stated that the requested information was exempt from disclosure by virtue of the fact that it was intended for future publication – section 22 of the FOIA. In support of that decision, Hampshire Constabulary explained to the complainant that there was already a pre-existing intention to publish information relating to the force's revised policy in this area.
7. Following an internal review Hampshire Constabulary wrote to the complainant on 17 October 2011, upholding its decision to withhold the requested information.
8. The Commissioner is aware of a press release on the Association of Chief Police Officers (ACPO) website, albeit one that was issued after the date of the request in this case, that refers to an audit conducted by ACPO:

"ACPO is coordinating an audit of human tissue previously retained as part of suspicious death and homicide cases so as to establish the current situation in terms of police holdings".

9. By way of explanation, in criminal cases there is often a legal requirement to retain tissue and samples as they may form part of the prosecution case (Criminal Procedure and Investigations Act 1996). Prior to September 2006 (the commencement of the Human Tissue Act) there was no legal requirement for the police to inform families of any retained tissue.

Scope of the case

10. The complainant contacted the Information Commissioner to complain about the way his request for information had been handled. He argued that, in his view, the issue is of such importance that "*at least some of this information should be released now*". He argued that, at the very least, the Constabulary should answer question 1.
11. During the course of the Information Commissioner's investigation, the complainant provided evidence of other police forces releasing such information.
12. Although the Information Commissioner understands from the complainant that some police forces would appear to have complied with similar requests, or voluntarily released relevant information, he does not consider that this sets an automatic precedent for disclosure under the FOIA. In the Information Commissioner's view, each case must be considered on its merits.
13. During the course of the Information Commissioner's investigation, Hampshire Constabulary confirmed that it was no longer relying on section 22. Instead, it stated that it is relying on section 12 of FOIA (cost of compliance):

"based on its new assessment that the request would exceed the statutory cost limit".

14. It explained:

"Following further and more detailed consultation with both in-force experts and other national bodies involved in the Human Tissue audit (such as the NPIA), it has subsequently become clear that it would be impossible for the force to respond to this request within the statutory cost limit imposed by the FOIA.

It has also become apparent following these discussions that the level of detail requested will not be published because the information is neither available nor easily retrievable".

15. The complainant told the Information Commissioner:

"I believe this is a very late application of a different exemption and surely their change from section 22 to section 12 shows that their original defence was wrong".

16. Whilst acknowledging that the exemption at section 12 of FOIA was not cited until after he began his investigation, the Information

Commissioner has no discretion as to whether or not to consider late exemptions: he must consider any exemptions raised by the public authority for the first time during his investigation.

17. Accordingly, and as the Constabulary is no longer relying on section 22, the Information Commissioner considers the scope of his investigation to be only with respect to the Constabulary's citing of section 12.

Reasons for decision

18. Section 12 of FOIA provides an exemption from a public authority's obligation to comply with a request for information where the cost of compliance is estimated to exceed the appropriate limit.
19. This limit is set at £450 in the fees regulations for public authorities such as the Constabulary. The cost of complying with a request is calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 18 hours.
20. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) states that an authority can only take into account the costs it reasonably expects to incur in:
 - determining whether it holds the information;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
21. The four activities are sequential, covering the retrieval process of the information from the public authority's information store.
22. When relying on section 12, a public authority must still confirm or deny whether it holds the information requested unless the cost of this alone would exceed the appropriate limit.

23. In this case, the Constabulary told the complainant:

"The vagueness of the questions, together with the intricacies and scope of the audit, combined with historic factors relating to how information was stored and recorded means that to determine if relevant information were held, locate and retrieve it would exceed 18 hours".

24. By way of explanation as to how it had reached that decision, it told the complainant:

"In order to respond to questions 1 – 3, there would no alternative but for the force to review thousands of cases and associated material still retained in line with CPIA [Criminal Procedure and Investigations Act 1996] requirements to determine whether any category 1, 2 or 3 material were held and then retrieve any additional information that may be held within this material to respond to the additional questions that have been posed."

25. The Information Commissioner notes that the Constabulary did not offer any help or assistance to the complainant as to how the request could be refined or limited to come within the cost limit.

26. Nor does the Information Commissioner consider that the Constabulary's response conveys clearly whether relevant information is, or is not, held; or whether the Constabulary is claiming that it would exceed the cost limit to establish whether information within the scope of the request is held. However he notes that the Constabulary's original response – albeit one no longer relied on – was that the requested information was intended for future publication. In the Information Commissioner's view, that response understandably gave the impression that relevant information is held. Accordingly, he considers the Constabulary is relying on section 12(1).

27. The complainant disputed the Constabulary's view that his request was vague, telling the Information Commissioner:

"In terms of their suggestion that the questions are too vague – I reject this totally. The first question is a simple yes/no answer that would encompass all of their storage before 2006 when the Human Tissue Act came into place".

28. He also explained why, in his view, he considered that the Constabulary would hold information relevant to parts 2 and 3 of his request.

29. The Information Commissioner has some sympathy with the complainant's frustration with respect to the Constabulary's argument about *"the vagueness of the questions"*. He notes that that argument

does not appear to have been raised prior to the commencement of his investigation.

30. Having considered the wording of the request, the Information Commissioner does not agree, on an objective reading of the request, that it was unclear or ambiguous.

The estimate

31. Section 12 makes it clear that a public authority does not have to make a precise calculation of the costs of complying with a request - only an estimate is required. In the Information Commissioner's view, any estimate that the cost limit is exceeded needs to be:

"sensible, realistic and supported by cogent evidence".

32. In this case, although referring to "*the enormous difficulties in locating and retrieving the information that has been requested*", the Information Commissioner is not satisfied that the Constabulary has provided himself or the complainant with substantive evidence of having estimated the amount of work involved.
33. The Information Commissioner is therefore unable to investigate the way in which an estimate has been arrived at. It follows that he is unable to make a determination as to whether he considers it to be reasonable.
34. Based on the arguments put forward by the Constabulary the Information Commissioner is therefore unable to reasonably conclude that section 12 and the cost regulations have been correctly applied in this case. Accordingly the Information Commissioner has determined that the Constabulary incorrectly applied section 12.

Section 16 Advice and guidance

35. The Information Commissioner is clear that where an authority refuses a request because the appropriate limit has been exceeded, it should, bearing in mind the duty under section 16 of FOIA to advise and assist an applicant, provide information on how the estimate has been arrived at and provide advice to the applicant as to how the request could be refined or limited to come within the cost limit.
36. In this case, the Information Commissioner acknowledges that the section 12 exemption was only cited during the course of his investigation. Nevertheless, he considers that the Constabulary failed to provide advice and assistance to the complainant.

37. The Information Commissioner would remind the Constabulary of its obligations under section 16 of the FOIA and the Code of Practice which places a duty on public authorities to provide advice and assistance to individuals requesting information under the FOIA. That advice and assistance includes providing them with reasonable guidance to rephrase information requests in order to meet the requirements of the Act. This includes providing an indication of what, if any, information could be provided within the cost ceiling.

Other matters

38. The Constabulary has explained that as there was no requirement formally to notify families prior to 2006 about the retention of samples, the information is poorly documented and the records incomplete.

39. It also argued that:

"Given the nature of the subject matter and the sensitivities involved, it is essential that any information released is accurate and complete. Consequently, to respond properly to this FOI request in the appropriate exact and precise manner, there would be no alternative or short-cut that it would be acceptable to adopt".

40. In the Information Commissioner's view, the fact that information is incomplete - and therefore potentially misleading - should not, in itself, be used to justify non-disclosure. He notes that the FOIA only provides a right to information and not to accurate, complete or easily comprehensible information and, secondly, that a public authority can usually provide an explanation or other background information to set the disclosure into context.

Right of appeal

41. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

42. 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.
43. 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

Jon Manners
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