

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 July 2020

Public Authority: Chief Constable of Sussex Police
Address: Malling House
Church Lane
Lewes
BN7 2DZ
Email: foi@sussex.pnn.police.uk

Decision (including any steps ordered)

1. The complainant requested information regarding the procedures and policies of Sussex Police for retaining body worn video camera records against their possible future use for evidential purposes. Sussex Police acknowledged that there had then been considerable delays in providing the information requested for which they apologised.
2. The Commissioner decided that Sussex Police had complied with section 1(1) (general right of access) FOIA when dealing with part 1 of the request and with section 12(1) (cost of compliance) FOIA when refusing part 2 of the request.
3. The Commissioner decided that Sussex Police had breached section 16(1) (advice and assistance) FOIA for part 2 of the request but that no further remedy was now feasible. She therefore did not require Sussex Police to take any steps.

Background

4. The request arose as a result of an incident when, during a visit to the complainant's property by Sussex Police (SXP) officers, body worn video

(BWV) camera recordings were made. These had subsequently been requested by the complainant as a subject access request (SAR) under the Data Protection Act 2018, but had been automatically deleted by SXP shortly after the SAR was made. (It is understood that SXP delete BWV footage after 30 days unless it is required for policing purposes).

5. In a previous connected decision, on 17 October 2019, the Commissioner issued a Decision Notice, reference FS50869745¹, to promulgate her decision that SXP had breached section 10(1) FOIA in failing to provide a valid response to this information request within the statutory time frame of 20 working days.

Request and response

6. On 11 May 2019 the complainant wrote to Sussex Police (SXP) and requested information in the following terms:

"I therefore make the following FOI request:

1 Please advise the official Police Complaint Procedure Policy to include how a complaint is dealt with, time factors, what information is sought before interview with Officers, how their responses are recorded, how subsequent interviews and handled etc [part 1]

2 How many times has Sussex Police been unable to provide bodycam footage due to its deletion over the past three calendar years? [part 2]"

7. On 28 November 2019, SXP provided some information in response to the first part of the request but did not respond to the second part of the request.
8. In its 29 April 2020 internal review, SXP explained that it was unable to answer part 2 of the request by virtue of the section 12(1) (cost of compliance) FOIA exemption. SXP issued a refusal notice to that effect in accordance with section 17(5) FOIA.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2019/2616114/fs50869745.pdf>

Scope of the case

9. Following earlier correspondence with the Commissioner, the complainant contacted the Commissioner again on 29 April 2020 to complain about the way her FOI request had been handled.
10. The complainant said that part 1 of the request had not been answered to her satisfaction. It had been for information about how SXP quality assured its complaints handling. She said SXP should hold, and she wished to see, an internal complaints policy, desk instructions, templates for responses to members of the public, interview guidance for officers and performance measures to monitor complaints.
11. For part 2 of the request, the complainant said that the section 12 FOIA exemption had been wrongly applied and that SXP had failed to provide her with appropriate advice and assistance in breach of section 16(1) FOIA.
12. The Commissioner considered section 1(1) FOIA (general right of access to information) in respect of part 1 of the complainant's FOI request. For part 2, the Commissioner considered SXP compliance with section 12(1) FOIA (cost of compliance) and its section 16(1) FOIA (advice and assistance) duty to provide advice and assistance to applicants.
13. The Commissioner has corresponded with both parties during the course of her investigation and considered the representations she received from both. She noted further disclosures of information made by SXP during the course of her investigation.

Reasons for decision

FOI request part 1

Section 1 – general right of access

14. Section 1(1) FOIA states that a person who asks for information is entitled to be informed whether or not the information is held and, if the information is held, to have that information communicated to them.
15. 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. In essence, the Commissioner determines whether it is

likely, or unlikely, that the public authority holds information relevant to the complainant's request.

16. The Commissioner considered the complainant's evidence and arguments. She also considered the actions taken by the public authority to check whether the information is held and any other reasons offered by the public authority to explain why the information is not held. She also considered any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities. In this case, the Commissioner determined whether or not, on the balance of probabilities, SXP hold further, as yet undisclosed, information within the scope of the request.
17. In her representations to the Commissioner, the complainant, said that her information request has been frustrated by SXP at every turn for reasons she did not understand. Her original request had not been not answered and her internal review requests had been ignored.
18. The complainant said that there was a strong public interest in having ready public access to the procedures and processes SXP followed when carrying out internal investigations into the conduct of its officers. There was a strong public interest too in knowing how many timeous requests made for BWV information had not been met. This was especially the case where the result had been the destruction of key evidence which could have enabled corroboration of statements made by SXP officers engaging with members of public. She said she perceived a considerable imbalance of power between police officers and members of the public which BWV records could redress. Now, two years after her original SAR request and a year after her FOI request, SXP still appeared reluctant to provide basic information about their service to the public.
19. The complainant said that SXP claimed it followed national guidance, but she had wanted to know what information SXP held. She had expected her request to lead to disclosure of desk instructions, procedures, template letters for handling complaints, etc. She wanted to know about the tools and guidance SXP staff referred to when handling complaints from members of the public. She considered that the answer could not be that no information was held. She said that SXP clearly had a complaint process that officers followed and did not just draft ad hoc letters for each and every complaint received. She believed that SXP had interpreted her request narrowly in order to avoid providing the information she wanted and that it held further information as its officers appeared to exercise significant discretion from national guidance.

20. During the Commissioner's investigation SXP provided the complainant with further information including the SXP BWV policy, the police staff disciplinary policy and the Independent Police Complaints Commission (IPCC) statutory guidance together with relevant Independent Office for Police Conduct (IOPC, formerly IPCC) guidance which it said SXP and other police forces followed.
21. SXP also provided the complainant with a detailed explanation of its relevant procedures for deciding whether or not to retain BWV for evidential purposes and related procedural matters. SXP said it was up to its investigating officers to decide whether or not to rely on BWV for an investigation. There were a number of factors that came into play. SXP explained that it could not retain every piece of BWV due to the huge volume of storage space BWV required. SXP said in summary that its investigations were necessarily tailored to individual circumstances. Nothing was set out in black-and-white although investigators did follow the relevant guidance.
22. The Commissioner noted that, during her investigation, the complainant had asked for a level of detail from SXP that had not been explicit in the initial FOIA request. The complainant had formed an understanding, in the light of her interpretation of national procedural guidelines, about how SXP "should" conduct its business. How SXP "should" function is not a matter for the Commissioner and she did not consider it.
23. While appreciating the complainant's frustration and assertion that SXP should hold further information within the scope of her request, the Commissioner recalled the comments made by the Information Tribunal in the case of *Johnson / MoJ* (EA2006/0085)² which explained that 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. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, in the light of the explanations and assurances the Commissioner received

² <http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i90/Johnson.pdf>

from SXP, and the further information that has now been provided to the complainant by SXP during her investigation, the Commissioner decided, on a balance of probabilities which is the test she must use, that SXP has now complied with section 1(1) FOIA.

FOI request part 2

25. SXP said that the cost of compliance with part 2 would far exceed the appropriate limit set out in the section 12(1) FOIA exemption.

Section 12(1) – cost of compliance exceeds the appropriate limit

26. Section 1(1) FOIA states that:

"(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 12(1) FOIA states that:

"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."

28. The 2004 Fees Regulations set the appropriate limit of £450 for SXP. The Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour of staff time, meaning that the appropriate limit for SXP equates to 18 staff-hours.
29. In estimating whether complying with a request would exceed the appropriate limit, regulation 4(3) states that a public authority can only take into account the costs it reasonably expects to incur in:
- a. determining whether or not it holds the information;
 - b. locating the information, or a document containing it;
 - c. retrieving the information, or a document containing it; and
 - d. extracting the information from a document containing it.
30. The complainant said that SXP had deliberately ignored her proposed way of gathering the requested information which she considered to be viable. She said that using her proposal would be a very simple straightforward process, as complaints needed to be monitored. She said that SXP had instead relied on a deliberately long method of reviewing all SARs whether or not they were part of a complaint, so as to make sure that the 18 hour rule was exceeded.

31. The complainant said that SXP could readily identify those cases where complaints about BWV had been received. She opined that there would be no more than a handful of cases; if it was in the hundreds that she would consider how to narrow her request. She added that BWV could and should be retrievable when it was needed.
32. The Commissioner understands that the complainant's own request for a copy of BWV footage had been unsuccessful as the footage had been automatically deleted in error after 30 days; this was despite her SAR for a copy having been made within that time period. She was now seeking to establish how many other parties had also made SARs for copies of BWV footage which had been destroyed despite having been made within the 30 day time period. SXP had therefore used searches of its SAR records as the starting point for locating any relevant material which may be held.
33. SXP told the Commissioner that the cost of providing the information exceeded the appropriate limit as it would need in excess of 18 staff hours to comply with the request. SXP confirmed to the Commissioner that, following an information recording error, it did not hold a collated record of the numbers of deleted BWV records. That information was only held in individual correspondence files.
34. SXP said that between January 2016 and 11 May 2019 a total of 2,281 SARs had been received. Locating the information requested about BWV from within these records would require a manual search of individual files and take an estimated average of 5 minutes for each file. For all 2,281 files this would take some 190 hours which far exceeded the 18 hour appropriate limit.
35. From the information and assurances provided to her by SXP, the Commissioner is satisfied that it would have to check through the case correspondence on individual complaint files in order to be sure about what had occurred in each case.
36. The complainant offered suggestions about ways in which a search might be conducted differently to reduce the time it would take. As with part 1 of the request, these were based on assumptions about how SXP gathered evidence and how it "should" conduct investigations. She also put forward views on how SXP "should" record information and extract the information she wanted based on her interpretation of relevant local and national guidelines and procedure policy documents. SXP considered the complainant's suggestions during the Commissioner's investigation but did not regard them as feasible because they did not accurately reflect the SXP business model and the information it actually held.

37. The Commissioner accepted the SXP description of how it operated and assurances that it could see no shorter way to retrieve the relevant information. She also found that the 190 hours estimated by SXP exceeded the 18 hour appropriate limit by an amount, in excess of an order of magnitude.
38. The Commissioner therefore decided that the SXP estimate was reasonable and entitled it to rely on the section 12(1) FOIA exemption.

Section 16 – advice and assistance

39. Section 16 FOIA states:

"(1) It shall be the duty of a public authority to provide advice and assistance, so far as would be reasonable to expect the authority to do so, to persons to propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case."

40. The Commissioner considers that, where a public authority refuses a request under section 12(1) FOIA, section 16(1) creates an obligation to provide advice and assistance on how the scope of the request could be refined or reduced to avoid exceeding the appropriate limit.
41. The Commissioner noted, and SXP acknowledged, that SXP had not provided advice regarding possible ways to adapt the information request to avoid exceeding the appropriate limit. She decided that, in failing to do this, SXP had breached section 16(1) FOIA.
42. In considering mitigation for the breach of the section 16(1) FOIA exemption, the Commissioner had regard for the opportunity that the complainant now has, given the passage of time and assisted by the information supplied through this investigation, to review her information request. She also recognised that it is open to the complainant to frame a fresh request on the basis of the information she now has about the SXP business model and its relevant policies and procedures.
43. In the light of the very large margin by which the estimated costs exceed the appropriate limit, the passage of time since May 2019, and the other issues she has considered, the Commissioner decided that for SXP to offer now advice and assistance concerning part 2 of the request would serve no useful purpose. Accordingly, the Commissioner did not require SXP to take any further steps.

Other matters

44. Although they do not form part of this decision the Commissioner noted the following additional matters of concern.

Internal review

45. The Commissioner cannot consider a public authority's failure to complete an internal review in a decision notice because that is not a formal FOIA requirement. Rather it is a matter of good practice which is addressed in the Code of Practice issued under section 45 FOIA (the code).
46. Part VI of the code states that it is good practice for a public authority to have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage their prompt determination. The Commissioner considers that these internal reviews should be completed promptly. While no timescale is mandated by FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for a review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days.
47. On 3 December 2019 the complainant asked SXP to carry out an internal review. She repeated her request again on 18 March 2020 and on 8 April 2020. On 29 April 2020 SXP completed its internal review. SXP apologised for the delay and for its oversight in not completing the review in a timely manner.
48. SXP explained that it had believed, incorrectly as it turned out, that it had resolved the FOIA matter within its other responses to the complainant's connected SARs and the other correspondence relating to the procedural issues she had also raised.
49. The Commissioner has noted the failing to carry out an internal review in a timely manner and will consider this failing in conjunction with her regulatory oversight of SXP performance in other information matters.

50. The Commissioner uses intelligence gathered from individual cases to inform her insight and compliance function. This aligns with the goal in her draft Openness by Design strategy³ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her Regulatory Action Policy⁴.

³ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁴ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

51. 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

52. 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.
53. 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

**Dr R Wernham
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Wycliffe House
Water Lane
Wilmslow
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SK9 5AF**