

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 July 2020

Public Authority: Chief Constable of Durham Constabulary

Address: Police Headquarters

Aykley Heads

Durham

DH1 5TT

Decision (including any steps ordered)

1. The complainant requested information relating to a Durham Constabulary-led investigation. Durham Constabulary stated that any information that may be held, was not held for the purposes of the FOIA, citing section 3(2) of the FOIA.
2. The Commissioner's decision is that some of the requested information, if held, would be held by Durham Constabulary for its own purposes, and therefore would fall within the definition of held for the purposes of the FOIA under section 3(2) of the FOIA.
3. She therefore considers that Durham Constabulary failed to comply with its duty to confirm or deny under section 1 of the FOIA.
4. The Commissioner requires Durham Constabulary to take the following step to ensure compliance with the legislation:
 - issue a fresh response in accordance with section 1 of the FOIA.
5. Durham Constabulary must take this step 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

6. The press release referenced in the request for information relates to arrests made as part of "a Durham Constabulary-led investigation into the suspected theft of confidential documents".
7. It is not in dispute that Police Service Northern Ireland (PSNI) asked Durham Constabulary to conduct an independent investigation into the suspected theft.
8. With respect to the cross border aid of one police force by another, Section 98(1) of the Police Act 1996 states:

"(1) The chief officer of police of a police force in England or Wales may, on the application of the chief constable of the Police Service of Scotland or the chief constable of the Police Service of Northern Ireland, provide constables or other assistance for the purpose of enabling the Scottish force or the Police Service of Northern Ireland to meet any special demand on its resources.

...

(5) While a constable is provided under this section for the assistance of another police force... he shall, notwithstanding any enactment,—

- (a) be under the direction and control of the chief officer of police of that other force (or, where that other force is the Police Service of Scotland or the Police Service of Northern Ireland, of the chief constable of that Service); and*
- (b) have in any place the like powers and privileges as a member of that other force has in that place as a constable".*

Request and response

9. On 3 June 2019, the complainant wrote to Durham Constabulary and requested information in the following terms:

"Dear Durham Constabulary ("Durham"),

On 31st August, 2018, Durham issued this press release:

<https://www.durham.police.uk/news-and-ev...>

Please disclose the following by way of the Freedom of Information Act (FOIA):

1. *Copy of the terms of reference.*
2. *Copies of all Durham internal correspondence, minutes, briefing notes, orders PRIOR to formal acceptance of the terms of reference and commencement of the investigation.*
3. *Copies of all correspondence between Durham and Police Service of Northern Ireland (PSNI) PRIOR to investigation commencing.*
4. *Name and rank of the senior officer signing off the press release.*
5. *Copy of the entry in that officer's day book, or notebook, or similar, referring to this press release.*
6. *Copies of all internal emails relating to this press release.*

On 8th November, 2018 the Office of the Police Ombudsman for Northern Ireland (OPONI) issued a statement that ran contrary to the 31st August statement issued by Durham. That is to say, no complaint had been made by OPONI regarding alleged theft of documents.

Please disclose the following by way of FOIA:

7. *Copies of all correspondence between Durham and OPONI relating to the existence, or otherwise, of the subject complaint.*
8. *Copies of all internal emails relating to the statement issued by Chief Constable Barton, soon afterwards, defending the position of Durham and asserting that there was a theft complaint made by OPONI, upon which the grotesquely disproportionate and, in the event, unlawful arrest of two of my fellow journalists was grounded".*
10. The request was made to Durham Constabulary using the 'whatdotheyknow' website.
11. On 3 July 2019, Durham Constabulary apologised for the delay in responding and explained that the request had been transferred to PSNI. Citing section 3(2) of the FOIA, it said that any information that may be held by Durham Constabulary was held on behalf of PSNI.
12. The complainant wrote to Durham Constabulary on 2 August 2019 requesting an internal review of its handling of the request.

13. Following an internal review, Durham Constabulary wrote to the complainant on 18 October 2019, maintaining that it was entitled to transfer the request to PSNI.

Scope of the case

14. Following earlier correspondence, the complainant provided the Commissioner with the relevant documentation on 14 November 2019 to complain about the way his request for information had been handled.
15. Mindful of the complainant's correspondence with both Durham Constabulary and PSNI regarding the handling of his request, the Commissioner understood from his correspondence with her that his complaint was with respect to Durham Constabulary's handling of the request for information.
16. In that respect, she acknowledges that the complainant told her:

"(i) Durham maintain that the transfer of the request to PSNI was lawful and appropriate. (ii) I maintain that it was neither ...

By way of background, if I wanted info that PSNI held then I would have made a request directly to them. It is what Durham hold that is important ...".
17. It is not in dispute that Durham Constabulary referred the complainant to section 98(1) of the Police Act 1996 in order to explain its transfer of his request to PSNI.
18. From the correspondence on the 'whatdotheyknow' website, it is evident that both Durham Constabulary and PSNI told the complainant that PSNI was responsible for handling the request, and that PSNI responded accordingly.
19. However, as the request in this case was made to Durham Constabulary, it is Durham Constabulary's obligations under the FOIA that are the issue.
20. As is her practice, the Commissioner wrote to the complainant setting out the scope of her investigation. She acknowledged that he considered that Durham Constabulary had no lawful grounds for passing over the request to PSNI and explained that the focus of her investigation would be to determine whether the request was handled in accordance with the FOIA by Durham Constabulary.
21. She asked the complainant to contact her within a given timeframe if there were matters other than this that he considered should be addressed.

22. While his response raised matters that are not the subject of this decision notice, the complainant did not dispute the Commissioner's interpretation of his complaint.
23. 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 the Freedom of Information Act 2000 (FOIA).
24. The issue for the Commissioner to determine in this case is whether or not Durham Constabulary would hold the requested information for the purposes of the FOIA. In doing so, she acknowledges that Durham Constabulary has not confirmed whether any relevant information is held.

Reasons for decision

Section 1 general right of access

Section 3(2) – information held by a public authority

25. Section 1 of the FOIA provides a general right of access to recorded information that is held by public authorities. When a request for information is made, a public authority must confirm whether it holds information of the specified nature in the request and if it does, it must provide it to the requester unless a valid exemption exists under the FOIA for not doing so.
26. Section 3(2) sets out the two legal principles that establish whether information is held for the purposes of the FOIA:

"For the purposes of this Act, information is held by a public authority if—

 - (a) it is held by the authority, otherwise than on behalf of another person, or*
 - (b) it is held by another person on behalf of the authority."*
27. This sets out a two part definition. Information is held by the public authority, and therefore within scope of a FOIA request, if the authority holds it (but not if it holds it only on behalf of another person), or if another person holds it on behalf of the authority.

28. The Commissioner's guidance¹ '*Information held by a public authority for the purposes of the FOIA*' explains the circumstances in which information is considered to be held by a public authority for the purposes of the FOIA.
29. Her guidance also makes it quite clear that whether any information is held by a public authority, or is held on behalf of a public authority, depends on the facts of the case.
30. As explained in the Commissioner's published guidance, each case needs to be reviewed individually to determine whether a public authority holds information for its own purposes. There are various factors that will assist in determining whether the public authority holds the information for the purposes of the FOIA. The weight attached to each one will vary from case to case. In some circumstances, one factor may outweigh all the others.
31. As the Commissioner's guidance on this section explains:

"The Upper Tribunal considered the meaning of section 3(2)(a) in the case of University of Newcastle upon Tyne v the Information Commissioner and the British Union for the Abolition of Vivisection [2011] UKUT 185 (AAC, 11 May 2011). It explained that the concept of 'holding' information for FOIA purposes "is not purely a physical concept, and has to be understood with the purpose of the Act in mind". This means that information may be present on a public authority's premises (or even its IT network) but not held by the authority for FOIA purposes. To be considered 'held' for FOIA purposes, there has to be "an appropriate connection between the information and the authority".

Is the information held by Durham Constabulary for the purposes of the FOIA?

The complainant's view

32. The complainant disputed Durham Constabulary's decision to transfer the request on the basis that if it were to hold any information within

¹ https://ico.org.uk/media/for-organisations/documents/1148/information_held_by_a_public_authority_for_purposes_of_foia.pdf

the scope of the request it would only be held on behalf of PSNI. He told Durham Constabulary:

"Your decision to transfer the request to PSNI is, in my respectful submission, (i) misconceived (ii) a ruse to frustrate disclosure".

33. He also said:

"The reasons given for transferring the request do not bear close scrutiny and are simply and [sic] artifice to avoid disclosure".

34. Similarly, he told the Commissioner:

"Durham are not entitled under the Act to transfer the request to PSNI".

35. In support of his view that Durham Constabulary should provide a response to his request for information, his arguments included the following observations:

"(i) The rationale engaging the Police Act (a piece of legislation I work with every day as a journalist in that specialist field) is an artifice.

(ii) The Police Act has no bearing on FOIA.

(iii) The information held by Durham is very likely to be different to that held by PSNI".

36. Specifically with respect to parts (7) and (8) of the request, he said:

"... They refer to matters between Durham and OPONI. No attempt to finalise those questions, by way of the Act, has been made by Durham".

Durham Constabulary's view

37. In correspondence with the complainant, Durham Constabulary told him:

"The request has been transferred to Police Service Northern Ireland. The basis for this decision is that Durham Constabulary was requested by Police Service Northern Ireland to assist in an investigation under Section 98(1) of the Police Act 1996:

...

Any information in relation to the investigation that may be held by Durham Constabulary is under Section 3 (2) of the Freedom of

Information Act 2000 [held] on behalf of Police Service Northern Ireland.

...

It is therefore the responsibility of Police Service Northern Ireland to respond to your request as promptly as possible within their legislative obligations."

38. It subsequently explained:

"It is a matter of fact, and also a matter of public record, that Durham Constabulary are carrying out this investigation on behalf of PSNI, and are reporting to the Chief Constable of PSN [sic]. PSNI are then accountable for this investigation to the Northern Ireland Policing Board. Durham Constabulary are therefore under the 'direction and control' of PSNI for this case and PSNI are bearing the full costs of this investigation.

Durham Constabulary, PSNI, together with an independent legal advisor, all separately consider therefore that the legal responsibility for answering your information request rests with PSNI. This is because PSNI have contracted, and tasked Durham Constabulary to carry out an investigation on their behalf, under the above Section 98 Police Act 1996 provisions".

39. It also told him:

"As confirmed to you at an earlier time point by PSNI, PSNI directed Durham Constabulary to forward FOIA requests received from anyone, to them i.e. PSNI. Durham Constabulary has complied with this PSNI direction".

40. In light of the complainant's concerns, during the course of her investigation the Commissioner asked Durham Constabulary to explain on what basis it concluded that it would not hold the requested information for the purposes of the FOIA. She also asked it to clarify the nature of the relationship between Durham Constabulary and PSNI with respect to the requested information itself.

41. In its submission, Durham Constabulary confirmed its view that any information within the scope of the request would be held on behalf of PSNI. It also confirmed that PSNI controls access to any such information.

The Commissioner's view

42. In this case, there is clearly some dispute between Durham Constabulary and the complainant about who holds the requested information for the purposes of the FOIA.
43. In considering this matter, the Commissioner can confirm that she has considered the relevant provision of section 98(1) of the Police Act 1996.
44. The Commissioner accepts that Durham Constabulary was tasked by PSNI to carry out an investigation on its behalf under section 98 of the Police Act 1996. However, while she considers that that legislation may be relevant, she does not consider that the Police Act provides a blanket exemption to FOIA: rather, each case should be determined on the facts of the case.
45. In her guidance *'Information held by a public authority for the purposes of the FOIA'*, the Commissioner acknowledges:

"When information is held by a public authority solely on behalf of another person, it is not held for FOIA purposes. However, information will be held by the public authority if the information is held to any extent for its own purposes".
46. In accordance with her guidance, factors that would indicate that the information is held solely on behalf of another person include:
 - the authority has no access to, use for, or interest in the information;
 - access to the information is controlled by the other person;
 - the authority does not provide any direct assistance at its own discretion in creating, recording, filing or removing the information; or
 - the authority is merely providing storage facilities, whether physical or electronic.
47. Likewise, factors that would indicate that the information is also held by the public authority include:
 - the authority provides clerical and administrative support for the other person, whether legally required to or not;
 - the authority controls access to the information;
 - the authority itself decides what information is retained, altered or deleted;
 - the authority deals with enquiries about the information; or

- costs arising from holding the information are included in the authority's overall budget.
48. The Commissioner acknowledges that the request in this case comprises a multi-part request. For the purposes of this decision notice, she considers that the requested information falls into the following categories:
- The terms of reference (ToR) (Q1);
 - Durham Constabulary internal correspondence etc prior to formal acceptance of the terms of reference and commencement of the investigation (Q2);
 - Correspondence between Durham Constabulary and PSNI prior to the investigation commencing; (Q3)
 - Information relating to the press release (Q4, Q5, Q6);
 - Correspondence between Durham Constabulary and OPONI relating to the existence, or otherwise, of the subject complaint and internal emails relating to the statement issued by Chief Constable Barton defending the position of Durham Constabulary (Q7, Q8).
49. She has considered each of those categories of information in turn – making a factual assessment of whether, if held, information within each category, would be held by Durham Constabulary to any extent for its own purposes.
50. In considering the matter, the Commissioner is mindful that while a public authority may have physical possession of certain information, it may not 'hold' that information for the purposes of the FOIA.
51. In her guidance, the Commissioner considers that for it to be considered 'held' for FOIA purposes, there has to be "*an appropriate connection between the information and the authority*".

TOR (Q1)

52. The Commissioner considers that a ToR typically defines the scope, objectives and deliverables of a project or piece of work, as well as the roles and responsibilities of participants. In other words, it sets out the parameters of the task and who is involved.
53. In this case, the Commissioner is satisfied, that, if held, the ToR would be instrumental to Durham Constabulary, for example with respect to understanding the scope of its investigation and remit. She considers that Durham Constabulary would have an interest in the information and

therefore finds that the ToR, if held, would be held by Durham Constabulary for the purposes of the FOIA.

Durham internal correspondence prior to acceptance of the ToR (Q2)

54. With regard to the requested internal correspondence, the Commissioner has taken account of the wording of the request with respect to the timing of that correspondence.
55. On the basis that the requested information relates to the time prior to acceptance of the ToR, the Commissioner considers that such information could relate, for example, to the decision whether or not to accept PSNI's request for assistance, or with respect to any amendments to the wording or scope of the ToR.
56. She is satisfied that any such internal correspondence would have been created by Durham Constabulary and there would be an appropriate connection between any such information and Durham Constabulary.
57. She therefore considers that, if held, any such information would be held by Durham Constabulary for the purposes of the FOIA.

Correspondence prior to investigation commencing (Q3)

58. With regard to the requested correspondence between Durham Constabulary and PSNI prior to the investigation commencing, the Commissioner accepts that the investigation was undertaken by Durham Constabulary at the request of PSNI and was not undertaken for its own benefit.
59. However, she is mindful of the wording of that part of the request, noting that it relates to correspondence between the two parties prior to the commencement of the investigation.
60. She considers that, as a public authority which has agreed to undertake an investigation in order to assist PSNI, Durham Constabulary is likely to be actively taking part in any relevant emails it holds on the subject of the investigation.
61. She therefore considers that while Durham Constabulary may hold any such information on behalf of PSNI, on the basis that it was under the direction of PSNI with respect to the investigation, she does not consider that PSNI would have sole control of all the information contained in any such emails. She considers that, if held, Durham Constabulary would have an interest in at least some of the information within the scope of that part of the request for the purposes of the FOIA.

62. Accordingly, the Commissioner considers that some of the information in this category, if held, is likely to be held by Durham Constabulary in its own right for the purposes of the FOIA.

Information relating to the press release (Q4, 5, 6)

63. Considering next the requested information relating to the press release, the Commissioner is mindful that the press release is entitled "*Arrests in Durham Police investigation into suspected theft of confidential documents*". She notes that the press release is available on Durham Constabulary's website and that it appears to have been issued by Durham Constabulary.
64. She considers that, where a press release is published on a public authority's own website, with all that that entails with regard to its reputation regarding its actions, it would be likely that the public authority would be party to the timing and content of the press release.
65. In the absence of any evidence that the entire press release was handled by PSNI, the Commissioner cannot be satisfied that the information within the scope of that part of the request, if held, would not be held by Durham Constabulary in its own right and therefore for the purposes of the FOIA.

Correspondence between Durham Constabulary and OPONI relating to the existence, or otherwise, of the subject complaint (Q7) and Internal emails relating to the statement issued by Chief Constable Barton (Q8)

66. The Commissioner is mindful that the preamble to parts (7) and (8) of the request referred to a statement issued by OPNI on 8 November 2018, that ran contrary to the statement issued by Durham Constabulary on 31 August. 2018.
67. In the context of this case, the Commissioner considers that, if Durham Constabulary held information within the scope of those parts of the request, there would be an appropriate connection between the information and the Constabulary.
68. For example, the Commissioner considers it likely for Durham Constabulary to have an interest in any relevant correspondence it holds arising from a press release it had issued about the investigation. Similarly, she considers Durham Constabulary to have an appropriate connection with any information held regarding a statement issued by its then Chief Constable.

Conclusion

69. The Commissioner recognises that section 98(1) of the Police Act 1996 has a bearing on the circumstances surrounding the request in this case.

In that respect, she accepts that the investigation was undertaken by Durham Constabulary at the request of PSNI and was not undertaken for its own benefit. She is also mindful that the requested information is about the administration and conduct of the investigation rather than details of the investigation itself.

70. With respect to its handling of the multi-part request for information, she considers that, rather than give due consideration to its responsibilities under the FOIA, and consider each part of the request on its own merits, Durham Constabulary applied a blanket transfer of the entire request on the basis of section 98(1) of the Police Act 1996.
71. Overall, the Commissioner has concluded that, if held, some, at least, of the requested information would be held by Durham Constabulary for the purposes of the FOIA.
72. By failing to notify the complainant whether it held information within the scope of the request by the completion of the internal review, the Commissioner finds Durham Constabulary breached section 1(1)(a) of the FOIA.

Other matters

73. Under section 77 of the FOIA it is an offence, where a request has been made to a public authority, for a person to alter, deface, block, erase, destroy or conceal any record held by a public authority with the intention of preventing its disclosure.
74. The complainant alleged such activity in this case.
75. However, having considered the matter, the Commissioner did not consider there was sufficient evidence to substantiate this allegation. Therefore the Commissioner has not undertaken a criminal investigation in this case.

Records management

76. The Commissioner's published guidance on section 3 of the FOIA considers the practical considerations in a case such as this, and recognises the importance of good records management:

"In order to comply with FOIA requirements, public authorities need to be clear about what information they hold for FOIA purposes. This means they need to be aware what information they are solely holding for another person and what information is being held on their behalf by others."

With regard to the former, public authorities need to know the basis on which they hold information that is in their possession, and with regard to the latter, authorities should know what information is held on their behalf by another person and also have arrangements in place which allow them to retrieve the information in the event of a request for information being made for it”.

77. The Commissioner recommends her guidance to all public authorities.

Right of appeal

78. 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

79. 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.

80. 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

**Laura Tomkinson
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