

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 October 2018

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

Decision (including any steps ordered)

1. The complainant has requested information about mobile phone extraction from Hampshire Constabulary ("HC"). HC advised her that it considered the request to be vexatious under section 14(1) of the FOIA. The Commissioner's decision is that the request is not vexatious and she requires HC to either disclose the requested information or issue a fresh response, compliant with section 17 of the FOIA, which does not rely on section 14(1).
2. HC 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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

3. The complainant has made this request to all UK police forces. She wrote to the Commissioner regarding eight responses where the police force concerned had advised that it considered the request to be vexatious. The Commissioner wrote to these eight forces and six of them revised their positions, no longer relying on section 14(1) of the FOIA. Two of the forces, including this one, maintained reliance on section 14(1) and the Commissioner has issued decision notices regarding these at the same time. The other relevant case is reference number FS50766146.

Request and response

4. On 11 April 2018 the complainant wrote to HC and requested information in the following terms:

"We write further to our report [provided with request] in relation to responses from UK police forces to our Freedom of Information Act request concerning mobile phone extraction.

We note that in your response to us ... you stated that you were undertaking a review. We request disclosure of the review of the use of mobile phone extraction. You did not disclose a local guidance / policy. Please disclose any local guidance if it now exists.

In addition, we make the following FOIA requests:

1. When did you start carrying out mobile phone extractions using SSK's and Hubs; (please include when you first trialled this technology and when you first started using it following the trial)

2. What specific technologies do you use including hardware and software e.g. Cellebrite UFED Touch, XRY Physical, Cellebrite Cloud Analyser. We note you currently state you contract with Radio Tactics.

3. Do you have a complete list of the different types of data that can be extracted using the different software and hardware?

4. Do you record mobile phone extractions which take place using SSK's and Hubs?

- (a) If so many extractions have taken place using SSK's and Hubs since you started trialling / using this power;

- (b) How are extractions recorded and what information is recorded;

- (c) Are records subject to independent audited;

5. How many of these extractions relate to a) victims, b) witnesses, c) suspects?

If you are unable to answer this question for the timeframe since you commenced using mobile phone extraction, can you provide statistics for the last 24 months?

6. Upon what legal basis do you believe you can carry out mobile phone extractions? Do you record the legal basis for each

extraction? If not, is the same legal basis assumed for every extraction, whether or not for example consent is obtained?

7. In every case where mobile phone extraction is carried out at an SSK or Hub, is the individual, whether victim, witness or suspect, informed that data will be extracted from their device?

(a) Do you have a record of whether individuals are told before the extraction takes place or at some point afterwards?

(b) Do you have a record of how many are not informed at all that extraction has taken place?

(c) Are you able to break down these figures depending on whether the individual is a victim, witness or suspect?

8. In every case where mobile phone extraction is carried out at an SSK or Hub, is the individual, whether victim, witness or suspect, informed of their rights and if so what information are they provided;

9. Do you seek consent from individuals, whether victim, witness or suspect, before you extract data from their device;

10. Do you request individual's password / passcode / biometric before extracting data from their mobile phone? Are there instances where you do not seek an individual's password / passcode / biometrics before extracting data? We note that certain extraction technologies enable the bypassing of passwords / passcodes / biometrics.

11. On what basis can an individual, whether victim, witness or suspect, refuse to provide password / passcode / biometric to their phone;

12. If an individual, whether victim, witness or suspect, refuses to provide their password / passcode / biometric, upon what legal basis can you either (a) force them to provide this information (b) pursue a prosecution for failure to provide this information (c) extract data without consent;

13. Does the technology you use allow you to bypass password / passcode / biometric;

14. If you are unable to bypass password / passcode / biometric on a device do you (a) send it to the High Tech Crime Unit and/or (b) send it to ACESO or Cellebrite".

(It should be noted that the original request had a numbering error which the Commissioner has corrected for convenience above).

5. HC responded on 30 April 2018. It refused to provide the requested information and advised the complainant that it considered the request to be vexatious as per section 14(1) of the FOIA.
6. Following an internal review HC wrote to the complainant on 18 June 2018. It maintained its position.

Scope of the case

7. The complainant contacted the Commissioner on 9 July 2018 to complain about the way her request for information had been handled.
8. The Commissioner will consider whether or not the request is vexatious below.

Reasons for decision

Section 14 – vexatious or repeated requests

9. Section 14(1) of the FOIA states that section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious. There is no public interest test.
10. Whilst the term 'vexatious' is not defined in the FOIA, in the case of the *Information Commissioner v Devon CC and Dransfield*¹ the Upper Tribunal commented that the term could be defined as the "*manifestly unjustified, inappropriate or improper use of a formal procedure*". The Tribunal's definition clearly establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
11. In the Dransfield case, the Upper Tribunal also found it instructive to assess the question of whether a request is truly vexatious by considering four broad issues: (1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the requester,

¹<http://administrativeappeals.decisions.tribunals.gov.uk/judgmentfiles/j3680/%5B2015%5D%20AACR%2034ws.rtf>

(3) the value or serious purpose of the request and (4) harassment or distress of, and to, staff.

12. The Upper Tribunal did, however, also caution that these considerations were not meant to be exhaustive. Rather, it stressed the: *"importance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests"* (paragraph 45).
13. The Commissioner's guidance² on dealing with vexatious requests sets out a number of indicators that may apply in the case of a vexatious request. 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 the case will need to be considered in reaching a judgement as to whether a request is vexatious, including the context of the request and the history of the public authority's relationship with the requester, when this is relevant.
14. In this instance, the Commissioner has considered the views set out by both HC and the complainant in the correspondence they have sent to each other, as well as the representations that they have provided directly for her consideration.

HC's representations

15. In its initial refusal notice to the complainant, HC advised her that section 14 applied because the amount of time required to review and prepare the information for disclosure would impose a *"grossly oppressive burden on the organisation"* in terms of time and resources. It advised that it could not reasonably be expected to comply with the request, no matter how legitimate the subject matter might be or how valid the intentions of the requester might be. It added that both itself and other forces had dealt with, and responded to, a number of requests on this subject area and that, in times of austerity where budget cuts had resulted in inadequate resources within FOI units, the overall burden needed to be taken into account.
16. HC has advised the Commissioner that its views on citing this exemption include advice it has received from the National Police Chiefs' Council ("NPCC") via the National Police and Freedom of Information and Data

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

Protection Unit ("NPFDU") as: *"this request and the requestor is having an Impact on the entire Police Service with their FOI requests"*.

17. HC's made the following representations to the Commissioner:

"... the applicant has submitted a large number of requests all relating to social media/predictive policing/IT software/hardware tools used within policing and the NPFDU consider and we agree that there is sufficient evidence to issue a full Section 14(1) refusal notice.

There has been a long history over the past year where the applicant has submitted numerous requests to the entire Police Service on the social media/predictive policing/IT tools used within the policing subject area. Our records show that since 2017, 9 requests have been received by Hampshire Constabulary alone.

We have taken on board that any FOI requests should be dealt with on an applicant blind basis. However, your guidance on the consideration of the identity or motives of the applicant confirms that an applicant's identity and motives may be relevant when considering the context in which request(s) are made, the burden it may impose, and the value of the request".

18. HC also relied on the following extract from the *Dransfield* judgment mentioned above:

"... The motive of the requester may well be a relevant and indeed significant factor in assessing whether the request itself is vexatious, the proposed application of Section 14 cannot side-step the question of the underlying rationale or justification for the request..." (Paragraph 34).

It advised that, taking this into account, it considered that the history of its dealings with the complainant could be taken into account.

19. HC further advised the Commissioner:

"Due to the obvious high interest in policing activity, the Police Service attracts large volumes of requests which place huge pressures on smaller teams of individuals charged with ensuring lawful compliance with FOI. Common-sense dictates that we have to use those resources wisely, and principles have been established within the judicial framework of the legislation to protect authorities when requests are a burden on its staff, have no serious purpose or value or harass and/or distress staff. It is vital that the motives of the requestor are taken into account when considering these issues.

In this case we feel the following indicators apply -

Unreasonable Persistence

The applicant has submitted a vast amount of requests along the same theme and received responses to the requests from forces. Having received responses the applicant then very quickly submits a further request asking more in-depth questions. It appears the applicant is intent on re-visiting the subject area with forces.

Frequent or Overlapping Requests

Since 2017 the applicant has submitted frequent requests relating to the same issue, i.e. social media/predictive policing/IT software/hardware tools used within policing.

Futile Requests

The applicant is a solicitor working for [name removed] and it appears she has taken it upon herself to obtain as much information as possible under the Freedom of Information Act relating to social media/predictive policing/IT software/hardware used by the Police, etc. Our previous responses to the applicant have clearly outlined that exemptions apply yet they continue to submit requests on the same subject matter.

Burden on the Authority

Forces have dealt with and responded to a number of requests on this subject area and in times of austerity where cuts to the police budget has resulted in FOI Units working with inadequate resources, the burden on our authority must be taken into account".

The complainant's representations

20. The complainant advised that she wished to rely upon the submissions she made when requesting an internal review. In respect of the "grossly oppressive" burden envisaged by HC she said:

"You fail to break this down and refer to particular questions in the FOIA request, which you believe would be 'so grossly oppressive'. Further information and justification is sought. Given that a number of forces have already responded to our FOIA, its seems unlikely that all of the questions can be judged as grossly oppressive in terms of the strain on time and resources ...

... We have already received responses to our FOIA from two other police forces who have not applied exemptions to all questions. It is therefore unclear, as you have not specified, which questions you do believe would be subject to exemptions and why".

21. The complainant also commented on the way in which HC had amalgamated her requests, saying that in its view they all related to a similar subject matter. In this regard she advised:

"In referring to similar requests, it is concerning that you seek to avoid transparency by amalgamating unrelated technologies. Had you proactively consulted the public, parliament and provided information regarding the use of mobile phone extraction technologies since 2012, there would be no need to use FOIA to uncover these secretive and opaque practices.

The FOIA submitted on 21 April 2018 which is the subject of this request for review, related very specifically to the use of mobile phone extraction. The FOIA clearly identified the previous response of Hampshire Constabulary on this issue and [name removed]'s report "Digital Stop and Search" highlighting very serious concerns with the use of this technology. The FOIA did not relate to other matters which may have been the subject of separate FOIA. It directly related to the use of mobile phone extraction.

We note that our initial FOIA was sent in January 2017. The FOIA which is the subject of this request for review was sent 15 months later and arising out of our report. This is the second of two Freedom of Information Act (FOIA) requests concerning mobile phone extraction".

She added that the questions posed in this particular request sought information that was not provided or previously sought in her previous request on this subject matter.

22. Regarding her use of the FOIA to obtain this type of information, she added that there is a clear public interest in the populace being better informed and understanding this technology, commenting that the public is largely unaware of its use. She argued:

"It is noted that in your response to our initial FOIA in January 2017 you stated that you do use this technology; that you contract with [name removed] Ltd; that you are engaging with the national review in to these services as well as looking at your own procurement channel.

Given that to date, the only method by which there has been transparency around the use of mobile phone extraction

technologies by the police, has been a result of Freedom of Information Act requests, we have contacted a number of authorities requesting public consultation. We have written to the Home Office; to every Police and Crime Commissioner, the Association of Police and Crime Commissioners and National Police Chief's Council to request public consultation on these technologies. If you do in fact seek and welcome transparency on this issue we would be grateful if you could indicate your support for this request so that we can inform the relevant authorities.

As noted in our report, which was sent with the FOIA, which is the subject of this request for review, it is noted the very serious concerns about the absence of transparency around the use of mobile phone extraction technology. Your failure to respond to the FOIA further compounds this situation and undermines the essence of Freedom of Information. It is clear that this information is in the public interest and there are positive and fundamental reasons why there should be disclosure to the world at large”.

The Commissioner's view

23. The Commissioner would firstly like to comment about HC citing the impact of this request on the police service as a whole rather than just on itself.
24. The police service seems to be unique in respect of dealing with FOIA requests as it has setup the NPFDU, which allows it to consider the impact of “round robin” requests on its service as a whole. The Commissioner accepts that this may be useful and can assist with ensuring that individual forces give similar considerations to requests when they are received across the service as a whole. However, despite any advice given and relied on, the ultimate response comes from each force rather than the NPFDU itself. This is because public authorities are individually subject to the FOIA legislation. The fact that the same request may have been made to any number of different public authorities is irrelevant under the FOIA and is not something which the Commissioner can take into account. It is also of note that other public services do not have this setup and could be disadvantaged were this to be the case. The FOI is public authority specific and not service specific. Were this not the case then all schools, hospitals, parish councils, etc, would each arguably fall to be considered as a whole. The Commissioner does not accept that this is the intention behind the legislation.
25. Accordingly, the Commissioner has not taken into account those arguments which have been applied in respect of the police service as a whole. She does however note that the vast majority of other forces who received this request did not consider it to be vexatious despite any central advice which may have been provided by the NPFDU and, of the

eight who did initially find it vexatious, six overturned their position once the Commissioner commenced an investigation.

26. In respect of the unreasonable persistence, frequency and burden claimed by HC in respect of this request, the Commissioner notes that HC has received nine requests on this policing subject area since 2017, ie just over a year at the time that this request was made. It did not provide the Commissioner with copies of these requests or explain why it considered them all to be on a similar subject matter. Furthermore, whilst she notes that the request in this case is lengthy, HC did not provide specific details of the burden of dealing with the request, such as an estimation of time.
27. In its submissions, HC has referred to a 'grossly oppressive burden'. The Commissioner's guidance on section 14(1) (see link at paragraph 13 above) advises that where a public authority can make a case that the amount of time required to review and prepare the information for disclosure would impose a grossly oppressive burden on an organisation then it may be able to rely on this exemption. However, the Commissioner considers there to be a high threshold for refusing a request on such grounds and she expects the authority to provide her with clear evidence to substantiate its claim that the request is grossly oppressive. No such evidence has been submitted by HC in this case.
28. Whilst HC has amalgamated all of the complainant's requests in its deliberations, the Commissioner notes the complainant's view that the topic of mobile phone extraction is distinct and that she has only submitted one other request on this specific subject.
29. The Commissioner is not persuaded by the arguments presented by HC. She is minded to agree with the complainant that the subject matter of mobile phone extraction sits alone and should not be amalgamated with the other subject areas suggested by HC which refer to matters such as social media and predictive policing. Even were all the requests received considered to be on the same subject she would find it difficult to conclude that nine requests to a police force over a time period of more than a year is likely to be burdensome – and the lack of further evidence from HC does not support its position.
30. In respect of the request being futile as the complainant is trying to obtain information which HC has says it has "*clearly outlined that exemptions apply yet they continue to submit requests on the same subject matter*" the Commissioner notes that the complainant has advised that she has not previously sought this specific information. Again, HC did not provide any evidence to the Commissioner to support its position so she is unable to comment further. She does however note that, as it has suggested itself, it is open for HC to apply other

exemptions to the request if it deems it necessary rather than finding it to be vexatious.

31. The Commissioner also considers that the information requested does have a serious value and purpose as it relates to a subject of genuine public interest.
32. Taking the arguments from both sides into account, and without any convincing evidence to support its position, the Commissioner does not find this request to be vexatious.

Right of appeal

33. 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

34. 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.
35. 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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