

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 31 January 2019

**Public Authority:** Independent Office for Police Conduct

**Address:** 90 High Holborn

London

WC1V 6BH

### Decision (including any steps ordered)

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1. The complainant requested information from the Independent Office for Police Conduct (IOPC) relating to an Independent Police Complaints Commission (IPCC) managed investigation. The IOPC refused the request under sections 21 (information accessible to the applicant by other means), 30 (investigations and proceedings), 38 (health and safety), 40 (personal information) and 42 (legal professional privilege) of the FOIA. The complainant also voiced concerns that the IOPC had not responded to the request "*promptly*" and that it had therefore breached section 10(1) (time for compliance) of the FOIA.
2. The Commissioner's decision is that the IOPC was entitled to rely on section 21 to refer the complainant to information already in the public domain and on section 30(1)(a)(i) to withhold further information falling within the scope of parts (1) and (2) of the request. However, she found that its response to part (3) of the request was inadequate, in that it failed to properly establish whether or not it held the information and thus that it failed to comply with the duty at section 1(1)(a) of the FOIA. By doing so, it also breached section 10(1) of the FOIA. However, the Commissioner found no wider breach of section 10(1) of the FOIA in terms of the promptness of the overall response.
3. The Commissioner requires the IOPC to take the following steps to ensure compliance with the legislation:
  - Issue a fresh response to part (3) of the request by either confirming or denying whether the information is held and disclosing it, or by issuing a valid refusal notice, compliant with section 17 of the FOIA.

4. The IOPC 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.

## Background

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5. The request in this case relates to an IPCC managed investigation known as 'Operation Kalmia'. That investigation looked at how a protected witness was handled and how disclosure issues were dealt with, prior to the trial of five men in 2008 for murder. A redacted copy of the final report<sup>1</sup> and a detailed summary of the report<sup>2</sup> have been published.
6. In January 2018 the IPCC was disestablished and replaced by the IOPC. While the investigation report was produced by the IPCC, for the sake of clarity all further references in this notice are to the IOPC.

## Request and response

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7. On 4 June 2018, the complainant wrote to the IOPC and requested information in the following terms:

*"Operation Kalmia was a managed investigation into Staffordshire Police's handling of a protected witness that gave evidence for the prosecution. The investigation revealed evidence of wrongdoing and in the course of Operation Kalmia an advice file was sent to the CPS.*

*The IPCC subsequently released a press statement indicating that the advice received from the CPS was that no individual officer would face prosecution following the investigation. This case involved 14 officers from the rank of Police Constable up to the rank of Chief Constable, therefore there has been a high level of public interest in the case.*

*The IPCC (Now known as [sic] the IOPC) have an important role in ensuring that the police are properly held to account on the occasions*

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<sup>1</sup>[https://policeconduct.gov.uk/sites/default/files/Documents/investigation\\_reports/IPCC\\_inv\\_reports/OpKalmia\\_%20RedactedFinalReport.pdf](https://policeconduct.gov.uk/sites/default/files/Documents/investigation_reports/IPCC_inv_reports/OpKalmia_%20RedactedFinalReport.pdf)

<sup>2</sup>[https://policeconduct.gov.uk/sites/default/files/Documents/investigation\\_reports/IPCC\\_inv\\_reports/OpKalmia\\_SummaryReport.pdf](https://policeconduct.gov.uk/sites/default/files/Documents/investigation_reports/IPCC_inv_reports/OpKalmia_SummaryReport.pdf)

*that they fail to meet the standards expected by the public and judicial system.*

*I would like to request the following details concerning the advice that the IPCC sought from the CPS in respect of Operation Kalmia.*

- 1. A list of all matters referred to the CPS for advice on possible criminal charges, please list these to include individual charges to be considered against the two groups of officers, i.e. junior officer (below the rank of Chief Inspector) and senior officers (Chief Inspector rank or higher). There is no request for the names of specific ranks individual officer [sic].*
  - 2. Where the CPS provided advice on individual charges an indication of the advice received in respect of each charge. Please indicate clearly the advice in the terms of 'insufficient evidence' to proceed, or 'not in the public interest' or 'alternative criminal charges' suggested.*
  - 3. In respect of the original trial, please confirm whether specific advice was sought from the CPS in respect of any officer(s) for the offence of perjury."*
8. The IOPC contacted the complainant on 2 July 2018, explaining that it held information relevant to the request and that it needed additional time to consider the balance of the public interest in respect of the application of section 30(1)(a)(i).
  9. The IOPC responded fully on 30 July 2018. It referred the complainant to the redacted Operation Kalmia report and summary on its website, which it provided links to. It also provided web links to information published by the CPS about the case. It said:

*"When considered together with the information contained in the summary report, the information published by the CPS appears to us to contain "an indication of the advice received in respect of each charge" because this information summarises their more detailed advice.*

*These sources confirm the offences that were considered by the CPS, the reasons behind the decisions not to prosecute and the ranks of the officers in respect of whom each offence was considered".*
  10. The IOPC said that to the extent that the information the complainant had requested was not accessible via these web links, it was exempt from disclosure under sections 30, 38, 40, and 42 of the FOIA.
  11. The complainant requested an internal review on 30 July 2018, commenting that the IOPC had breached the statutory time for compliance. He acknowledged that the published information he was

referred to was "...relevant to [my] request" and "...shed some light on the issues raised", but maintained that it did not fully answer his request, stating:

*"Whilst the CPS Blogs outline a number of matters considered in respect of two groups of officers (5 and 9), they do not set out the information in the way request [sic] in Part 1 of my FOIA, nor is it clear whether the matters mentioned in the CPS represent all of the matters considered or simply the main matters considered. Answering Part 1 of my FOIA clearly and fully would appear to be a simply [sic] matter which could have been done easily within the initial 20 day period.*

*Part 2 of my FOIA, is equally as simple and requires only a brief headline answers [sic] such as 'Insufficient Evidence', against each matter outline [sic] in Part 1. There was never any request for a detailed breakdown of the police evidence or CPS decision making process.*

*Part 3 of my FOIA. i.e. "3. In respect of the original trial, please confirm whether specific advice was sought from the CPS in respect of any officer(s) for the offence of perjury." This point was not addressed in your response, all it requires is a simply 'Yes' or 'No', again there [sic] no request for a detailed breakdown of the police evidence or CPS decision making process".*

12. The complainant also disputed the exemptions cited and set out public interest arguments in favour of disclosing the information.
13. Following an internal review, the IOPC wrote to the complainant on 26 September 2018. It disagreed that it had breached the statutory time for compliance. It also said that it was possible to construct most of the information requested in parts (1) and (2) of the request by cross referencing information in the published sources to which links had been provided. For the remaining information, and for the information requested in part (3), it maintained the application of the aforementioned exemptions.

## Scope of the case

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14. The complainant contacted the Commissioner on 14 October 2018 to complain about the way his request for information had been handled. He asked the Commissioner to investigate the time the IOPC took to issue a response and carry out an internal review, and its grounds for applying the exemptions relied upon.

## Reasons for decision

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### Section 1 – general right of access

15. 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."*

16. It is clear from this that the first requirement of section 1 of the FOIA is that a public authority must determine whether or not it holds the information that has been requested.

17. In the internal review, the IOPC explicitly confirmed to the complainant that it did hold information falling within the scope of part (3) of the request and that it was exempt from disclosure under, amongst other things, section 30(1)(a)(i) of the FOIA. However, in its response to the Commissioner, it described the searches it had undertaken and said that these had not located the information specified in part (3) of the request. It said it was possible that perjury had been discussed in correspondence or documented meetings with the CPS lawyer while the investigation was in progress, but that the information which would have to be searched in order to establish this was voluminous:

*"Kalmia was an investigation of events surrounding a murder trial. Owing to this subject matter and the limitations of the free text tool on the HOLMES system, an automated search of the Kalmia account using terms such as "perjury" or "CPS advice" produces a large number of results, each of which would have to be assessed for their relevance to the request...confirming whether or not there was any discussion of this offence would be likely to involve the examination of a large number of documents and the retrieval of papers from our*

*hard copy file, which consists of over 400 boxes of papers stored in an external archive facility”.*

18. It was clear from this that the IOPC had not established whether it did or did not hold the information requested at part (3) prior to responding to the request, and that it had applied section 30(1)(a)(i) on the presumption that, if it did hold the information, it would be exempt from disclosure.
19. The Commissioner notes that under section 12(2) of the FOIA, a public authority is not obliged to comply with the duty at section 1(1)(a) if it estimates that the cost of doing so would exceed the appropriate limit set by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. However, the IOPC has not sought to argue this, either to the complainant or to the Commissioner.
20. Since the IOPC had not established whether or not it held the information, it follows that the Commissioner is not satisfied that the IOPC complied with the duty at section 1(1)(a), in respect of part (3) of the request. She now requires the IOPC to take the action set out at paragraph 3 to rectify this.

### **Section 10 - time for compliance**

21. As set out in paragraph 15, section 1(1) of the FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.
22. Section 10(1) of the FOIA states that:

*“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt”.*
23. With regard to part (3) of the request, the Commissioner has found that the IOPC failed to comply with section 1(1)(a) of the FOIA. In failing to do so it has breached section 10(1) of the FOIA.
24. With regard to parts (1) and (2) of the request, there is provision at section 17(2) of the FOIA for a public authority to claim an extension to the statutory 20 working day limit. This extension may be claimed where the authority requires more time to determine whether or not the balance of the public interest lies in maintaining an exemption.
25. The FOIA does not set a limit on the amount of additional time the public authority can take to consider the test, stating only that the notice communicating its final decision must be provided within *“such time as is reasonable in the circumstances”*.

26. The Commissioner's position<sup>3</sup> is that a public authority should take no more than an additional 20 working days to consider the public interest, which means that the total time spent dealing with the request should not exceed 40 working days. In this case, the IOPC provided its response on the fortieth working day.
27. The complainant nevertheless stated that the IOPC had failed in its duty to respond "*promptly*", as he believed that nothing about the request or the response justified the IOPC taking more than 20 working days to respond.
28. The Commissioner's guidance<sup>4</sup> clarifies that the obligation to respond promptly means that an authority should comply with a request as soon as is reasonably practicable.
29. The Commissioner expects that careful deliberation will be given to any decision to apply an exemption and it is not a decision which should be reached lightly or without adequate supporting evidence. In this case, the Commissioner is satisfied that, due to the complexity of the request and the sensitivity of the information falling within scope, the IOPC had to examine a range of information and weigh up competing public interest arguments, and that it was reasonable that this should take a further 20 working days. Consequently, she finds no failure to respond "*promptly*" and no breach of section 10(1) of the FOIA in respect of parts (1) and (2) of the request.

## **Section 21 - information accessible to applicant by other means**

30. Section 21 provides that a request need not be complied with if the information is accessible to the complainant otherwise than under the FOIA.
31. The IOPC argued that the redacted Operation Kalmia report, the summary of that report and the CPS's own review of the case, was information that was in the public domain at the time of responding and the complainant was given the web addresses at which he could view it. It said that it was possible, by reading across the documents, to identify the decisions that had been taken in respect of the police officers under

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<sup>3</sup> [https://ico.org.uk/media/for-organisations/documents/1211/refusing\\_a\\_request\\_writing\\_a\\_refusal\\_notice\\_foi.pdf](https://ico.org.uk/media/for-organisations/documents/1211/refusing_a_request_writing_a_refusal_notice_foi.pdf)

<sup>4</sup> <https://ico.org.uk/media/for-organisations/documents/1165/time-for-compliance-foia-guidance.pdf>

investigation, by rank. Paragraph 24 of the summary of the report sets out the ranks of the 14 officers who were investigated under Operation Kalmia; senior officers (above Chief Superintendent) are named, while junior officers are given a unique reference number. This reference number is utilised in the redacted report, which sets out the allegations considered against each officer. The summary report sets out the CPS's determination in respect of each officer (either that there was no criminal case to answer or that there was insufficient evidence).

32. Cross referencing the information would involve a little work by the complainant, and he believed that his questions should be answered directly. However, the FOIA does not oblige a public authority to create new information from which to answer a request. The Commissioner is therefore satisfied that information about the offences considered by the CPS, the ranks of the officers in respect of whom each offence was considered and the reasons not to prosecute, was information which was reasonably accessible to the complainant from the web links provided by the IOPC.

### **Section 30 – investigations and proceedings**

33. The IOPC applied section 30(1)(a)(i) to withhold the CPS advice files for Operation Kalmia, which it said contained the information requested at part (1) and (2) of the request which was not already reasonably accessible to the complainant (specifically, more detailed information about the advice sought and received from the CPS).

34. Section 30(1)(a)(i) of the FOIA states:

*"Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-*

*(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-*

*(i) whether a person should be charged with an offence".*

35. The phrase "*at any time*" means that information will be exempt under section 30(1)(a)(i) if it relates to an ongoing, closed or abandoned investigation.
36. Section 30(1)(a)(i) of the FOIA is a class-based exemption, which means that there is no need to demonstrate harm or prejudice in order for the exemption to be engaged. For the exemption to be applicable, any information must be held for a specific or particular investigation and not for investigations in general. Therefore, the Commissioner has considered whether the requested information would fall within the class specified in section 30(1)(a)(i).

37. The public authority in this case is the IOPC and the withheld information relates to an investigation report. The IOPC stated that it held this information for the purposes of an investigation carried out under paragraph 19 of Schedule 3 of the Police Reform Act 2002 and that it has a duty, under paragraph 23 of that Act, to consider whether a criminal offence may have been committed and, if so, whether it should be referred to the Director of Public Prosecutions.
38. The Commissioner therefore accepts that the withheld information in respect of parts (1) and (2) of the request falls within the class specified in section 30(1)(a)(i). Consequently, the Commissioner is satisfied that section 30(1)(a)(i) is engaged in respect of parts (1) and (2) of the request.

*Public interest test*

39. Section 30(1)(a)(i) is subject to a public interest test. This means that even though the exemption is engaged, the information may only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

*Public interest in disclosing the information*

40. In his internal review request, the complainant stated:

*"Operation Kalmia reportedly cost in excess of £8,000,000 took several years to complete and resulted in no individual facing any criminal or formal misconduct hearing. Amongst the 14 officers investigated there were a [sic] three Chief Constables, an Assistant Chief Constable, a Detective Chief Superintendent (Head of Crime) all very senior police officers, understandably this case as [sic] attracted a huge amount of public attention, both in the national and regional newspapers, on BBC news and other channels, and it was featured in Radio Four - File on Four Programme. I would argue that there is overwhelming public interest in this case that justifies the release of the information requested".*

41. The IOPC acknowledged the general public interest in transparency and accountability with regard to the investigation of complaints about the conduct of officers, stating:

*"The disclosure of this information would reveal the detailed police reports in the advice file and the fully reasoned decisions of the CPS. Much of this information consists of detailed evidence relating to the events that formed the subject matter of Operation Kalmia.*

*In providing a more detailed account of the advice sought by Operation Kalmia and the subsequent CPS review, this information*

*may assist the public in forming a view as to whether the criminal and police disciplinary outcomes of Operation Kalmia are properly supported by evidence. It may also help the public to decide whether or not the managed investigation was thorough and fair and clarify the concerns that led to appeals against conviction being allowed in the case of R v Joof and others.*

*In turn, this would serve the public interest in openness and in accountability for decision making and the use of public funds”.*

#### *Public interest in maintaining the exemption*

42. The IOPC pointed to the amount of information about Operation Kalmia (the redacted report, and a summary of the report) which was already in the public domain. It said that this comprised a significant amount of information about the decisions taken and the criminal outcomes in the matter and that the public interest in transparency and accountability was already served to a considerable degree by this.
43. The IOPC also referred the Commissioner to the CPS’s guidance<sup>5</sup> on disclosure, which states that the disclosure of communications between the CPS and the Police, and of other related materials, would be damaging to the freedom and candour of communications between the two parties. It said that in order to maintain the effective investigation and prosecution of crime it was vital that prosecutors and investigators have a safe space in which to deliberate the merits of pursuing a case, away from public scrutiny. It said that this held true both at the time of an investigation and after it had concluded.
44. It also expressed the view that the withheld information contained information obtained from a confidential source, which had previously been considered under decision notice FS50645506<sup>6</sup>, with the Commissioner recognising the “*significant public interest in protecting information relating to confidential sources*”.

#### *Balance of the public interest*

45. In applying the public interest test, the Commissioner considers it is important to recognise that the purpose of the section 30 exemption is

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<sup>5</sup> <https://www.cps.gov.uk/legal-guidance/disclosure-material-third-parties>

<sup>6</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2172815/fs50645506.pdf>

to protect the effective investigation and prosecution of offences and the protection of confidential sources.

46. The Commissioner has considered what public interest there is in the IOPC disclosing the requested information. The Commissioner also considered whether disclosure would be likely to harm any investigation, which would be counter to the public interest, and what weight to give to these competing public interest factors.
47. The Commissioner recognises the importance of the public having confidence in public authorities that are tasked with upholding the law. Confidence will be increased by allowing scrutiny of their performance and this may involve examining the decisions taken in particular cases.
48. In this case, the IOPC had considered concerns about the way in which Staffordshire Police handled a criminal investigation in which the criminal convictions obtained were subsequently quashed. The Commissioner considers that there is public interest in disclosure, given the seriousness of the allegations to which the withheld information relates. Disclosure would add to public knowledge about the conduct of Staffordshire Police (including actions by individual police officers) which contributed to the convictions being quashed. This is a valid factor in favour of disclosure of some weight.
49. The Commissioner also considers that there is a particular public interest in the disclosure of this information in order to strengthen understanding of the actions taken by the IOPC in response to allegations of misconduct by the Police, and in general about the work of the IOPC and its role in relation to incidents of this kind. The Commissioner's view is that this adds weight to the public interest in favour of disclosure.
50. However, she notes that the IOPC and the CPS have already published significant information about the case, to which the complainant has access, and considers that this goes some considerable way to serving the public interest with regard to the above two points.
51. Turning to other arguments against disclosure, clearly it is in the public interest for the IOPC to be able to carry out its functions effectively, and this means being able to engage with the authorities it is tasked with investigating, without being hindered from doing so by unwarranted public scrutiny. The Commissioner recognises the wider detriment that could be caused to it (and by extension, to the CPS) by the loss of the ability to fully and privately consider case options and reach decisions, away from external interference and scrutiny. The expectation amongst staff that deliberations could routinely be disclosed, could have an inhibiting, 'chilling' effect on their participation in future investigations. The consequent loss of frankness and candour could damage the quality of information being recorded and the quality of deliberation, and lead to

poorer decision-making. The Commissioner considers that the perception that sensitive investigation information may be disclosed under FOIA would be likely to undermine the criminal investigative process.

52. The Commissioner notes the IOPC's comments about the protection of confidential sources. There is a significant public interest in protecting information relating to confidential sources, both in terms of protecting the safety and wellbeing of those sources and in ensuring they (and others) are not deterred from cooperating with investigators in future, for fear of being identified. There is a significant public interest in avoiding that outcome and it is a factor of some weight in favour of maintenance of the exemption in this case.
53. Having given due consideration to the arguments set out above, the Commissioner is satisfied that in this case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. She is therefore satisfied that section 30(1)(a)(i) has been applied appropriately to the withheld information in respect of parts (1) and (2) of the request.
54. In light of this conclusion, it has not been necessary for the Commissioner to go on to also consider the other exemptions cited by the IOPC in respect of points (1) and (2) of the request.

## **Other matters**

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### **Section 45 - internal review**

55. 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 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.
56. 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.
57. The complainant asked for an internal review of the outcome on 30 July 2018. The IOPC acknowledged receipt of this request the same day. However, it did not provide the results of its review until 26 September 2018, 41 working days later.

58. Although she acknowledges the complexities of this case, the Commissioner would draw the IOPC's attention to the recommended time scales for completing internal reviews.

## Right of appeal

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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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**