

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 June 2018

Public Authority: Chief Constable of Sussex Police
Address: Sussex Police Headquarters
Malling House
Church Lane
Lewes
BN7 2DZ

Decision (including any steps ordered)

1. The complainant requested information on the seizure and processing of digital devices. Sussex Police disclosed some information and said that it did not hold information about instances in which the results of individual forensic examinations were used to prosecute device owners. The complainant challenged this assertion.
2. The Commissioner's decision is that, on the balance of probabilities, Sussex Police does hold the requested information. She also found that by failing to respond to the request within the statutory 20 working day timescale, Sussex Police breached section 1 and section 10 of the FOIA.
3. The Commissioner requires Sussex Police to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the request to know, for the periods specified by the complainant, in how many instances the results of forensic examinations were used to prosecute the device owner. The fresh response should not rely on a claim that the requested information is not held.
4. Sussex Police must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 2 July 2017, the complainant wrote to Sussex Police via the "Whatdotheyknow"¹ website and requested information in the following terms:

"I would like information on your seizure and processing of digital devices seized/confiscated and processed by your digital forensic.

For each week over the past five years I would like to know how many devices were seized, how many were sent for processing, the time it took for processing to be completed and whether the results of the forensic examination were then used in the prosecution of the owner."

6. The complainant contacted Sussex Police several times to request a response. Sussex Police responded to the request on 31 August 2017. It disclosed some information. In respect of the remainder, it said:

"...data is not available on the processing time as this information is not centrally collated, nor is any data held within Digital Forensic Team regarding the use of the results of digital forensics examinations.

To locate further information would require the manual search of 000'S of individual files to establish results and the creation of new collated data which is not a requirement of us under the FOI Act 2000."

7. The complainant wrote to Sussex Police the same day. While apparently satisfied by the majority of the response, he challenged its assertion that it did not hold figures for the use of the results of digital forensic examinations to prosecute device owners.
8. The complainant sent a chaser on 19 September 2017, and again on 26 September 2017, clarifying that the correspondence should be treated as a request for an internal review.
9. Sussex Police acknowledged the correspondence on 26 September 2017 and said that it would respond "in due course". However, the complainant heard nothing further.

¹ <https://www.whatdotheyknow.com/>

Scope of the case

10. The complainant initially contacted the Commissioner on 20 October 2017 to complain about Sussex Police's failure to conduct the internal review and about its poor track record of dealing with requests in a timely manner.
11. The Commissioner wrote to Sussex Police and asked it to conduct the internal review by 27 December 2017, but it did not respond to her correspondence and it failed to conduct the internal review.
12. The complainant contacted the Commissioner again on 12 February 2018 to notify her that Sussex Police had still not provided him with the outcome of the internal review. He indicated that he believed that Sussex Police did hold information about the use of forensic examinations in prosecutions and he repeated his dissatisfaction with the overall time taken to respond to the request.
13. The analysis below therefore considers Sussex Police's response to the final part of the request; specifically, whether, on the balance of probabilities, Sussex Police holds information as to "*...whether the results of the forensic examination were then used in the prosecution of the owner*".
14. This decision notice also considers Sussex Police's compliance with section 1 and section 10 of the FOIA, in terms of the time it took to respond to the request.
15. The Commissioner has commented on Sussex Police's failure to conduct an internal review in the "Other matters" section of this decision notice.

Reasons for decision

Section 1 – general right of access

Section 10 - time for compliance

16. Section 1(1) of the FOIA states:

"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."

17. Section 10(1) of the FOIA states that on receipt of a request for information made under section 1(1), a public authority should respond to the applicant promptly and within 20 working days.
18. From the information provided to the Commissioner in this case it is evident that Sussex Police did not deal with the request for information in accordance with the FOIA. In this case, Sussex Police has breached sections 1(1) and 10(1) by failing to respond to the request within 20 working days.
19. As well as issuing this notice, the Commissioner has made a separate record of the failure by Sussex Police to respond to the complainant's request within the statutory timescale for compliance. This issue may be revisited should evidence from other cases suggest that this is necessary.

Section 1 – general right of access

20. As set out at paragraph 16, above, 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.
21. In this case, the complainant clearly believes that Sussex Police holds information from which it can answer the final part of the request. Sussex Police's stated position is that it does not.
22. In cases where there is some dispute about 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.
23. 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 proof of the balance of probabilities.

The complainant's position

24. The complainant voiced general dissatisfaction with Sussex Police's assertion that it did not hold the information. However, he did not offer any specific reason to the Commissioner as to why Sussex Police would be likely to hold it.

Sussex Police's position

25. In her initial letter to Sussex Police, the Commissioner explained that its response to the complainant of 31 August 2017 seemed self-contradictory, in that it said both that the information was not held, and that the time/costs involved in retrieving it would be excessive. She invited Sussex Police to consider whether section 12 (costs of compliance) of the FOIA would have been a more appropriate grounds for its refusal, saying that she was able to consider the late introduction of new grounds if accompanied by supporting evidence.
26. Sussex Police did not respond to or address this point in any of its subsequent correspondence with the Commissioner, and it has maintained its position that it did not hold the information in question.
27. The Commissioner has asked Sussex Police a series of detailed questions, aimed at assisting her understanding of its reasons for stating that it did not hold the requested information. She invited it to provide as much evidence as possible in response to her enquiries, including full details of searches conducted and a complete chronology, as appropriate, to support its conclusions. She advised Sussex Police that she could not accept at face value any assertions that, in her view, required a proper and fuller explanation.
28. Sussex Police's response, sent more than two months later, was simply to forward to the Commissioner a copy of its letter to the complainant of 31 August 2017.
29. The Commissioner pressed Sussex Police to respond to the specific questions she had put to it. Sussex Police then provided an extremely brief, cursory response.
30. Sussex Police said that if it were held, the information would have been held in manual format, within the Digital Forensic Team. Searches were carried out and procedural advice sought within the Digital Forensic Team. The searches conducted related to generic procedural matters. There was no business purpose for holding the information. Sussex Police said that the force complies with Management of Police Information Requirements regarding information retention. It said the complainant had not requested statistical information, but rather he was "*posing questions relating to procedure*". It answered several questions

simply "N/A" and also referred the Commissioner to further information which it said was attached to its email, but which was not received by her.

The Commissioner's view

31. 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 22 and 23, above, the Commissioner is required to make a finding on the balance of probabilities.
32. Having looked at Sussex Police's submissions to her, and its correspondence with the complainant, the Commissioner is not satisfied that Sussex Police has provided a comprehensive or cogent explanation for believing that it does not hold the requested information.
33. As set out in paragraphs 6 and 25, above, Sussex Police's response to the complainant seems to suggest that the information is held, albeit not in a centralised or collated form, and that searching for it would be too costly. If that is this case, then the correct response would have been to refuse the request under section 12 (cost of compliance exceeds appropriate limit) of the FOIA.
34. Furthermore, logic dictates that the information would be held by Sussex Police, in some format. The complainant is requesting to know whether, where a device has been forensically examined, the results of the examination were subsequently used in the prosecution of the owner. The Commissioner considers that such information would be extractable from files passed to the Crown Prosecution Service (CPS) and that Sussex Police would retain a record of the information it passes to the CPS. She accepts that there might be no way of identifying whether an individual file holds such information, other than by manually searching it and that this may have severe resource implications. That being the case, again, the correct response would have been to refuse the request under section 12 of the FOIA, rather than to state that the information is not held.
35. The Commissioner notes that Sussex Police characterised the request as the complainant "*posing questions relating to procedure*" and that he was not asking for statistical information. In fact, the complainant was clearly asking for statistical information; answering the request would involve divulging, for each time period, how many times the results of forensic examinations were used to prosecute a device's owner.

36. The Commissioner also considers it debateable that the searches Sussex Police conducted were adequate, given that only the Digital Forensic Team was searched, and for information about "*generic procedural matters*".
37. The paucity of Sussex Police's submissions is disappointing, given the concerns that the Commissioner expressed to it about its seemingly contradictory response to the complainant, and the need for it to provide detailed and well evidenced arguments to support its position. The Commissioner considers that Sussex Police has had ample opportunity to set out its case and that she has guided it as to the information it would be necessary to provide to adequately support its position. Ultimately, it is a public authority's responsibility to satisfy the Commissioner that it has complied with the law and in this case she considers Sussex Police's efforts have fallen short.
38. In view of this, and taking into account the contradictory nature of its response to the complainant, and the likelihood that the information in question would be capable of being extracted from retained copies of case files passed to the CPS, the Commissioner's decision is that, on the balance of probabilities Sussex Police did hold information as to "*...whether the results of the forensic examination were then used in the prosecution of the owner*".
39. Sussex Police must therefore take the steps set out in paragraph 3 of this decision notice.

Other matters

Section 45 – internal review

40. There is no obligation under the FOIA for a public authority to provide an internal review process. However, it is good practice to do so, and where an authority chooses to offer one the section 45 code of practice sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
41. Any expression of dissatisfaction by the requester about the handling or outcome of a request should trigger the commencement of the internal review process. It is not necessary to ask for an internal review by name.

42. In this case, Sussex Police advised the complainant that he could request an internal review in its response letter of 31 August 2017. The complainant responded the same day, expressing dissatisfaction with the way Sussex Police had, in his eyes, failed to address part of the request. Although Sussex Police confirmed that it would respond, it did not subsequently provide the complainant with the outcome of the internal review, and it has not explained why.
43. The Commissioner considers that in offering but failing to conduct an internal review, Sussex Police has not conformed with the section 45 code.
44. The Commissioner would remind Sussex Police of the importance of completing internal reviews, within the timescales set out above.

Right of appeal

45. 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

46. 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.
47. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF