

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 October 2016

Public Authority: Chief Constable of West Midlands Police
Address: Lloyd House
Colmore Circus
Queensway
Birmingham
B4 6NQ

Decision (including any steps ordered)

1. The complainant requested information about a former Detective Chief Inspector following what she described as his *“sexual harassment of four female colleagues”*. West Midlands Police (‘WMP’) initially refused to provide the information citing section 31(1)(g), law enforcement, and section 40(2), personal information. However, during the Commissioner’s investigation, WMP confirmed that it instead wished to rely on section 14(1), vexatious request, on the grounds that responding to it would be likely to cause a disproportionate and unjustified level of disruption, irritation and distress.
2. The Commissioner’s decision is that WMP acted correctly in relying on the section 14(1) FOIA exclusion. She does not require WMP to take any steps to ensure compliance with the legislation.

Request and response

3. On 31 July 2015 the complainant made the following request for information under the FOIA for:

“All documents, memos, emails, force information (historical and present) which refer to when West Midlands Police first became aware of allegations of inappropriate/unprofessional behaviour by Detective Chief Inspector [name redacted].”

** Copies of all emails, correspondence, memos, briefings notes, any information exchanged between [name redacted], Head of*

Corporate Communications for West Midlands Police (and Head of the force's Freedom of Information Unit) and the force's Professional Standards Unit which relate in any way to the suspension, sacking, and allegations/case against former Detective Chief Inspector [name redacted].

** Copies of all emails, correspondence, information exchanged between any members of the force press office/communications team which relate in any way to the suspension, sacking, and allegations/case against Detective Chief Inspector [name redacted].*

** Copies of all emails, correspondence, information exchanged between any member of the force's Corporate Communications Team and the Professional Standards Department and any other force department which relate in any way to the suspension, sacking and allegations/case against Detective Chief Inspector [name redacted].*

** Copies of all emails, correspondence, memos, documents held by the force which relate in any way to the case against [name redacted].*

I obviously do not expect or want to be provided with the identities of any of the victims in the case so fully expect you to redact such details.

I wish to be provided with ANY information held by your organisation regarding my request...

...I would like to receive the information in an electronic format if possible."

4. WMP responded on 24 August 2015 stating that the matter was subject to an ongoing employment tribunal and that any information located might be subject to the exemptions for personal information (section 40(2) and law enforcement (section 31(1)(g)(2)(b)). However, WMP also advised that it would not be able to provide the information it holds within the cost limit (section 12(1) of FOIA) and asked the complainant to consider how she might refine her request.
5. The complainant requested an internal review on 4 December 2015. WMP sent her the outcome of its internal review on 29 January 2016. It maintained that sections 40(2) and 31(1)(g) apply but did not refer to section 12(1).

Scope of the case

6. The complainant contacted the Commissioner on 22 March 2016 to complain about the way her request for information had been handled.

7. As part of the Commissioner's investigation, public authorities are asked to revisit their handling of a request. In this case, WMP did so and concluded that the request was vexatious (section 14(1) of FOIA). It wrote to the complainant on 24 June 2016 to inform her of its revised position.

8. WMP also advised the complainant as follows:

"After contact with the ICO and further consideration of this request, I believe that this material is exempt from disclosure because S. 14 (1) applies. This is because we have over 1,001 pages of material and dealing with the request would impose a disproportionate burden on West Midlands Police. Full reasoning behind this decision, with reference to ICO Guidance is included below.

I would also like to encourage you to request information that would reduce the burden on West Midlands Police and therefore could be considered for release without reference to Section 14(1).

For example, if you were to reduce the request to:

- 1) Emails to or from Head of News (6 emails – 11 pages)*
- 2) The Investigating Officers report (54 pages)*

This would reduce the amount of material to 65 pages which, while still burdensome, would be below the threshold for disproportionality.

Please note that all six emails are related, and most are replies to an original."

9. On 27 June 2016, the Commissioner wrote to the complainant seeking her viewpoint on WMP's reliance on section 14(1) and its suggested refinement of the request. These views were provided on 8 August 2016.

10. With a view to trying to resolve the case informally, the Commissioner sought the complainant's consent to share her comments with WMP. It then became apparent that the complainant wanted the Commissioner to consider WMP's earlier reliance on sections 31(1)(g) and 40(2) as well as 14(1).

11. After rechecking WMP's position, the Commissioner confirmed to the complainant that WMP now only sought to rely on section 14(1) in relation to the whole request, which in turn meant that the Commissioner could only consider WMP's reliance on section 14(1).

12. On 23 August 2016, the Commissioner wrote again to the complainant setting out this position and asked her whether she would be prepared to refine her request as suggested by WMP. Following further email contact the complainant finally provided her response on 23 September 2016 which included the following statement:

"Whilst I would like to see this information as part of my request, in the light of the seriousness of the matter and the importance of facilitating public scrutiny of the case, this offer of a limited release is not sufficient."

13. The Commissioner has therefore considered whether WMP is entitled to rely on section 14(1) of FOIA in relation to this request with regard to the arguments put forward by both parties.

Reasons for decision

14. Section 14(1) of FOIA says that a public authority is not obliged to comply with a request for information if the request is vexatious.
15. The term 'vexatious' is not defined in the FOIA. The Upper-tier Tribunal considered the issue of vexatious requests in the case of *The Information Commissioner and Devon County Council vs Mr Alan Dransfield (GIA/3037/2011) (Dransfield)*¹ and concluded that the term could be defined as *"manifestly unjustified, inappropriate or improper use of a formal procedure"*.
16. The *Dransfield* case identified four factors that may be present in vexatious requests:
- the burden imposed by the request (on the public authority and its staff)
 - the motive of the requester
 - harassment or distress caused to staff
 - the value or serious purpose of the request.

¹ <http://www.osspsc.gov.uk/judgmentfiles/j3680/GIA%203037%202011-01.doc>

17. 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 requests². In short they include:
- Abusive or aggressive language
 - Burden on the authority
 - Personal grudges
 - Unreasonable persistence
 - Unfounded accusations
 - Intransigence
 - Frequent or overlapping requests
 - Deliberate intention to cause annoyance
18. 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 a case will need to be considered in reaching a judgement as to whether a request is vexatious.
19. The Commissioner's guidance suggests that, if a request is not patently vexatious, the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. In doing this the Commissioner considers that a public authority should weigh the impact of the request upon it and balance this against the purpose and value of the request.
20. Where relevant, public authorities also need to take into account wider factors such as the background and history of the request. However, it is important to recognise that one request can in itself be 'vexatious' depending on the circumstances of that request.

WMP

21. In its submission WMP has argued that complying with the request would cause them a disproportionate and unjustified level of disruption, irritation and distress, citing the Commissioner's guidance, which states that, although a public authority cannot claim section 12 for the "*cost and effort associated with considering exemptions or redacting exempt information*", it may apply section 14(1) "*where it can make a case that the amount of time required to review and prepare the information for*

² <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

disclosure would impose a grossly oppressive burden on the organisation."

22. The guidance also acknowledges 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 **AND**
 - Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.

Volume

23. WMP said there are over 1,001 pages of material within the scope of the request and that dealing with the request would impose a disproportionate burden on it. WMP explained that it had conducted a search of its email system which included the email accounts of seven named members of its Professional Standards Department and 12 named members of Corporate Communications Department. The search had 'de-duplication' enabled which means that if a particular email appeared in more than one person's mailbox it was only retrieved once.
24. This search uncovered 188 emails, many of which contain attachments. It was clear that some of these are not relevant to the request and removal of those irrelevant to the request leaves 47 emails. When copied into Microsoft Word there were 138 pages of email covering text. The attachments contained 659 pages. There was also one spreadsheet containing 1,100 rows of data. The investigating officer's report contains 204 pages. Therefore, after the initial 'weeding' exercise the total number of pages to be examined is 1001 plus 1100 rows in a spreadsheet.
25. WMP confirmed it had already spent approximately four hours to read through the emails to confirm their relevance to the actual request. It suggested the complainant refine her request such that it could provide a response, as set out in paragraph 8. However, the complainant declined to do so.
26. In terms of its resources and numbers of requests, WMP has 4.56 (FTE) staff to answer all FOI requests and the majority of internal reviews. In addition there is a manager who runs the FOI unit and answers some internal reviews, all ICO appeals and tribunal cases.

27. Up to the end of September 2016, WMP received 1270 requests for information, 30 internal reviews and eight appeals to the Information Commissioner. This represents an average of 141 requests per calendar month or approximately between six and seven requests per working day. WMP also currently has two live cases with the Information Tribunal which are resource intensive.
28. In the last five years WMP's budget has been reduced by £130 million pounds and there has been a reduction of 20 per cent in FTE staff (1,332.2 officers, 265.5 PCSOs and 492.9 staff). WMP said that these huge reductions make the task for staff in the FOI Unit of retrieving the information more difficult. It also inevitably leads to staff being distracted from other tasks in order to service FOI requests.

Concerns about potentially exempt information

29. WMP said it believes section 40(2) of FOIA would apply to the requested information because the emails contain personal data of the individuals involved; some of this is sensitive personal data. This can be divided as follows:
 - Personal information concerning and statements provided by [named officer]
 - Personal information concerning, and statements provided by, other individuals directly involved in the case
 - Personal information concerning, and statements provided by, other individuals who were not directly involved in the case
 - Information regarding individuals who were performing administration tasks regarding this case.
30. With respect to the named officer, WMP said it is clear that he would not expect the details of this case, and his personal details, to be made public beyond that which would normally be revealed through the usual processes when such a case is brought. It is clearly necessary and in the public interest to reveal some details and this has been done through the normal channels. To put detailed personal data, some of which is sensitive personal data as defined by the Data Protection Act, into the public domain is beyond the reasonable expectations of the named officer. Given the nature of the allegations and the outcome the distressing consequences of release are also obvious.
31. As for the individuals directly involved, WMP believes that there is a clear expectation that their personal information would not be placed into the public domain. WMP referenced the fact that the complainant

appears to believe that such an expectation is obvious, given that her initial request stated "*I obviously do not expect or want to be provided with the identities of any of the victims in the case so fully expect you to redact such details.*"

32. WMP believes that the same is true for those other individuals who provided statements or whose personal data was caught in this request. If they provided a statement their reasonable expectation would be that the information they provided would be used only for the purposes of the investigations and any related processes. The consequences of release into the public domain would be distressing. This also applies for those individuals who did not give statements but whose personal data is nonetheless included within the gathered data.
33. In addition, WMP said for those individuals who performed only administrative tasks regarding this case, and whose role is not public facing, there is a less clear cut case for exempting. However, each case would need to be considered on its own merits. Such consideration further increases the burden.
34. In relation to why section 31(1)(g) of FOIA applies to this information, WMP referenced its explanations set out in its original response and the response to the internal review. The Home Office guidance on Police Officer Misconduct, Unsatisfactory Performance and Attendance Management Procedures outlines the responsibility of the Police to investigate these matters appropriately.
35. Release into the public domain of information would harm WMP's ability to investigate these issues. Releasing information provided by or about witnesses may affect the public's perception of the investigative process and make people more reluctant to report misconduct in the future.

Potentially exempt information cannot easily be isolated

36. Personal data, not just names but information that would identify individuals, is distributed throughout the emails and attachments. To locate and redact each instance WMP said would be "*arduous and burdensome*".
37. The majority of the information is covered by this exemption. WMP explained that some information has already been released into the public domain and so the issue would be "*to recognise which information can be released because it has already been released*". This would therefore involve conducting online searches in an effort to identify what is already "known" and can therefore be safely disclosed, which would again add to the burden in dealing with the request.

Details of the detrimental impact of complying with the request

38. In *Salford vs ICO and TieKey Accounts Ltd (EA2012/0047)*³ the Tribunal decided that, in that case, a reasonable estimate of time per page to examine was five minutes. Based on this, it would amount to 83.4 hours for WMP to examine 1001 pages.
39. In this case, WMP stated that a reasonable estimate of time per row of data in the Excel spreadsheet is two minutes; this gives a time of over 36.6 hours to examine the spreadsheet.
40. WMP said it had already spent four hours spent identifying the relevant data. Therefore, in terms of burden, this request represents 124 hours. This is far in excess of the 18 hours limit defined in section 12 (cost exclusion) of FOIA to locate and extract material to respond to a request, which is the approximate guide to disproportionality.

The impact of a request against its purpose and value

41. The application of section 31(1)(g) is analogous to the application of section 30 and , as such, the public interest in release is to show that Professional Standards investigations in general (and this one in particular) have been conducted appropriately. WMP said the arguments against release are to ensure that its ability to undertake this type of investigation is protected.
42. In this case the information concerns the dismissal of a Senior Police Officer, so the information can be seen to be of public concern. With this in mind WMP have already released relevant information and the issue here is the relevance of the detailed information contained within the emails and investigation file.
43. WMP explained there are appeals processes built into the Professional Standards Department's system which can be exercised by those involved should they disagree with the findings. This case has in fact been subject to external scrutiny at an Employment Tribunal. These mechanisms reduce the public benefit in releasing detailed investigative material into the public domain. There are already mechanisms for external scrutiny of these investigations which do not necessitate the publication into the public domain of personal data.

³<http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i873/20121030%20Decision%20amended%2031-10-12%20EA20120047.pdf>

44. The information contains witness statements and other personal information provided by WMP employees. Releasing this material into the public domain would undermine the ability of WMP Professional Standards Department to undertake such interviews and gather this information in the future. It is clear that (given the nature of the information) the reasonable expectation of those involved would be that this information would not be made public. To do so would make people reluctant to share it in future.
45. Given that information on this investigation has already been made public, WMP argued that to read through the data to try to locate material which could or could not be released would not be proportionate. The matter has been investigated by WMP Professional Standards Department and subject to an Employment Tribunal. It is therefore unjustified to search through the detailed investigative material for a matter that has been investigated and scrutinised externally and is now considered to be closed.
46. However, WMP accepts that there is some legitimate public interest in this matter and so it offered to examine some of the material, at a refined and more proportionate level of information, to judge whether it is appropriate to release into the public domain.

The complainant

47. The complainant told the Commissioner that information already released into the public domain is *"not adequate to answer important questions about the actions of the police officer, the enquiry into his conduct, the background to the misconduct hearing and the way the matter was dealt with by the communications department."*
48. She argued that her request clearly has *"a serious purpose and is of significant value"* given its attempt to make public the facts surrounding the gross misconduct investigation of a Senior Police Officer. She also stated *"Clearly, my request is not made with the aim of frustrating or causing disruption or annoyance. It is an FOIA request with a manifestly reasonable foundation made by a senior journalist in the interest of the public."*
49. In addition, the complainant submitted an example where a decision notice⁴ had not upheld the public authority's reliance on section 14(1) in

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1623639/fs50571757.pdf>

support of her view that WMP has not reached the threshold for stating that dealing with her request would be too burdensome.

50. She also highlighted another decision notice⁵ where she said that the Ministry of Defence ('MOD') had already spent 55 hours in dealing with a request which it then deemed to be vexatious. The Commissioner upheld the MOD's reliance on section 14(1) in that case on the grounds that complying with the request would place a grossly excessive burden on it. The complainant commented: *"Note that 55 hours had been spent on the request, before the MOD submitted that further time should not be spent."*

The Commissioner

51. The burden on WMP in this matter arises principally from the resources and staff time that would need to be spent on addressing the complainant's information request. WMP would need to spend considerable staff time on identifying and redacting exempt information from the emails and spreadsheet prior to disclosure. The costs provision (section 12 FOIA) cannot be claimed on the basis of time spent applying exemptions. However, the Commissioner's published guidance on section 14(1) FOIA allows for the possibility that a request can be refused as vexatious on the basis of the time that would be taken in addressing it.
52. The Commissioner has considered the arguments put forward by WMP and the complainant before reaching her decision in this case. She notes that whilst WMP is the second largest police force in England, its resources have been significantly reduced which makes it more time consuming and labour intensive to retrieve the information in order to respond to requests. Further, WMP has a small team dealing with FOIA (and EIR requests) and associated internal reviews, complaints to the ICO and appeals to the First tier tribunal.
53. She is also mindful of the example decision notices submitted by the complainant and has reviewed those notices, which do not set legal precedence. Each case, and the surrounding circumstances, has to be considered on its merits. However, she would comment that the MOD was not legally obliged to have spent 55 hours on that particular request before deeming it vexatious.

⁵ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432884/fs_50578749.pdf

54. With reference to her guidance on vexatious requests , the Commissioner is satisfied that the three elements (as set out under paragraph 22) of volume, concerns about potentially exempt information and the difficulty in isolating that potentially exempt information have been met in this case. She is mindful that WMP suggested how the complainant could refine her request, such that further disclosures could be made; however the complainant wanted WMP to address the request in its entirety.
55. The Commissioner considered whether the request has a serious purpose or value and considered that it did. However disclosures already made went a long way to addressing this and severely diminished the value that responding positively to this request would achieve.
56. In conclusion, the Commissioner has accepted the evidence from WMP that addressing the information request would impose a significant burden on them. As to whether the request was nevertheless of such value that this burden would be proportionate, the Commissioner's view is that it would not. Whilst the Commissioner accepts that there may be a degree of value in this request, she considered that any value further disclosure might add to the public understanding of the matter would not be proportionate to the burden and distress that would be placed on WMP. The investigation into the officer's conduct has been undertaken, and concluded, through the appropriate channels, and any necessary action against the officer will have been taken. Accordingly, the Commissioner can see little value in re-opening the matter to full public scrutiny when it has already been formally resolved.
57. Therefore, the Commissioner's decision is that the request viewed as a whole was vexatious and that WMP was not obliged to comply with it.

Other matters

58. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As she has made clear in her *'Good Practice Guidance No 5'*, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 35 working days for an internal review to be completed, despite the publication of her guidance on the matter.

Right of appeal

59. 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@hmcts.gsi.gov.uk

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

60. 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.
61. 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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