

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 April 2022

Public Authority: Chief Constable of South Yorkshire Police
Address: Carbrook House
Carbrook Hall Road
Sheffield
South Yorkshire
S9 2EH

Decision (including any steps ordered)

1. The complainant requested specific documents relating to Exercise Cygnus. The Chief Constable of South Yorkshire Police (SYP) initially stated that it did not hold some of the information and that that which it did hold was exempt. However, SYP later reversed its position and said that it did not hold any information within the scope of the request at all.
2. The Commissioner's decision is that SYP does hold a very small amount of information falling within the scope of the request – but that information is already available to the complainant. As SYP failed to make a correct determination of the information it held within 20 working days, it breached section 10 of FOIA.
3. The Commissioner does not require further steps.

Background

4. Exercise Cygnus was an exercise run in 2016 to test England's overall ability to deal with a "flu-like" pandemic. Many public authorities participated including SYP – as part of the South Yorkshire Resilience Forum.

Request and response

5. On 21 April 2021 the complainant requested information of the following description:
 - "1. Copy of hot debrief notes, PHE-led structured debrief notes and Evaluator Questionnaire filled in by SY LRF [South Yorkshire Local Resilience Forum] as part of Exercise Cygnus
 - "2. Any previous versions of the Exercise Cygnus Report before publication of the final version of the report here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/927770/exercise-cygnus-report.pdf (The dates I am interested in are between October 2016 and July 2017)."
6. On 29 April 2021, SYP responded. It stated that:

"We have recently received a similar request to yours, and are attaching a copy of our response, which may provide information on how we can respond to this type of request, along with the exemptions triggered, should you wish to refine your request in any way.

"Please forward your clarification to South Yorkshire Police as this request will be 'stopped' on our database until this has been received."
7. Following confirmation that the complainant did wish to proceed, on 2 July 2021, SYP responded to the request. It denied holding information within the scope of element 2, but confirmed it held information within the scope of element 1. However, it refused to provide that information and relied on section 21 of FOIA (reasonably accessible to the requestor) in order to do so.
8. The complainant requested an internal review on 28 July 2021. He accepted that some documents were in the public domain, but most of those documents were redacted and therefore the information they contained was not reasonably accessible. SYP sent the outcome of its internal review on 5 January 2022. It upheld its position in respect of element 2, but revised its position in respect of element 1. Whilst it still contended that the unredacted published information engaged section 21 of FOIA, where that published information had been redacted, SYP now relied on various exemptions to continue withholding that information, including section 31 (law enforcement), section 36

(prejudice to the effective conduct of public affairs) and section 40(2) (third party personal data).

Scope of the case

9. The complainant contacted the Commissioner on 27 May 2021 to complain about the way his request for information had been handled. He disputed the exemptions that had been applied and was not persuaded that SYP held no information within the scope of element 2.
10. The Commissioner commenced his investigation on 7 February 2022 with a letter to SYP asking it to justify its use of the exemptions and to explain why it was satisfied that it held no information within the scope of element 2.
11. SYP responded on 11 March 2022. It stated that it had gone back to its original response – which it had now determined to be incorrect. It now stated that it did not hold any information whatsoever within the scope of the request. No explanation was offered as to why it was satisfied that it held no information. No explanation was offered as to why its position had altered.
12. Further exchanges of correspondence followed in which the Commissioner tried to clarify why no information was held and why SYP had altered its position. Unfortunately, the Commissioner was unable to get an unequivocal answer to the latter question (something he will comment on in the “Other Matters” section of this notice) but, for the reasons given below, he was satisfied that he had sufficient information to proceed to a decision notice and that further correspondence would only prolong the matter – to the detriment of the complainant.
13. The Commissioner considers that the scope of the complaint is to determine whether or not SYP holds further information within the scope of the request.

Reasons for decision

Section 1 (Held/Not Held)

14. Section 1(1) of the 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."
15. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, he will consider any reason why it is inherently likely or unlikely that information is not held.
16. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

Element 2

17. The Commissioner begins with element 2 as he considers that this is the less controversial of the two elements.
18. After informing SYP that its response of 11 March was inadequate, the Commissioner received a further response from SYP on 17 March 2022 in which it set out the steps it had taken to search for information – although confusingly the response started off by saying its original response to this element had been "incorrect", despite SYP having maintained since its first response that it held no information in respect of this particular element.
19. SYP explained that any information it held would be held on its behalf by the local resilience forum's secretariat. It had therefore asked the secretariat to carry out searches on its behalf.
20. The secretariat had responded to say that it had carried out searches electronically using the keywords "Cygnus" and "Exercise Cygnus." No copies of the report had been located apart from the final version.
21. SYP said that it could not rule out that it had previously held versions of the report but said that, if it had held previous versions, these would have been deleted "once the final report had been submitted." Therefore it was satisfied that, whatever it might previously have held, it now held no information – nor did it have any statutory or business purpose to retain such information.

22. The complainant argued that information would be held, he considered that such an important report would need to be shared in draft version before it was published.

The Commissioner's view

23. On the balance of probabilities, the Commissioner's view is that SYP does not hold this information.
24. The Commissioner considers that, in the event that SYP did hold such information, (or if the secretariat held it on SYP's behalf) it would be held electronically. Appropriate keyword searches have been carried out and it seems unlikely that these would have failed to retrieve any further versions of the document that did exist.
25. The Commissioner is sceptical that SYP would have received a draft version of the report in the first place. The report was produced by central government, summarising the input of a large number of public authorities that had taken part in Exercise Cygnus. It would have been unwieldy to have consulted each individual public authority on draft versions and it is unclear what value such a consultation would have added. No argument has been put forward to suggest why SYP would have been more likely to have received a draft than other organisations. In the Commissioner's view, any drafts still in existence (if in fact there are any) would most likely be held by the various central government departments that wrote the report.
26. However, even if the Commissioner is wrong on that point, he can see no reason why SYP would want or need to hold older draft versions, of a report it did not write, once the final report had been published. If in fact SYP did once hold such information (or it was held on SYP's behalf) it would have been deleted years before the request was made.
27. The Commissioner is therefore satisfied that, on the balance of probabilities, SYP holds no information within the scope of element 2.

Element 1

28. In its response of 17 March 2022, SYP explained the searches that the secretariat had carried out on its behalf. Both the context and the content of those answers indicated that the searches only related to element 2. However, immediately after the answers, SYP stated the following:

"In terms of Section 31 onwards I believe the Internal Reviewer has made an error here. By trying to be helpful she seems to have confused the situation by providing a link and explanation from an old

FOI request from 2020 as opposed to concentrating on this Internal Review in relation to the 2 questions.

"We did not change our position from Section 21 to then include Section 31, Section 36 and Section 40 (2) I think she has tried to explain but in the incorrect way by including information not relevant to this request for which I apologise for the confusion.

"South Yorkshire Police still maintain that Section 21 is appropriate and no information is held in relation to previous version of the Cygnus report."

29. Given this confusing and contradictory statement, the Commissioner responded on 23 March 2022 to ask SYP to answer five questions about its current and previous positions in respect of element 1. He also asked to be provided with an unredacted copy of the information that had previously been "withheld." The questions were:

1. Provide a detailed explanation as to why the partially published material was created and why you do not consider that it falls within the scope of the request.
2. Given that the final Cygnus report demonstrates that SYP did originally provide hot debrief notes, structured debrief notes and an evaluator questionnaire, it seems logical to assume that you must have held the information at some point. Are you able to account for why this information no longer appears to exist?
3. Please explain the searches you have undertaken to satisfy yourself that you do not hold any further information and that the South Yorkshire Resilience Forum does not hold any information on your behalf.
4. What enquiries have you made of the local resilience forum to establish what information may be held?
5. Are there any other explanations you wish to offer as to why you do not hold this information?

30. SYP responded on 24 March 2022, apologising for the confusion, to say that:

"Please see attached the original documents that a request unrelated to [the complainant] that were considered for the same information along with the Section 36 from the Chief Constable at that time (All are in WORD format and Sensitive

"Please note these are for the ICO sight only and not to be disclosed to [the complainant], it appears that it was these documents from a case in Feb 21 that the internal reviewer directed [the complainant] to

(obviously the redacted versions which we published at that time. These are also attached

"The above should explain Q1

"Q2. I can only determine that any notes, evaluator questionnaires etc have since been deleted as the LRF are adamant they hold no information

"Q3. I have liaised with the LRF and they confirm that there is no other information held and they have searched for files and e mails

"Q4 as per Q3

"Q5. I cannot offer any other information as to why no other information is held."

31. Having read through the unredacted versions of the document, it is the view of the Commissioner that, with a single, small exception, these do not fall within the scope of the request.
32. The complainant did not ask for "any" debrief report. He sought the "hot debrief" notes, the "PHE-led debrief" notes and the evaluator questionnaire responses.
33. The report that SYP holds is a debrief report, but it appears to have been developed internally and for internal purposes. There is no reference to Public Health England (PHE) having been involved in its production or that it was produced specifically for PHE.
34. Nor could the report be said to be a "hot debrief." "Hot debriefs" have their origins in medicine where clinical staff huddle together either immediately or very shortly after a particular incident (usually where something has gone wrong) to share their immediate observations. This distinguishes the exercise from a "cold debrief" where the individuals involved are asked for their observations some time after the event has taken place, having had time for reflection.
35. The participants who provided feedback for this report evidently did so more than a week after the event and the report was not finalised until the following year – therefore each participant had had ample time to reflect on their contribution. This would not fall within the description of a "hot debrief."
36. The Commissioner considers that SYP's answers do demonstrate that it has carried out searches to establish whether any other information within the scope of this element of the request is held. Given the nature of the requested information and the fact that a final report has been

produced, he considers it unlikely that this information would have been retained by SYP or on SYP's behalf.

37. It is frustrating to the Commissioner that, despite having been given several opportunities to do so, SYP has not explicitly confirmed that it now no longer considers the documents to fall within the scope of the request. Nevertheless, that is the conclusion he draws from the information available to him. In any case, his role is to consider whether the information is held – and SYP's answers demonstrate that it is not.
38. There is however one exception. The final page of the debrief report includes the table showing the responses provided to the evaluator questionnaire that Exercise Cygnus participants were asked to complete. This clearly falls within element 1 of the request. However, this table is already visible, in the redacted version of the report. The Commissioner thus considers that it is in the public domain and has been provided to the requestor.
39. It is of course for the requestor to determine whether or not he wishes to make a request for the unredacted version of the debrief report that SYP does hold.
40. However, on the balance of probabilities, the Commissioner considers that, with the one exception already identified, SYP holds no further information within the scope of the request.

Procedural matters

41. Section 10 of the FOIA states that a public authority must comply with its duty under section 1(1) of FOIA and confirm whether or not it holds information "promptly and in any event not later than the twentieth working day following the date of receipt."
42. It is clear to the Commissioner that SYP failed to properly consider and inform the complainant appropriately, within 20 working days, of the information it held within the scope of the request. It therefore breached section 10 of FOIA.

Other matters

Engagement with the Commissioner

43. SYP's engagement with the Commissioner on this case has left much to be desired. Whilst its various responses have been provided quickly, their content (as has already been set out) has been confusing, contradictory and often short on detail. The Commissioner notes that this is not the first time that he has had to raise concerns about the quality of SYP's engagement with his office.¹
44. There is nothing to prevent a public authority from changing its position during the course of an investigation. However, as a bare minimum, the public authority should be prepared to explain why it has changed its position to the Commissioner – even if not to the complainant. In a case such as this, where a public authority has previously claimed that information was held and relevant information clearly exists, the Commissioner does not expect a public authority to suddenly claim it holds no information whatsoever without any reference to its previous position. Had SYP merely said that "we've reconsidered and we no longer think this information is within scope" or "this information is available publicly but we don't hold a copy ourselves" this investigation would have been much more easily concluded.
45. As it is, SYP has still not given a satisfactory explanation for its change of position and the Commissioner has had to deduce matters for himself.
46. When providing submissions, SYP should review its previous correspondence to ensure that its responses are consistent and that any changes are properly explained.

Obtaining clarification

47. The Commissioner is somewhat concerned by the content of SYP's response to the complainant of 29 April 2021.
48. Section 1(3) of FOIA allows a public authority to obtain clarification of a request where it "reasonably requires further information in order to identify and locate the information requested." Where such clarification has been sought, the public authority is entitled to suspend processing the request until the clarification has been obtained.

¹ See for example: <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4019741/ic-109664-t8v6.pdf>

49. SYP's response was not a formal response to the complainant's request. It did not provide information, nor did it constitute a refusal notice. It merely noted that someone had made a request for vaguely similar information (which had been largely refused) and asked him for "clarification" of his request.
50. However, SYP was clearly not seeking to clarify the request. The request was perfectly clear in what it was seeking. Even if it wasn't, nothing in the content of SYP's response sought anything extra that it might "reasonably require" in order to identify and locate the requested information.
51. SYP's response was neither a FOIA-compliant response nor a proper request for clarification as described by the section 45 FOIA Code of Practice, which states that clarity may be needed when a request "is not clear enough to adequately describe the information sought by the applicant in such a way that the public authority can conduct a search for it." As such, if SYP did in fact cease processing the complainant's request, it had no right to do so.
52. There is nothing to prevent SYP from utilising the content of previous responses to speed up the process of responding to new requests. Indeed the Commissioner encourages public authorities to use disclosure logs so that they do not have to keep providing the same information. However, if it chooses to do this, SYP must make sure that those previous responses are relevant to the current request. It must also ensure that it is still meeting its duties under section 1(1) and section 17 of FOIA in respect of each request.
53. What SYP may not do, is delay or deflect requests by seeking clarification in circumstances where it is unnecessary to do so. The Commissioner takes a dim view of such activity and does not want to see it repeated.
54. The Commissioner notes that he uses intelligence gathered from individual cases to inform his insight and compliance function. This aligns with the goal in his draft "Openness by design" strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner also aims to increase the impact of FOIA enforcement activity through targeting systemic non-compliance, consistent with the approaches set out in his Regulatory Action Policy

Right of appeal

55. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

56. 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.
57. 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

Roger Cawthorne
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