

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 August 2022

Public Authority: Chief Constable of Staffordshire Police
Address: Police Headquarters
Weston Road
Stafford
ST18 0YY

Decision (including any steps ordered)

1. The complainant requested from Staffordshire Police information relating to Operation Eustace,¹ an independent investigation following allegations of an alleged incident involving senior officers in 2007. In a revised response, Staffordshire Police stated that it does not hold information to questions 1 and 3 of this request.
2. The Commissioner's decision is that on the balance of probabilities Staffordshire Police does not hold information to questions 1 and 3 of the request. Therefore, the Commissioner does not require Staffordshire Police to take any steps as a result of this decision.

Request and response

3. On 18 October 2021 the complainant wrote to Staffordshire Police and requested information in the following terms:

¹ <https://northumbria-pcc.gov.uk/v3/wp-content/uploads/2021/12/OP-Eustace-Investigation-Report-V-2-1.pdf>

"Operation Eustace was set up as an "Independent Investigation" which Staffordshire Police, led by Deputy Chief Constable Nicholas Baker, have conducted on behalf of Northumbria Police (NP) and the Office of the Police and Crime Commissioner for Northumbria (OPCC).

Operation Eustace was specifically set up to investigate whether an Incident occurred at a senior NP Officer's home in 2007 and whether details of the Incident may have been covered up.

The Investigation also sought to examine information presented to [name redacted] Employment Tribunal in May 2016 and "any allegations that may have arisen during the course of the evidence or in the way in which it was presented, particularly those considered criminal in nature"

(Reference – Press Statement by Chief Constable [name redacted] – 5th August 2016)

"1. When were the original Terms of Reference agreed? Who approved them? What were they?

2. How many versions (from Interim to Final) of the Operation Eustace Report have been created. For each version please list: -

a) Version number, Date created

b) Number of pages

c) Who was it sent to within NP and/or OPCC

3. During the Investigation, have there been significant changes to the Terms of Reference which have altered the focus/direction of the Investigation – e.g. changes which have named specific individuals and either added or removed them from the Terms of Reference? If so, then in each case,

a) Who suggested the changes to the Terms of Reference?

b) Who was consulted and/or agreed with the changes?

c) Who approved the changes – and on what date?

4. Have any of the persons who have been specifically named within any of the Terms of Reference been "interviewed under caution" by Staffordshire Officers?"

4. On the same day, Staffordshire Police responded to the complainant and noted that as his requests relate to the same subject, this request had been aggregated as one request. Staffordshire Police assured the complainant he would receive a response in due course.
5. On 16 November 2021 Staffordshire Police provided its response and confirmed that it does hold some of the requested information. It amalgamated this request with another request which the complainant had submitted about Operation Eustace. Within its response, Staffordshire Police provided him with a redacted copy of the Terms of Reference (ToR) and stated that "the terms of reference were not changed during the investigation." It also cited section 40(2) (personal information) of FOIA to question 3(c) ("who approved the changes – and on what date?").
6. On 20 November 2021 the complainant asked Staffordshire Police for an internal review. He said there were several responses which he considered required clarification, he expressed his concerns and listed a series of questions to Staffordshire Police to address.
7. On 25 November 2021 Staffordshire Police provided its internal review response. It believed that the response issued, alongside all clarification provided, fully answered the terms of the request. With regard to its application of section 40(2) of FOIA to question 3(c), Staffordshire Police maintained its reliance of this exemption to this part of the request.
8. Staffordshire Police also referred to the internal review request, in which the complainant listed additional questions to the ones initially posed, and it informed him that he would need to submit the questions as a new request, should he wish Staffordshire Police to consider under FOIA. It further advised that the FOIA extends only to requests for recorded information, and does not require public authorities to answer questions generally; only if they already hold the answers in recorded form. Staffordshire Police also explained that "the FOIA does not extend to requests for information about policies or their implementation, or the merits or demerits of any proposal or action."

Scope of the case

9. The complainant contacted the Commissioner on 27 November 2021 to complain about the way his request for information had been handled. Specifically, he disputed the assertion by Staffordshire Police that there has only been one set of ToR throughout Operation Eustace, and which he strongly believes is incorrect.

10. During the Commissioner's investigation, Staffordshire Police reviewed the request, and as a result it provided the complainant with a revised copy of the Operation Eustace ToR. It removed most of the redactions and explained "this is because during our review it has come to our attention that the Operation Eustace Investigation report (including the ToR) has now been published online" and it guided the complainant to a link containing the report in question.
11. Staffordshire Police also highlighted to the complainant that the ToR within the online published document, is slightly different to the subsequent document. It confirmed to the complainant this is not another version, but that it had been specifically prepared for publication with the names of individuals removed.
12. Staffordshire Police explained to the complainant, with regard to the ToR which had been disclosed to another applicant's FOI request (in 2019), that this was provided in error. It said this was an early draft version and was supplied to the FOI team without the realisation that it would be published. Staffordshire Police apologised to the complainant for the confusion. It said it would contact the applicant that made the FOI request, and provide them with an explanation along with a copy of the correct document.
13. Staffordshire Police revised its response to question 3(c) of the request. It said to the complainant that it was an error to have cited section 40(2) in its original response to him, and it now stated "no information held" to this part of the request.
14. The complainant expressed his dissatisfaction of this revised response, and outlined his reasons to Staffordshire Police as to why he found its letter unacceptable.
15. As Staffordshire Police has stated that it was an error to have cited section 40(2) of FOIA to parts of the request and changed its position to 'information not held', this analysis will not focus on section 40(2) exemption. The following analysis focuses on whether on the balance of probabilities, Staffordshire Police holds recorded information which falls within questions 1 and 3 of the request.

Reasons for decision

Section 1 – General right of access

16. Section 1 of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by

the public authority whether it holds that information and, if so, to have that information communicated to him.

17. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions must decide whether on the civil standard of the balance of probabilities the public authority holds any information which falls within the scope of the request (or was held at the time of the request).
18. In this case, the complainant strongly believes that Staffordshire Police must hold information to questions 1 and 3 of his request. Staffordshire Police maintain that no information is held to these parts.
19. The Commissioner will consider the complainant's evidence and arguments. He 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. He will 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, he 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

20. The complainant stated he is aware that in 2019 [name redacted] had asked a similar question about the ToR within a FOI request and Staffordshire Police answered this question on 7 June 2019. The complainant provided the Commissioner with a screenshot image of both copies of the ToR to support his argument that although both documents are heavily redacted, he believes they are not the same ToR. He said that the second document has been "significantly enhanced from the earlier document" and he emphasised in his complaint to Staffordshire Police (20 November 2021) that there are significant discrepancies between the two documents.
21. The complainant is of the view that there have been at least two versions of the ToR. He said the copy sent to [name redacted] in 2019 is different and appears to be an earlier version than the copy he received from Staffordshire Police in November 2021.
22. The complainant clarified the questions he wanted Staffordshire Police to answer:
 - "1. When were the original Terms of Reference agreed? Who approved them? What were they?

2. During the Investigation, have there been significant changes to the Terms of Reference which have altered the focus/direction of the Investigation – e.g. changes which have named specific individuals and either added or removed them from the Terms of Reference? If so, then in each case,
- a) Who suggested the changes to the Terms of Reference?
 - b) Who was consulted and/or agreed with the changes?
 - c) Who approved the changes – and on what date?”
23. The complainant listed his reasons to both Staffordshire Police and the Commissioner, as to why he finds the revised response from Staffordshire Police unacceptable and described in the following terms:

“1. You state that *‘the ToR that was disclosed to another applicant’s FOI request in June 2019 (ref 10848)...was actually an early draft version...’*.

If this statement is true then there must have been correspondence, meetings, emails and other documentation between a “draft” and a final ToR document. Hence there must have been a chain of information. Hence there will be a list of persons within Staffordshire Police, Northumbria Police, Northumbria PCC and elsewhere who will have been Consulted or Informed about the development of the ToRs. There will have been identifiable persons who were Responsible and Accountable for the approval of the Terms of Reference.

2. The College of Policing publish comprehensive guidance to police forces on all types of investigation. This includes the maintenance of Policy Documents and other key documentation throughout any investigation. The Terms of Reference of an investigation is one of the primary documents as it defines the scope of the entire investigation. Operation Eustace lasted for more than 3 years – with the final report only being published in December 2021. It cost the taxpayer many hundreds of thousands of pounds and involved interviewing over 400 Northumbria Police and Staff.

It was investigating potential criminal activities of TWO former Chief Constables. Yet, the Staffordshire Police now state that “*No Information Held*” as to the persons who were responsible for developing and approving of the Terms of Reference. This is in-credible (i.e. not believable)! If the “*No Information Held*” response were to be true then it raises serious concerns about the accountability of senior police officers and staff and/or the decision by Staffordshire Police not to name them. This is contrary to the College of Policing guidelines and cannot be in the public interest.

3. Northumbria PCC [name redacted] resigned on 7th June 2019.[name redacted] was not elected until 18th July 2019. But in a meeting with [name redacted] in December 2020 and in subsequent email correspondence, she was very clear in stating that she had not approved the Terms of Reference for Operation Eustace. Hence if the response to [name redacted] FOI in June 2019 was that the state of the ToRs were in draft format and if [name redacted] did not approve them, then it is of public interest to be informed who did approve the ToRs and the subsequent expenditure of significant public funds.”
24. The complainant summarised his complaint and said he believes that Staffordshire Police should conduct a proper investigation into the matter in question, and provide him with an honest response to his initial complaint which he raised in November 2021.

Staffordshire Police and its position

25. Staffordshire Police maintained its revised position that no information is held to questions 1 and 3(c) of the request – (“When were the original Terms of Reference agreed? Who approved them? What were they? Who approved the changes – and on what date?”). The Commissioner therefore asked Staffordshire Police a series of questions to determine whether any relevant recorded information was held. This included questions about the searches Staffordshire Police conducted to locate the requested information, and he asked for details about the possible deletion or destruction of information which might be relevant to the complainant’s request. The Commissioner also asked Staffordshire Police to provide any general explanations or arguments as to why it should not be expected to hold information relating to the request.
26. Staffordshire Police stated that searches had been conducted on the email archive system which would contain all emails relating to the Operation, any meeting minutes circulated and any other documents circulated. It confirmed archive email system was searched via privileged access for certain staff to access all emails sent/received by anyone in the organisation, and the retention is 7 years so this would cover the date of the information requested.
27. Staffordshire Police described the archive email system search terms used, and the years they were split into (January 2016 to December 2020). It confirmed all emails, internal, outgoing, ingoing outmix, unknown were searched. Staffordshire Police said; “These extensive searches have been used albeit it information in the public domain indicates that SP took on the investigation in March 2017. The wider searches have been done to establish if there were any email trails at a later or earlier date containing the information requested. All SP devices are networked.”

28. Staffordshire Police stated that at the time, the FOI team failed to clarify if the information was held in a recorded manner and did not conduct any searches to locate the information requested. Instead, the FOI team accepted a verbal agreement without specific knowledge and section 40(2) exemption was applied to the request. Staffordshire Police explained that the investigation into this complaint had been hindered by the fact that the senior officer leading the investigation [name redacted] no longer works for the organisation. The senior officer that worked on the investigation is also no longer working for the organisation.
29. With regard to Staffordshire Police and its formal records management policy about the retention and deletion of records of this type, it said that it follows the National Police Chiefs Council retention guidelines. It explained "there is and was nothing specific in relation to Independent Police Complaints Commission (IPCC) independent investigations. In a previous different records review we followed the Independent Office of Police Conduct (IOPC from 01/01/2018 previously the IPCC) retention of 7 years from the last action."
30. Staffordshire Police also provided its response to the complainant's subsequent concerns about its letter of 12 July 2022. Staffordshire Police said searches have been conducted, and documented information relating to this concerns had not been located. Therefore, it believed it would be wrong for it to speculate as to what was held, if anything, and what processes were followed. It reiterated that the individuals involved no longer work for the organisation. Staffordshire Police concluded its response by stating there is no information held to be able to comment on the complainant's concerns. It said, if Northumbria Police do not hold the information either, it suggests that there is nothing documented.

The Commissioner's view

31. The Commissioner recognises that the complainant believes there has been at least two versions of the information he is seeking (ToR). He also acknowledges the complainant's view that Staffordshire Police "should conduct a proper investigation into the matter" and provide him with "an honest response to his initial complaint".
32. Staffordshire Police confirmed to the Commissioner that it does not hold information to questions 1 and 3 of this request. Having considered the revised response from Staffordshire Police and its answers to questions relating to information held/not held, there is no contradictory evidence presented to the Commissioner that indicates its position is incorrect. However, the Commissioner does find it unusual for substantial changes to have been made to an important document, and for there not to be an audit trail or a decision-making process.

33. The FOIA only applies to recorded information held at the time of a request is received. The Commissioner does not require a public authority to create new information in order to satisfy a complainant's request.
34. Based on the above, the Commissioner concludes that on the balance of probabilities, Staffordshire Police does not hold information to questions 1 and 3 of the request.

Right of appeal

35. 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

36. 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.
37. 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

Phillip Angell
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