

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 January 2018

Public Authority: College of Policing
Address: 10th Floor Riverside House
2a Southwark Bridge Road
London
SE1 9HA

Decision (including any steps ordered)

1. The complainant requested information from the College of Policing ('COP') relating to complaints, grievances and whistleblowing. COP refused to comply with the request as it said that to confirm or deny whether or not it holds any information would exceed the cost limit at section 12(2) of FOIA.
2. The Commissioner's decision is that COP was correct to apply section 12(2) of FOIA and that it was not therefore obliged to comply with the request. It also complied with its duty under section 16 FOIA to provide the complainant with appropriate advice and assistance.
3. However, by failing to issue its refusal notice within the statutory time limit of 20 working days, COP breached section 17(1) of FOIA. The Commissioner requires no steps to be taken.

Request and response

4. On 15 June 2017 the complainant wrote to COP and requested information in the following terms (the complainant had inadvertently used some numbers more than once towards the end of this request, so the numbering is in line with COP's renumbering in its response):

"1, The number of complaints/issues/grievances/whistleblows made against the College of Policing which progressed to the instigation of legal proceedings by the Complainant/Appellant

2, The number of complaints/issues/grievances made against the College of Policing where legal proceedings had been instigated but which were settled by way of:

2a) Compromise Agreement

2b) Out of Court Settlement (other than 2a) above

2c) In any other manner than as specified at 2a or 2b) above

3, The number of issues/cases as at 1, above that were Civil in nature,

3a) The number of issues/cases as at 1, above that were Criminal in nature.

4, The number of issues/cases as at 1, above that were instigated by Employees of the College of Policing.

4a) The number of issues/cases as at 1, above that were instigated by Associates of the College of Policing.

4b) The number of issues/cases as at 1, above that were instigated by Contractors not specifically engaged as Associates of the College of Policing.

4c) the number of issues/cases as at 1, above that were instigated by any Regulatory Body against the College of Policing.

4d) The number of issues/cases as at 1, above that were instigated by any other person/Organisation or None Regulatory Body, against the College of Policing.

5, The number of issues/cases as at 1, above that were not settled in any way as defined at 2(a),(b),(c) above, where there was a finding of guilt/culpability against the College of Policing.

5a) The number of issues/cases as at 1, above that were not settled in any way as defined at 2(a),(b),(c) above, where there was no finding against the College of Policing.

5b) The number of issues/cases as at 1, above that are still outstanding/yet to be determined.

6, The combined total amount paid/ordered to be paid in respect of all matters by the College of Policing, however settled, as at 1&2(a),(b),(c) above.

6a) The total of all settlements/fines/penalties paid out/ordered to be paid by the College of Policing in respect of Criminal complaints/proceedings.

6b) The total of all settlements/fines/penalties paid out/ordered to be paid by the College of Policing in respect of Civil complaints/proceedings.

6c) The total amount currently outstanding of all unsettled claims whether Civil/Criminal.

7, The number of cases where it is within the knowledge of the College that investigations are ongoing whereby any finding of guilt could render the College of Policing liable to fines/penalties, be they Civil/Criminal or otherwise defined.

7a) The maximum total amount payable for which the College would be liable upon any finding(s) of guilt in respect of 7, above.

8, The total number of complaints/cases/proceedings instigated against the College of Policing specifically in respect of Data Protection Act issues.

8a) The number of Subject Access Requests refused by the College of Policing while claiming 'disproportionate effort' was required

8a)i) The number of matters at 8a) above, that were challenged

8a)ii) The number of matters at 8a)i) above, that were successful (i.e the rationale of 'disproportionate effort' was unfounded/dismissed).

8b) The number of issues/cases/proceedings instigated against the College of Policing specifically concerning non-compliance with Subject Access Requests

8b)i) The number of cases at 8b) above that were found in the Appellant's favour.

8c) The number of issues/cases/ proceedings instigated against the College of Policing specifically concerning non-compliance with Freedom of Information Requests

9, The total number of cases whereby Treasury Solicitors were instructed to act for the College of Policing.

10, The total number of cases whereby Counsel's opinion was sought to defend matters against/on behalf of the College of Policing.

11, The total number of cases whereby Counsel was instructed to act on behalf of the College of Policing.

12, The total cost of defending actions brought against the College of Policing, whether successful or otherwise.

The Request [sic] is to cover the 3 year period inclusive of all dates whereby matters were either instigated and/or concluded and/or remain outstanding within the timeframe, notwithstanding whether matters were brought before 1st January 2015 or not, between:

1st January 2015 to 31st December 2015

1st January 2016 to 31st December 2016

1st January 2017 to 31st December 2017".

5. Although COP initially advised the complainant it required further time to consider whether section 40(2) may apply, ultimately it provided its substantive response, late, on 10 August 2017. It refused to provide the requested information citing section 12(2) of FOIA, the cost of compliance. COP advised the complainant to consider refining her request in accordance with its section 16 FOIA responsibilities.

Scope of the case

6. The complainant had initially contacted the Commissioner on 14 July 2017 to complain about the way her request for information had been handled. However, she sent her correspondence to a different complaint and, unfortunately, it was therefore not noticed until late October 2017.
7. The complainant had not requested an internal review from COP in relation to her request of 15 June 2017. However, due to the delays already experienced with COP's response as well as those in identifying this complaint at the ICO, the Commissioner has exercised her discretion in this case and has not required the complainant to request an internal review before accepting the complaint. Instead, the Commissioner, in line with her usual practice, asked COP to reconsider its approach to the request as part of her investigation. The Commissioner also left COP to decide whether it wished to carry out a

separate formal 'internal review' in addition to reconsidering the request.

8. COP carried out an internal review and responded separately to the Commissioner's investigation. Its internal review of 19 December 2017 explained it had initially considered parts 9-12 of the request on the basis that if the cost of complying with these exceeded the appropriate limit under section 12 FOIA, then the cost exclusion would also apply to the remainder of the request.
9. 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 1 of FOIA. The FOIA is to do with transparency of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held by public authorities. The FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.
10. The Commissioner has considered whether COP was entitled to reply on section 12(2) in relation to this request. Other points raised by the complainant are commented on in 'Other matters' at the end of this notice.

Reasons for decision

Section 12 – cost of compliance exceeds appropriate limit

11. Section 12(2) provides that a public authority is not obliged to confirm or deny whether requested information is held if it estimates that to do so would incur costs in excess of the appropriate limit. In other words, if the cost of establishing whether information of the description specified in the request is held would be excessive, the public authority is not required to do so.
12. 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 must be calculated at the rate of £25 per hour, providing an effective time limit of 18 hours' work.
13. The 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.
14. Section 12(2) requires a public authority to estimate the cost of confirmation or denial, rather than to formulate an exact calculation. The question for the Commissioner here is whether the cost estimate by the COP was reasonable. If it was, then section 12(2) was engaged and the COP was not obliged to confirm or deny whether the requested information was held.

Can all parts of the request be aggregated?

15. In its response to the request, COP said it had relied on section 12(4) and considered all parts of the request together. Section 12(4) can be engaged where one person makes two or more requests. It allows for the aggregation of these requests for the purpose of calculating costs in circumstances which are set out in Regulation 5 of the Fees Regulations. This Regulation provides that multiple requests can be aggregated where two or more requests relate, to any extent, to the same or similar information.
16. Given the effect of section 12(4), the Commissioner first considered whether the complainant's request of 15 June 2017 constituted a single request with multiple elements or multiple requests. The Information Tribunal considered a similar issue in *Fitzsimmons v ICO & Department for Culture Media and Sport* [EA/2007/0124]¹.
17. Taking the Tribunal's decision in *Fitzsimmons* into consideration, the Commissioner would characterise the complainant's request as containing multiple requests within a single item of correspondence.
18. Having established that the complainant has made multiple requests in a single letter, the Commissioner went on to consider whether those requests could be aggregated for the purpose of calculating the cost of compliance. The Commissioner notes that all parts of the request relate to the instigation of legal proceedings by a complainant or appellant and therefore relate to a similar subject matter. The Commissioner has therefore concluded that it is reasonable for them to be aggregated for the purpose of calculating the cost of compliance because they follow an overarching theme.

¹<http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i242/Fitzsimmons.pdf>

19. Having reached this conclusion, the Commissioner will next consider the application of section 12(2). Section 12(2) requires a public authority to estimate the cost of confirmation or denial, rather than to formulate an exact calculation. The question for the Commissioner here is whether the cost estimate given by COP was reasonable. If it was, then section 12(2) was engaged and COP was not obliged to confirm or deny whether the requested information was held.
20. In its response of 10 August 2017, COP explained that none of the requested information for parts 9-12 of the request is held in one central place, and that its Finance team processes payment for all external legal services. Its Finance team calculated that between the relevant time periods, 276 receipts were submitted in respect of legal fees. It said:

“The team would need to consider each receipt and then liaise with the relevant Subject Matter Expert (‘SME’) in the College to align the receipt with the work undertaken. We would then need to categorise the data to answer the specific questions you have raised. Please see details of the calculation below:

This would require:

- a) an action from Finance to locate the receipt and ascertain whose business area it related to within the College*
- b) an action from the SME within the College to confirm what the receipt was for*
- c) an action from Legal Services to determine the answer to each of the questions, based on the data provided*

Calculation:

- 5 – 10 minutes per action. Average taken of 7.5 minutes per person per action*
- 276 receipts x 7.5 minutes = 2070 minutes*
- 2070 minutes/60 = 34.5 hours*
- This would then be **doubled** to reflect the work for Finance and the relevant SME = 69 hours*
- This does not include any time it would then take to separate out the information into the questions requested by Legal Services*

Under the fees regulations, a public authority can cost the level of work at a rate of £25 per hour, up to a maximum fee of £450. Therefore, the monetary figure in complying with questions 9 –

12 inclusive would be £1725. This is a conservative estimate as we have not considered the time it would take the Legal Services team to categorise the data in line with the four questions. If the limit is exceeded, there is no requirement for the College to conduct work up to the cost limit – it applies to the whole request and there is no obligation requiring us to answer other parts of a request even if only one area of the request invokes the limit.

I am therefore unable to comply with section 1(1)(a) and can neither confirm nor deny whether the College holds all information relevant to your request, as to ascertain that fact will exceed the fees limit."

21. At the internal review, COP advised the complainant as follows:

"We do not have a ready means of providing the total figures requested in questions 9–12 as there is currently no central repository of this information, rather our employees have the discretion to engage external legal services direct, and predominantly using the support network provided to us via the Home Office.

While we accept that information which could be used to formulate a response to questions 9–12 is likely to be held by the College, it would sit with numerous members of staff, in various different aspects of business, making its collection too onerous. It would simply not be possible to scope a College-wide request and compile meaningful results within the costs limit."

22. As part of its internal review COP revisited its cost estimate. It advised the complainant that its Finance team were approached "*as the most accurate, combined source*" but that, as outlined in its initial response, extracting this information was not straightforward and considerable investigative work was required to consider each receipt, trace it back to the work undertaken and interpret it in the manner required by the complainant.

23. In order to provide a more accurate assessment of COP's ability to answer questions 9–12, COP's Finance team was asked, (as part of the internal review), to undertake a larger sample calculation than in the original enquiry. Accordingly, the Finance team tested 20 receipts relating to COP's use of external legal services; it took five hours to trace these receipts back to the originator and confirm whether or not the works related to the complainant's questions. This wider sample demonstrates that COP's original assessment of one receipt taking 7.5 minutes (as disclosed in its initial response) was a very conservative

one. To consider the 276 receipts which fall within the time period requested would significantly exceed the cost limit.

24. Having considered the estimate above, and with a lack of any specific argument to the contrary from the complainant, the Commissioner considers this estimate to be a reasonable one. Given that the cost limit would be exceeded simply by responding to parts 9-12 of the request, the Commissioner is satisfied that to answer the request as a whole would exceed the cost limit. The Commissioner therefore concludes that section 12(2) is engaged and that COP was not obliged to confirm or deny holding any of this information.

Section 16 - advice and assistance

25. Section 16(1) of FOIA provides that a public authority is required to provide advice and assistance to any individual making an information request. In general, where section 12 is cited, in order to comply with this duty a public authority should advise the requester as to how their request could be refined to bring it within the cost limit, albeit that the Commissioner recognises that where a request is far in excess of the limit, it may not be practical to provide any useful advice.
26. In this case COP has explained to the complainant about how the information is held and why confirmation or denial would exceed the limit. Although it has been unable to assist with narrowing the request sufficiently to allow disclosure of any information, the Commissioner recognises that, on this occasion, this has not been practicable. COP's usage of external legal services has been developed for its own purposes and the information that the complainant requires is not readily accessible as it is not something which is useful to the COP in the format that has been requested.
27. Although the complainant did not choose to refine her request in any way, the Commissioner is satisfied that COP took steps to address its obligation to provide advice and assistance and so she finds no breach of section 16(1) in this case.

Section 17(1) – time for refusal of a request

28. Section 17(1) of FOIA states:

*"(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, **within the time for complying with section 1(1)**, give the applicant a notice which –*

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

29. COP's response to the complainant withheld information under section 12(2) of FOIA. As this refusal notice was not issued within the time frame for complying with section 1(1) (ie 20 working days) COP has breached section 17(1) of FOIA. However, as the response has been issued no steps are required.

Other matters

30. In further correspondence with the Commissioner the complainant has expressed disappointment with what she describes as COP's *"inadequacies in respect of maintaining adequate and appropriate records which now seemingly results in a 'costs' issue in providing the information"*.

31. She also said:

"I still am not convinced that information concerning their use of public funds to reach settlements with employees/associates over a 3 year period, could possibly invoke this exemption? It begs the question as to just how many settlements/disputes and pay outs there must have been should this, in fact, be the case? Hence the FOI request in the first instance and, the necessity to be open and honest in this regard."

32. These are matters are outside the Commissioner's jurisdiction. The FOIA cannot require a public authority to change its systems, although the Commissioner may make an adverse comment if she believes there is evidence of particularly poor record handling. In this case COP has advised that it has no business requirement to centrally collate the specific information that has been requested, although, where held, it will be recorded and traceable for individual enquiries by virtue of the receipts. The Commissioner therefore notes that, if it does become necessary to locate such information, this will be accessible via the receipts. She does not therefore consider there to be any evidence of poor records management on this occasion.

Right of appeal

33. 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

34. 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.
35. 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

Carolyn Howes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF