

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 November 2018

Public Authority: Chief Constable North Yorkshire Police

Address: Police Headquarters

Newby Wiske Hall

Newby Wiske

Nr Northallerton

North Yorkshire

DL7 9HA

Decision (including any steps ordered)

1. The complainant requested information relating to a document known as the 'Scheme of Delegation' pursuant to the Independent Office for Police Conduct (the 'IOPC'). North Yorkshire Police ('NYP') denied holding the information for part of the request and cited section 21 (information accessible to applicant by other means) for the remainder. Following an internal review it said it did not hold any of the requested information.
2. The Commissioner's decision is that, on the balance of probabilities, NYP did not hold the requested information and it therefore complied with the duty set out at section 1(1) (general right of access) of FOIA. However, by failing to respond to the request and issue a refusal notice within the statutory timescale of 20 working days, the Commissioner finds that NYP has breached sections 10 (time for compliance) and 17 (refusal of a request) of FOIA.
3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. On 11 June 2018 the complainant wrote to NYP via the *WhatDoTheyKnow.com* website¹ and requested information in the following terms:

"Please provide me with a link to the url on your website to the document known as the Scheme of Delegation pursuant to paragraph 13.25 of the IOPC Statutory Guidance.

Also please provide me a copy of this document dating from from [sic] January 2012."

5. NYP responded, late, on 11 July 2018. It denied holding some of the requested information (part one of the request) but confirmed the remainder was held (part two of the request). However, NYP refused to provide the information at part 2 of the request citing section 21 of FOIA – information accessible to applicant by other means. In doing so it provided the complainant with a link to a previous FOIA request for the same information which was publicly available on its website². In response to that request, NYP had confirmed it did not hold the requested information.
6. The complainant requested an internal review on 16 July 2018 which NYP provided, late, on 30 August 2018. It revised its position and said that after conducting searches for the requested information, no information from 2012 was held for either part of the request.

Scope of the case

7. The complainant initially contacted the Commissioner on 10 July 2018 to complain about the delay in NYP's response to his information request. Following receipt of the internal review outcome on 30 August 2018, he complained further about the way his request for information had been handled. He stated that NYP should hold the requested information as, in his view, *"they have a statutory duty to do so"*. He also contended

¹https://www.whatdotheyknow.com/request/scheme_of_delegation_document#incoming-1172003

² <https://northyorkshire.police.uk/access-to-information/foi-disclosure-log/deeds-delegation-concerning-transfer-appropriate-authority-2012-2016-305-2016-17/>

that: *"Furthermore, the Chief Constable cannot legally delegate his powers without this formal document"*.

8. Additionally, the complainant complained about the delays in the handling of his request. He raised further points which have been considered in the 'Other matters' section at the end of this notice.
9. 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 I of FOIA. It is not within her remit to consider, or comment on, a public authority's compliance with legislation she does not regulate.
10. The analysis below therefore considers whether NYP dealt with the request for information in accordance with the requirements of Part I of FOIA. Specifically, the Commissioner has considered whether, on the balance of probabilities, NYP holds the requested information and also whether NYP failed to meet the statutory FOIA timescale for handling this request.

Reasons for decision

Section 1 - general right of access

11. Section 1 of FOIA states that:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

12. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First Tier Tribunal decisions, applies the civil standard of the balance of probabilities.
13. In this case, the Commissioner has sought to determine whether, on the balance of probabilities, NYP held the requested information at the time of the request.
14. In deciding where the balance of probabilities lies, the Commissioner will consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness

and results the searches yielded. She will also consider any other information or explanation offered by the public authority which is relevant to her determination.

15. In progressing her investigation, the Commissioner asked NYP to describe the searches it carried out for information falling within the scope of the request and the search terms used. She also asked other questions, as is her usual practice, relating to how NYP established whether or not it held the requested information.
16. In its substantive response to the Commissioner, NYP confirmed that the requested information, if held, would be held by its Professional Standards department ('PSD') in electronic form.
17. PSD advised that paragraph 13.25 of the IOPC Statutory Guidance states that:

"Chief Officers should also develop and disseminate a scheme of delegation to ensure that the right people at the right levels and with the right training are allocated as decision makers. In the interests of accountability and transparency, it is good practice to make the scheme of delegation available on the force website".

18. NYP said that it does not have a scheme of delegated officers and that the Head of PSD is *the "designated appeal nomination on behalf of the Chief Constable"*. NYP highlighted that whilst the guidance states it is good practice to have a scheme of delegation, it does not stipulate that publication on the force website is compulsory.
19. With regard to the nature of the searches it had conducted, NYP described the searches it carried out for information falling within the scope of the request and the search terms used.
20. NYP told the Commissioner that in response to an earlier request (see footnote 2), it had searched the PSD folder on the relevant drive, using the search term *'deed of delegation'*, but that this had provided a nil return. It further advised:

"I also asked the current Head of PSD and the current Appropriate Authority, neither of whom were aware of a document. There were no other systems that I could check as we do not appear to have a deed of delegation, historically the responsibility has always been held by the Head of PSD but I am not aware of any of any official documentation that goes along with this".

21. The Commissioner contacted NYP on 31 October 2018 to clarify whether it had undertaken fresh searches in response to the current request; NYP confirmed that it had repeated the search process but had not located the requested information.

22. NYP also confirmed that it had not held any information falling within the scope of the request which had been destroyed.
23. While appreciating the complainant's frustration that, at the time of the request, NYP did not hold the requested information, the Commissioner is mindful of the comments made by the Information Tribunal in the case of *Johnson / MOJ* (EA2006/0085)³ 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".*
24. Having considered NYP's response, and on the basis of the evidence provided to her, the Commissioner is satisfied that, on the balance of probabilities, NYP did not hold the requested information at the time of the request.
25. The Commissioner therefore considers that NYP complied with its obligations under section 1(1) of FOIA.

Section 10(1) – time for compliance with a request

26. Section 1(1) of FOIA states:

"(1) Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

27. Section 10(1) of FOIA states:

"(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

28. The complainant submitted his request on 11 June 2018. NYP did not confirm whether it held the requested information until 11 July 2018, which is 22 working days after receipt of the request.

³<http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i90/Johnson.pdf>

29. As NYP did not communicate held information to the complainant within 20 working days it breached section 10(1) of FOIA. As the response has been issued no steps are required.

Section 17(1) – time for refusal of a request

30. Section 17(1) of FOIA states:

*"(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, **within the time for complying with section 1(1)**, give the applicant a notice which –*

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

31. NYP's initial response to the complainant withheld some of the requested information under section 21 of FOIA. As this refusal notice was not issued within the time frame for complying with section 1(1) (ie 20 working days) NYP breached section 17(1) of FOIA. As the response has been issued no steps are required.

Other matters

Other concerns raised by the complainant

32. The complainant referred to a previously issued decision notice

(FS50714670)⁴ which is currently under appeal to the First-tier Tribunal. That case concerns a request made by him to Norfolk Police, as follows:

"Please provide me with copies of all Deeds of Delegation powers concerning the transfer of Appropriate Authority responsibilities of the Chief Constable to any other member of his police force in

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2258873/fs50714670.pdf>

respect of recording, investigating and deciding appeals and complaints against police officers for the last 3 years”.

33. The complainant argued that the Commissioner: *“took a decision on this matter concerning Norfolk Police which was wrong as she held that they should not hold this information. However, when I appealed to the Tribunal the ICO barrister conceded that they should have the document and attempted to supply it at the last minute”.*
34. As set out in her published decision notice, the Commissioner found that, on the balance of probabilities, Norfolk Police did not hold the requested information at the time of the request. She made no finding on whether Norfolk Police *should* hold this information as this is not within her remit.
35. She is aware, however, that since the request was made, Norfolk Police has drafted and created such a document. Although it was under no obligation to provide this to the complainant, given that its creation post-dated his request, Norfolk Police did so.
36. It is important to note that while the Commissioner may consider and take into account her decisions in related cases, those decisions are not binding and she will deal with each case on its individual merits.
37. During the investigation, and on the basis of her earlier decision in the previously issued notice referenced above, the complainant submitted that the Commissioner had already *“prejudged”* the outcome of the current case. He also contended that the Commissioner’s decisions have to be *“consistent”* stating: *“Therefore, for you to draw a different conclusion would mean that the Commissioner is not delivering her responsibilities coherently. As such, your investigation is clearly prejudiced.”*
38. The Commissioner said she would take these comments into consideration when making her decision in the current case. She explained to him her approach to cases as set out in paragraph 36 above. These two cases concern different public authorities and differently worded requests. Each public authority has submitted details of its own search process in response to the Commissioner’s investigations.
39. The Commissioner can categorically state that she is not required to take a *“consistent”* approach in relation to these two complaints and has investigated each one individually before making her decision. It is possible that one public authority may hold the requested information, whilst another may not. Given that her remit is only to determine what, if any, recorded information is held in relation to the FOIA requests made, the Commissioner is not required to consider whether public authorities *should* hold the requested information.

Internal review

40. Part VI of the section 45 Code of Practice states that it is 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. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers 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 take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.
41. The Commissioner is concerned that in this case, it took 32 working days for an internal review to be completed, despite the publication of her guidance on the matter.
42. The Commissioner would like to remind NYP that she routinely monitors the performance of public authorities and their compliance with the legislation. Records of procedural breaches are retained to assist the Commissioner with this process and further remedial work may be required in the future should any patterns of non-compliance emerge.

Right of appeal

43. 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

44. 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.
45. 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
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