

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 August 2020

Public Authority: Chief Constable of Sussex Police

Address: Sussex Police Headquarters

Malling House

Church Lane

Lewes

East Sussex

BN7 2DZ

Decision (including any steps ordered)

1. The complainant requested information from Sussex Police relating to a football match between Brighton & Hove Albion and Crystal Palace. Sussex Police refused the request on the grounds that compliance would exceed the cost limit under section 12(1) of the FOIA. The complainant reduced the scope of the request, but Sussex Police maintained its application of section 12(1) to the revised request.
2. The Commissioner's decision is that Sussex Police is not entitled to rely on section 12 to refuse to comply with the revised request.
3. The Commissioner requires Sussex Police to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the revised request which does not rely on section 12 of the FOIA.
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 15 March 2019, the complainant wrote to Sussex Police and submitted a multipart request for information which is reproduced in the Annex at the end of this decision notice. The request concerned claims that weapons had been recovered from the scene of a football match between Brighton & Hove Albion and Crystal Palace, and Sussex Police's engagement with the media about those claims.
6. The complainant received no response, and, following the Commissioner's intervention, on 25 June 2019 a decision notice was issued under reference FS50842450¹, requiring Sussex Police to respond in accordance with section 10 of the FOIA.
7. Sussex Police responded to the decision notice, late, on 30 September 2019. It told the complainant that it was not obliged to comply with the request because doing so would exceed the appropriate limit established under the Fees Regulations. The Commissioner has interpreted this as being a claim that section 12(1) (cost of compliance exceeds appropriate limit) of the FOIA applies.
8. Sussex Police invited the complainant to consider refining his request so that it might be dealt with within the costs limit.
9. On 6 November 2019, the complainant asked Sussex Police to conduct an internal review of its decision. He also confirmed that several parts of the request could be disregarded and asked it to reconsider the request on that basis.
10. Despite further intervention by the Commissioner on 13 December 2019, asking Sussex Police to respond to the complainant, Sussex Police did not do so.

Scope of the case

11. The complainant contacted the Commissioner on 17 January 2020 to complain about the way his request for information had been handled. He explained that he had not received the outcome of the internal review or heard anything further with regard to the revised request.
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¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2615256/fs50842450.pdf>

12. The analysis below considers whether Sussex Police was entitled to rely on section 12(1) of the FOIA to refuse to comply with the revised request. That is:

- parts 1, 2, 3, 5, 6 and 7(ix) of the original request, as clarified by the complainant in his letter of 6 November 2019.

13. 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 12: Cost of compliance exceeds appropriate limit

14. Section 12(1) of the FOIA states:

"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."

15. This limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004² (the Fees Regulations) at £450 for police forces. The Fees Regulations also specify that the cost of complying with a request must be calculated at a flat rate of £25 per hour. This means that Sussex Police may refuse to comply with a request for information if it estimates that it will take longer than 18 hours to comply.

16. 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;

- determining whether it holds the information;
- locating the information, or a document containing it;
- retrieving the information, or a document containing it; and
- extracting the information, or a document containing it.

17. Section 12 explicitly states that public authorities are only required to estimate the cost of compliance with a request, and are not required to give a precise calculation. However, the Commissioner considers that

² <http://www.legislation.gov.uk/uksi/2004/3244/contents/made>

the estimate must be reasonable. The Commissioner follows the approach set out by the Information Tribunal in the case of *Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency (EA/2007/0004, 30 October 2007)* which stated that a reasonable estimate is one that is "...sensible, realistic and supported by cogent evidence"³.

18. The Commissioner asked Sussex Police to provide a detailed estimate of the time/cost it would take to provide the information falling within the scope of the revised request. When providing these calculations, she asked it to include a description of the nature and type of work that would need to be undertaken (e.g. searching X number of files – 1 hour), clarify whether a sampling exercise had been undertaken in order to determine this estimate and, also, to clarify whether the estimate was based upon the quickest method of gathering the requested information.
19. The Commissioner referred Sussex Police to the importance of providing a detailed and well-reasoned response, saying:

"It is important that you provide clear and cogent evidence in support of Sussex Police's position, as the matter may be examined by the Information Tribunal, should either party appeal against the Commissioner's decision ... please be aware that a number of Information Tribunals have made it clear that an estimate for the purposes of section 12 has to be 'reasonable' which means that it is not sufficient for a public authority to simply assert that the appropriate limit has been met; rather the estimate should be realistic, sensible and supported by cogent evidence."

Sussex Police's position

20. In its response, Sussex Police commented that the request may meet the threshold for being considered vexatious, and said that it believed the complainant may be submitting requests in collaboration with a third party. However, it did not offer any further arguments in that regard.
21. Its submission in support of section 12(1) consisted solely of the following:

"It is my position to maintain S.12 does apply to this request and have [sic] attempted to provide a response to your specific questions below."

³<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf>

In assessing our ability to locate all the information requested within cost I have considered the following in relation to time required for the following;

a) Determining if the information is held (and by whom and if a duplicated request).

Search of electronic log of radio traffic recorded during match 4 x hours = £100

b) Locating the information. (individual email accounts including retired officers)

Search of Officers and Press Office email accounts, gaining access to retired Officers records 6 x hours + £150

c) Retrieving the information.

Establishing by search of telephony system (Telephone calls are not recorded) x 3 hours =£75

d) Extracting the information from previous disclosures and press releases all previously disclosed to [the complainant].

Search of 5 x FOI requests from [the complainant], 2 x request from [third party's name redacted] and 3 x similar requests on subject of the football match. 7 x hours = £175".

The Commissioner's conclusion

22. The Commissioner is concerned by, and disappointed with, the lack of detail in Sussex Police's submission. The Commissioner considers that the level of information required to justify a public authority's reliance on section 12(1) is well established. She has published detailed guidance on section 12⁴ and there are currently more than 500 decision notices setting out the Commissioner's position on section 12 on her website⁵. In addition, the FOIA has been in force for many years and she would expect that Sussex Police should be aware of the procedural basics of the Act. However, as set out above, Sussex Police has simply stated a

⁴https://ico.org.uk/media/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

⁵ <https://icosearch.ico.org.uk/s/search.html?collection=ico-meta&profile=decisions&query=&f.By+section|sectionOfLegislation=FOI%2012>

number of hours as its section 12 estimate, and has not provided the level of analysis that the Commissioner explicitly requested.

23. As set out in paragraph 17 of this notice (and drawn to Sussex Police's attention), to be considered reasonable, an estimate should be *"...sensible, realistic and supported by cogent evidence"*.
24. Sussex Police has only described, in general terms, the areas in which searches would need to be conducted. It has not provided any information regarding why it would take so long to extract the requested information from each area, such as the volume of records that would need to be searched, and whether or not keyword searches could be used. It has offered no comment to the Commissioner regarding the extent to which the requested information is, or is not, readily to hand, nor has it detailed any particular obstacles it might face in responding to specific parts of the request. Without any explanation as to how it has calculated this estimate, the Commissioner cannot conclude that it is a reasonable estimate of the time and work required.
25. It is also unclear why, at part (d) of its response, Sussex Police has allocated so much time to extracting information which it says has previously been disclosed in response to FOIA requests, as presumably this information should already be to hand. The Commissioner notes that were this excluded from the costs estimate, it would reduce the estimate by some way, and bring it under the £450 limit at which a request may be refused under section 12.
26. The Commissioner also questions the inclusion of the investigations described at (c) of the response in the cost estimate. If telephone calls are not recorded, this calls into question why a search of the telephony system would be necessary, and, consequently, whether its inclusion as a cost in the costs estimate was reasonable.
27. Sussex Police also failed to provide details of any sampling exercise it had conducted in calculating the estimate, despite being asked to do so, and nor did it clarify whether the estimate was based on the quickest method of gathering the requested information.
28. The Commissioner acknowledges that her casework enquiries to Sussex Police coincided with the onset of the COVID-19 pandemic, which has, understandably, impacted on the ability of some public authorities to respond to her enquiries in a timely and comprehensive fashion. In this case, Sussex Police initially explained that its FOI staff were working from home and did not have immediate access to the records the force holds about the request. Nevertheless, when, two months later, the Commissioner asked if Sussex Police was now in a position to respond regarding its handling of the request, it indicated that it was. The

submission that followed did not contain any suggestion that its ability to respond has been impaired by the current situation.

29. Taking all the above into account, the Commissioner considers that she has not been provided with cogent evidence to support the costs estimate, and thus she is not satisfied that it is reasonable. It follows that the Commissioner is not satisfied that the appropriate limit would be exceeded by complying with the request.
30. The Commissioner's decision is therefore that Sussex Police was not entitled to rely on section 12(1) of the FOIA to refuse to comply with the complainant's request.
31. The Commissioner requires Sussex Police to take the action in paragraph 3, above.

Other matters

32. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

Section 45 – internal review

33. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. However, it is good practice to offer an internal review, and, where a public authority chooses to do so, the code of practice established under section 45 of the FOIA sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales.
34. 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.
35. The complainant asked for an internal review on 6 November 2019. However, Sussex Police did not conduct an internal review and, although asked to, it has not provided the Commissioner with any explanation of why it failed to do so.
36. By failing to conduct an internal review, when it had previously offered to engage with the complainant about the request, Sussex Police has failed to act in accordance with the section 45 code.

General engagement

37. Sussex Police was slow to respond to the Commissioner's casework enquiries, and when it did, its response was cursory and lacking in detail.
38. As stated in paragraph 28, the Commissioner acknowledges that the COVID-19 pandemic has reduced the capacity of some public authorities to respond to FOIA complaints in a timely fashion. However, this was the latest in a series of delays that characterised Sussex Police's handling of this request, and which pre-date the particular problems caused by the pandemic. In the first instance, it was necessary to issue a decision notice to compel Sussex Police to respond to the initial request. Sussex Police then complied with the steps specified in that notice well outside of the 35 day time for compliance. Sussex Police then failed to respond to the complainant's request for an internal review, or to the Commissioner's request that one be completed. It also failed to respond to the revised request. By the time the Commissioner forwarded her casework enquiries to Sussex Police, on 3 March 2020, almost 12 months had elapsed since it received the original request.
39. Sussex Police's attention is drawn to the fact that 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"⁶ strategy 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 Policy"⁷.
40. This case may be revisited with Sussex Police should its handling of other FOIA requests suggest there is an ongoing problem with timeliness and engagement.

⁶ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁷ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

41. 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

42. 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.
43. 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

Annex – FOIA request dated 15 March 2019

1. For ease of reference, the Commissioner has differentiated the request from background information, in bold.
2. Parts (Q4) and (Q7)(i)-(viii) of the original request were later excluded from scope by the complainant when he revised the request. Therefore, they do not form part of the cost estimate, and are not shown in bold.

"I should be grateful if you could kindly provide the following information:

Q1 Can you please confirm whether a Sussex Police spokesperson told an Independent journalist on or about 5 December 2017 that weapons had been recovered at the scene and were being held as evidence? Can you also confirm that a request for proof of this claim was denied? If such proof was denied, please can you explain why?

*Q2 CS Neil Honnor was reported as saying on 8 December 2017 that Sussex Police had apologised to a journalist because "an error was made in relation to responding to [his] enquiry about this." **Did that apology relate to the information given to The Independent at Q1?***

Q3 If that apology did not relate to that conversation, please tell me:

- (i) what newspaper or other organisation did that journalist represent;***
- (ii) what "error" was made in responding to his enquiry;***
- (iii) what erroneous information was given to him; and***
- (iv) what was the true position***

Q4 In your letter of 13 March under ref FOI/1300/17 you have disclosed that

- (i) Sussex Police received one report of "weapons" being found at the match between BHA FC and CPFC on 28 November 2017;*
- (ii) this one report was in the form of an electronic log of radio traffic; and*
- (iii) the log recorded the source of the report.*

Please advise me whether the source of the report was a police officer, a club official, a club steward, member of the public or any other description of person. In which case, please specify.

Q5 In my FOI request dated 10 December 2017 under your ref FOI/1300/17 I referred to the fact that Sussex Police had issued an

apology on the afternoon of 7 December 2017 in respect of its claim that knives and knuckledusters had been found in the away end of the Amex Stadium at the match held on 28 November 2017. I said this apology had been issued "following an FOI request for evidence of the existence of weapons".

In that request I asked "At what time was the above FOI request received by Sussex Police and at what time was the Sussex Police "apology" issued? "

The only FOI request I had mentioned previously was the one I referred to above. The FOI request in question was FOI/1294/17 which was sent by email to Sussex Police at 1323 hours on 7 December 2017.

In your reply this question you said "FOI Request received 16.42hrs 10/12/2017. The 'apology' was prepared for release at 16.44hrs on 07/12/2017."

*It appears to me that your reply may refer to a different FOI request. **Please confirm at what time and on what date Sussex Police received the FOI request under your reference FOI/1294/17.***

Q6 In the FOI request under FOI/1300/17 I asked:

"Q11 Given that Sussex Police had stated publicly that offensive weapons had been found in the south stand what attempts were made by Sussex Police to recover those weapons in the week following the match?

You replied: "It was acknowledged that there were no weapons found."

With respect this does not appear to answer the question. I asked about attempts to recover the alleged weapons, not about whether they were found.

I am aware that in the afternoon of 7 December 2017 Sussex Police issued a statement saying:

"The reference to weapons being found discarded at the stadium following the Brighton v Crystal Palace match on November 28 was based on information logged by our officers on the night and done so in good faith. Subsequently, it has been established that no such items were physically recovered at the stadium or in the city."

Nonetheless, it was reported by The Independent on 7 December that a Sussex Police spokesperson had told them on 5 December that weapons had been recovered and were being held as evidence. It is a fact that CI (now Supt) Simon Nelson, the Match Commander, tweeted from his corporate account on 7 December 2017 that BHAFC staff "had found those items (i.e. knives and knuckledusters) in the away end of the stadium."

In response to another question you said that it was normal practice for any offensive weapons found by a football club's officials or stewards, to be immediately handed to the police. In this case Sussex Police apparently believed that offensive weapons had been found in the stadium and Mr Nelson, the Match Commander, apparently continued to believe that BHAFC staff had found such weapons 10 days after the match. My question did not ask whether any weapons were recovered. We now know that none were. My question is about what efforts were made to recover them if Sussex Police continued to believe as late as 10 days after the match that they had been found in the stadium.

I should be grateful if you could now provide the following information:

(i) were any efforts made by Sussex Police to recover offensive weapons of any description, but to include in particular knives and knuckledusters, which it claimed had been found in the away end of the Amex Stadium on 28 November 2017, between 28 November 2017 and 9 December 2017?

(ii) if no such attempts were made, why were no attempts made given that that you have said that it is normal practice for offensive weapons found by a football club's officials or stewards, to be handed to the police and immediately?

(iii) if any such attempts were made, how many such attempts were made and when were they made?

(iv) what were the outcomes of any such attempts?

(v) if there were any such attempts when was the final attempt made?

(vi) what reports, if any were made of the failure to recover such weapons and when were they made and to whom?

Q7 In your letter dated 13 March 2018 in which you purported to disclose some of the information sought in my FOI request under your reference, you said that following:

"Q4 If no such weapons had held by police at any time, on the basis of what evidence did the Sussex Police spokesman allege

that they were being held given that 5 days had elapsed since the weapons were allegedly found?

No physical evidence but acted upon initial verbal report."

In your reply you appear to be saying that the press spokesperson who reportedly alleged that weapons had been recovered at the scene by Sussex Police and were being held by Sussex Police, had relied on the initial verbal report to make that claim. This would suggest that the initial verbal report which the press officer relied upon, had reported that knives and knuckledusters or any other offensive weapons had been recovered by police at the scene and were being held by police as evidence. Clearly, if the verbal report did not record that such weapons had been recovered by police and were being held as evidence, then the report could not justify the press officer's claim.

You have told me that one report in the form of an electronic log of radio traffic recorded that weapons had been seen or found Please provide the following information:

(i) did the log record that offensive weapons had been found and recovered?

(ii) If so did the log record that they had been found and recovered either by:

(a) a Sussex Police officer or officers ;

(b) a police officer or officers from another force;

(c) a member of staff employed by BHA FC or a steward employed by BHAFC or CPFC or a subcontractor of either club. If yes, please specify;

(d) or any other person, such as a member of the public, (please specify;)

(iii) if the log did not record that any offensive weapon had been found and recovered, did the log record that such a weapon had been sighted?

(iv) if so, did the log record that such a weapon had been sighted by:

(a) a Sussex Police officer or officers ;

(b) a police officer or officers from another force;

(c) a member of staff employed by BHA FC or a steward employed by BHAFC or CPFC or a subcontractor of either club. If yes, please specify;

(d) or any other person, such as a member of the public, (please specify;)

(e) did the log record the number of persons who had sighted such weapons?

(f) If so, what was the number of such persons?

(v) did the log record that any weapons recovered by police were being held as evidence?

(vi) was there any other evidence that such weapons had been recovered by police?

(vii) was there any other evidence that such weapons were being held as evidence?

(vii) [sic] if the log did not record that such weapons and been recovered and did not record that they were being held as evidence on what evidence did the Sussex Police spokesperson rely when saying on or around 5 December 2017 that weapons had been recovered and were being held as evidence?

In the light of the confusion about this matter please therefore supply me also with:

(viii) a written transcript of the electronic log of radio traffic reporting the existence of offensive weapons referred to in your answers to Q4, Q7 and Q8 of FOI/1300/17;

(ix) a copy of the all the [sic] briefing including "lines to take" given to Press Office or other officers or staff from 28 November to 9 December 2017 inclusive to be used in response to enquiries from the press or others about the presence of offensive weapons on the occasion of the match."