

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 September 2017

Public Authority: Police and Crime Commissioner for Northumbria

Address: 2nd Floor Victory House

Balliol Business Park

Benton Lane

Newcastle upon Tyne

NE12 8EW

Decision (including any steps ordered)

1. The complainant submitted a request for information composed of nine questions, about the Independent Police Complaints Scrutiny Panel, set up by the Police and Crime Commissioner for Northumbria ("the PCC"). The PCC disclosed some information in response to the request and withheld some under section 40(2) (personal information) of the FOIA. It also said that compliance with one question would exceed the costs limit at section 12(1) of the FOIA and said that it did not hold the information requested in the remaining questions.
2. The Commissioner's decision is that the PCC was entitled to withhold information under section 40(2) and that it was entitled to rely on section 12(1) to refuse to comply with one question. She also found that on the balance of probabilities, the PCC does not hold any further information.
3. The Commissioner does not require the PCC to take any steps.

Background

4. The Independent Police Complaints Scrutiny Panel was set up by the PCC in October 2013 to undertake a scrutiny role of how Northumbria Police deal with complaints against it. The Panel was made up of seven members of the public. The PCC has informed the Commissioner that although the Panel has not been disbanded, it last conducted work in October 2015.

Request and response

5. On 6 April 2017, the complainant, following up on the PCC's response to a previous request, wrote to the PCC and requested information in the following terms:

"In your letter to the ICO dated 14 March 2017 (Ref FS50669704) you stated; "The Independent Panel Members have not met within the last 12 months, the latest review of complaint cases were reviewed by the Police and Crime Commissioner, Chief Executive and Director of Business."

I would like to know;

1. How many times have the Independent [sic] Scrutiny Panel (or Independent panel members) reviewed complaint cases since the Panel was setup? (please supply all dates)

2. Please explain why the Independent Scrutiny Panel has not met within the last 12 months. When was the last time the Independent Panel met?

3. Have any of the Independent Scrutiny Panel Members;

a Resigned;

b left for whatever reason;

c raised any concerns of any kind (including, about the PCC, Northumbria Police, the way the panel was operating etc;

d made any complaints;

e expressed any type of dissatisfaction;

f made any criticism

Please also supply all recorded information you hold regards a to f above.

4. Please supply a detailed breakdown of all costs paid, to date, relating to;

a Each Independent Scrutiny Panel Members(s) (since it was setup);

b All amounts paid, a breakdown, to each Independent Panel member (i.e. Panel member 1 £? etc, I do not require names);

c All amounts paid, a breakdown, to any other person(s) who is not an Independent Panel Member but who has reviewed complaint cases since the Panel was setup;

d All amounts paid, a breakdown, to Police and Crime Commissioner, Chief Executive, Director of Business, any other PCC staff members since it was setup relating to work, business, tasks (reviewing complaint files, cases) etc ;

e All/any services, costs, funding, any type of expences,[sic] equipment, allowances, benefits, salaries, bonuses and also any other payments made relating to reviewing complaint files, the cases, the Independent Scrutiny Panel (and the Scrutiny Panel) since it was setup.

5, How many times have Panel Members raised, expressed or recorded any concerns about Northumbria complaint files, PSD [Professional Standards Department] investigations since the panel was setup?

6, Has the Independent Scrutiny Panel been disbanded. If so, when (what date), what was the reason?

7, Is the Independent Scrutiny Panel (which includes the Independent Members) still operating?

8, How many times have the Police and Crime Commissioner, Chief Executive and or Director of Business raised, expressed or recorded any concerns about Northumbria complaint files, PSD investigations which they have reviewed? (Please supply all recorded information)

9, It is not independent for the Police and Crime Commissioner, her staff (including her Chief Executive and Director of Business) to be reviewing complaint files when this is the job of the Independent Panel. I would like to know;

a How many times has the Police and Crime Commissioner, her Chief Executive, her Director of Business and or any other PCC staff

reviewed Northumbria Police, PSD complaints files in the past? (I would like each, every date)."

6. The PCC responded to the request on 20 April 2017. It explained that it did not hold recorded information in respect of questions 2, 3(c)-3(f), 8 and 9. It provided the requested information in respect of the remaining questions, apart from question 5, for which it said it was unable to provide any specific information, due to its broad nature.
7. Following an internal review, the PCC wrote to the complainant on 10 May 2017. It conceded that question 4 had not been answered as fully as it could have been and provided further information. While it said that question 5 was not a valid request for information, it stated that it did not hold the information sought by the question. It maintained its position that it did not hold recorded information in respect of the remaining questions.

Scope of the case

8. The complainant contacted the Commissioner on 17 May 2017 to complain about the way his request for information had been handled. He set out his reasons for considering that the PCC's response to his request had been inadequate and that it had not disclosed all the recorded information it held. He challenged the PCC's response in respect of questions 2, 3(a)-(f), 4(a),(b), 5, 8 and 9.
9. During the Commissioner's investigation, the PCC disclosed to the complainant a spreadsheet containing full details of expenses paid in response to questions 4(a) and (b). It also located information relating to the resignation of a Panel member which fell within questions 3(a) and (b), which it said was exempt from disclosure under section 40(2) of the FOIA. The PCC also said that it had identified that it held information in respect of question 5, but that compliance with it would exceed the appropriate limit set out at section 12.
10. The Commissioner has therefore considered in this decision notice the PCC's assertion that it did not hold any further information in respect of questions 2, 3(c)-(f), 8 and 9. It has also considered the PCC's application of section 40(2) to withhold information in respect of question 3(a) and (b) and its application of section 12 to refuse to comply with question 5.

Reasons for decision

Section 1 - extent of information held

11. Section 1 of the FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds that information and, if so, to have that information communicated to him.
12. The complainant is concerned that the PCC has not identified and disclosed all the recorded information it holds which is relevant to the request. In cases where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes might 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 will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.
13. The Commissioner will consider the complainant's evidence and arguments. She will also consider 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 will also consider 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.

The complainant's position

14. The complainant understood that the Independent Police Complaints Scrutiny Panel had not been disbanded, but that it had not met for 15 months. That being the case, he considered it wholly implausible for the PCC not to have recorded information relating to why the panel had not met for 15 months. The same was the case concerning the claim that no recorded information was held relating to previous reviews of Professional Standards Department files and complaints. He said that the parts of his request where he asked for "*All recorded information...*" had not been dealt with, as no such documents had been disclosed. He was particularly concerned that information about resignations had been withheld and accused the PCC of a lack of transparency.

The PCC's position

15. The PCC stated that it did not hold any information in respect of questions 2, 3(c)-(f), 8 and 9.

16. The Commissioner asked the PCC to justify its position that it did not hold the information described in these questions. She asked a series of detailed questions aimed at determining the extent of its searches and any specific reasons it had for considering that it did not hold the information.
17. The PCC explained to the Commissioner that it was satisfied that it did not hold the requested information. It described the searches it had conducted to check if information was held. It said that all information held by the PCC in relation to the Independent Scrutiny Panel, both in manual and electronic format, is held in a central location. No information is held by individual members of staff on individual personal computers or laptops, and nor are manual files held by individual members of staff. In particular, it stated that in the course of their duties, the Police and Crime Commissioner, Chief Executive and the Director of Business do not retain any notes, expressions or concerns in relation to Northumbria Police complaint files. If asked to undertake any such review, they would discuss, in their advisory capacity, any issues verbally with Northumbria Police's Professional Standards Department in the form of a face to face meeting.
18. Therefore, if any relevant information was held, the PCC's searches, which were of both manual and electronic folders, would have retrieved the information requested by the complainant as this was the central location of the data falling within his request. All relevant emails and correspondence generated by individual members of staff were located in the centrally held electronic and/or manual files and so would have been identified as part of the search. The PCC stated that it had not conducted keyword searches because in fact all the information held within the central electronic and manual files was scrutinised to establish whether it fell within the scope of the request. It said that none did.
19. When asked whether the PCC might once have held the information and subsequently deleted it, it explained that its formal records management policy required that information of the type requested (including minutes of meetings), if held, should be retained for six years.
20. For the avoidance of doubt, the PCC also said that there was no record of information relevant to the scope of the request having been deleted or destroyed.
21. It explained that there was no business purpose for which the requested information was required to be held. The Independent Scrutiny Panel was set up in October 2013 to facilitate greater transparency in relation to complaints received about and investigated by Northumbria Police. The Panel is not a statutory requirement of the PCC's Office and it is composed of volunteers. Similarly, it said that there was no statutory requirement on the PCC to collect or retain information about the

volunteers or about data relating to opinions expressed by, or concerns raised by any individual undertaking a review of Northumbria Police complaints.

Conclusion

22. 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, as set out in paragraphs 12 and 13, above, the Commissioner is required to make a finding on the balance of probabilities.
23. The Commissioner is satisfied that the PCC has provided a detailed and cogent explanation for believing that it does not hold the requested information. It has explained how information about the Independent Scrutiny Panel is held and why the particular searches carried out would be expected to return relevant information, if held. It has also explained that it would have no business case for collecting or retaining the requested information, the Independent Scrutiny Panel being a purely voluntary initiative on its part; there was no statutory obligation on the PCC to create the Panel or ensure that it collects and retains specific monitoring information.
24. The complainant has expressed disbelief that information would not be held. However, the Commissioner notes that it has previously been explained to the complainant¹ that the Independent Scrutiny Panel has not met since December 2015, and that that the most recent work conducted by a Panel member was completed in October 2015. While the Panel has not been disbanded, it would appear to be, at least currently, dormant. Against this background of apparent inactivity, the dearth of information about any case reviews undertaken by the PCC is perhaps not surprising.
25. The Commissioner is satisfied in this case that the PCC has demonstrated that it has reasonable grounds for considering that the searches it conducted would have revealed all relevant information, and that its belief that it does not hold any further information beyond what has already been disclosed is similarly reasonable.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2017/2013764/fs50669704.pdf>

26. Taking all the above into account the Commissioner is satisfied that that, on the balance of probabilities, the PCC did not hold any further information which falls within the scope of questions 2, 3(c)-(f), 8 and 9.

Section 12 – cost of compliance exceeds appropriate limit

27. Section 12(1) of the FOIA states that a public authority is not obliged 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 appropriate limit in this case is £450, as laid out in section 3(2) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Fees Regulations”). This is calculated at the rate of £25 per hour, providing an effective time limit of 18 hours work.
29. When estimating whether complying with a request for information would exceed the appropriate limit, a public authority may take into account the costs it reasonably expects to incur in complying with the request. The estimate must be reasonable in the circumstances of the case. It is not necessary to provide a precise calculation.
30. The Fees Regulations allow a public authority to charge the following activities at a flat rate of £25 per hour of staff time:
- determining whether the information is held;
 - locating the information, or a document which may contain the information;
 - retrieving the information, or a document which may contain the information; and
 - extracting the information from a document containing it.
31. The PCC explained to the Commissioner that to locate and extract the information in question 5 of the request would exceed the costs limit established at section 12(1) of the FOIA.
32. The question asked to know how many times Independent Scrutiny Panel members raised, expressed or recorded any concerns about Northumbria Police complaint files or Professional Standards Department investigations, since the Panel was setup. The PCC had informed the complainant when responding to his request that it did not hold this data separately. It informed the Commissioner that it could only be obtained by interrogating each individual report compiled by Panel members, during the time they were active.
33. The PCC stated that from the Panel’s inception in 2013 until the most recent work undertaken by a Panel member in October 2015, Panel members had submitted 198 separate reports, relating to each

individual complaint scrutinised. These reports are all manual records, stored within a central location.

34. In order to identify whether a report contains information about concerns "*raised, expressed or recorded...about Northumbria complaint files or Professional Standards Department investigations*" it would be necessary to examine each individual report to ascertain whether it contained information from which this part of the request could be answered. In view of the amount of information contained within each report, the PCC has estimated that to assess a single report in accordance with this question would take approximately ten minutes. The assessment of 198 such reports would therefore take 33 hours. The PCC was therefore satisfied that complying with question 5 would exceed the costs limit established under section 12(1) of the FOIA.
35. The Commissioner has noted that the PCC's test search of a representative report took ten minutes. She therefore accepts that if each and every file takes this long to search, the prescribed limit will be exceeded by 15 hours. Even if the search time was reduced by some margin to six minutes per record, the prescribed limit would still be exceeded by nearly two hours.
36. Taking all the above into account, the Commissioner accepts that the PCC has demonstrated that compliance with question 5 would exceed the appropriate limit, and therefore that it was entitled to refuse to comply with that part of the request on the basis that section 12(1) of the FOIA was engaged.

Section 16 – Advice and assistance

37. Section 16 sets out that a public authority has a duty to provide advice and assistance, in so far as it is reasonable to do so, to persons who propose to make, or have made requests for information.
38. The Commissioner's guidance on advice and assistance states that public authorities should provide advice and assistance to applicants to help them to narrow requests which exceed the costs limit. It clarifies that the purpose of section 16 is to ensure that a public authority communicates with an applicant to find out what information they want and how they can obtain it.
39. In this case the PCC did not apply section 12 in respect of question 5 until the Commissioner's investigation and therefore it did not explore with the complainant how the request might be refined in such a way as to avoid engaging section 12(1). However, the Commissioner considers it unlikely that the PCC would be able to assist the complainant to narrow the request sufficiently to allow disclosure of any information, given that the request is already highly specific and covers what was a relatively brief period of activity by the Independent Scrutiny Panel.

Section 40 – personal information

40. The PCC explained that it held information about the resignation of a Panel member, which fell within the scope of questions 3(a) and (b). However, it said that this information was exempt from disclosure under section 40(2) of the FOIA.
41. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and its disclosure would breach any of the data protection principles or section 10 of the Data Protection Act 1998 (DPA).

Is the information personal data?

42. Personal data is defined in section 1 of the DPA as:

“ ...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.”

43. The two main elements of personal data are that the information must 'relate' to a living individual and the individual must be identifiable. Information will relate to an individual if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
44. In this case, the PCC has explained to the Commissioner that the withheld information constitutes the personal data of a Panel member who resigned and that it would be unfair to them to disclose it. It supplied a copy of the withheld information to the Commissioner. The Commissioner notes that it comprises two letters – a letter of resignation from the Panel member, briefly outlining reasons for their resignation, and a letter of acknowledgement from the Police and Crime Commissioner, thanking them for their service on the Panel. The Commissioner is satisfied that it constitutes information which falls within the definition of 'personal data' as set out in section 1 of the DPA as the information comprises personal data relating to the resigning member of the Scrutiny Panel.

Would disclosure breach one of the data protection principles?

45. The PCC considered that disclosure of the requested information would contravene the first data protection principle. The Commissioner agrees that the first data protection principle is relevant in this case.

Would disclosure contravene the first data protection principle?

46. The first principle deals with the privacy rights of individuals and the balance between those rights and other legitimate interests in processing personal data. It states:

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met”.

47. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions. If disclosure would fail to satisfy these criteria, then the information is exempt from disclosure.

Would it be fair to disclose the requested information?

48. When considering whether disclosure of personal information is fair, the Commissioner takes into account the following factors:

- the individual's reasonable expectations of what would happen to their information;
- the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned); and
- the balance between the rights and freedoms of the data subject and the legitimate interests of the public.

49. Under the first principle, the disclosure of the information must be fair to the data subject. Assessing fairness involves balancing the data subject's rights and freedoms against the legitimate interest in disclosure to the public.

50. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in its disclosure.

Has the data subject consented to the disclosure?

51. The PCC told the Commissioner that the data subject has not been consulted about the request and so they have not consented to the disclosure.

Has the data subject actively put some or all of the requested information into the public domain?

52. Where the data subject has put some or all of the requested information into the public domain, the Commissioner considers that this weakens the argument that disclosure would be unfair to them. In this case, the Commissioner is satisfied that the withheld information comprised a private exchange between the resigning Panel member and the Police and Crime Commissioner, and that there is no evidence to suggest that that data subject has disclosed it to the wider public.

Nature of the information

53. The requested information, if disclosed, would reveal information about the Panel member's reasons for resigning. The reasons given related to a change of circumstances in their personal life. The Commissioner considers that the data subject would have a reasonable expectation that this information would be kept confidential by the PCC and would not be disclosed for purposes not directly to do with administering their resignation.

Consequences of disclosure

54. The requested information, if disclosed, would reveal information about the personal life of the resigning member of the Scrutiny Panel. There is no suggestion that the resigning member left due to any impropriety, either on their part or on the part of the PCC. It was simply a change of personal circumstances which led to them being unable to continue with their role on the Panel. The Commissioner considers that disclosing this information would be an unwarranted intrusion into their personal life, and very likely to cause them distress.

Balancing rights and freedoms with legitimate interests

55. The Commissioner accepts that in considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for their own sake, along with specific interests.
56. In this case, the Commissioner notes the complainant's apparent concerns that the PCC was not being sufficiently transparent with regard to Panel members' resignations. In view of the role and remit of the Independent Scrutiny Panel, the Commissioner accepts that there may be a legitimate interest in a disclosure which sets out the identity of

resigning Panel members and their reasons for resignation, if there is any suggestion that the resignation is due to the conduct or behaviour of either the Panel member or the PCC. However, as set out in paragraph 54, above, that is clearly not the case here.

57. In the circumstances of this case, the Commissioner accepts that it would be unfair to the data subject to disclose the requested information and that to do so would therefore breach the first data protection principle. She is satisfied that disclosure would not be within their reasonable expectations, that it would be likely to have detrimental consequences for them and that there are no wider legitimate interests to be served by disclosure which would be capable of outweighing the data subject's expectation of, and right to, privacy.
58. Since the Commissioner has determined that disclosure would be unfair, it is not necessary to go on to consider whether any of the schedule 2 conditions would permit disclosure. The Commissioner is satisfied that the exemption at section 40(2) of the FOIA is engaged in respect of the information the PCC holds in respect of questions 3(a) and (b).

Right of appeal

59. 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

60. 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.

61. 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

Samantha Bracegirdle
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SK9 5AF