

## Independent Police Complaints Commission (IPCC) policy on reopening investigations

1. The purpose of this guidance is to assist the IPCC in the exercise of its discretion to reopen an investigation previously carried out by one of its investigators or under its management.<sup>1</sup> A decision to reopen is an exceptional course of action and may be the subject of legal challenge. This policy aims to ensure that the decision takes account of all relevant considerations, is fair and reasonable and is ultimately capable of withstanding judicial scrutiny.

### The power to reopen

2. The IPCC has the power to reopen an investigation and does not necessarily require a court order to quash its original investigation (or subsequent decisions on discipline/performance) before commencing a fresh or further investigation (or revising its decisions on discipline/performance). This was confirmed by the Court of Appeal case of *R (on the application of the Commissioner of Police of the Metropolis) v Independent Police Complaints Commission (the MPS case)*.<sup>2</sup> Whether a quashing order is necessary, is dealt with in Section D below.

### The decision to reopen

3. The Police Reform Act 2002 is silent on the question of reopening. As a result, there is no statutory test to apply and no legal requirement that the decision should be taken at a particular level.
4. Given the exceptional nature of a decision to reopen however, the decision should be taken by a commissioner<sup>3</sup> (or a Commission Delegate where the

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<sup>1</sup> This policy applies only to investigations which have already been completed and submitted to the Commission under paragraph 22 of Schedule 3 to the Police Reform Act 2002

<sup>2</sup> [2015] EWCA Civ 1248

<sup>3</sup> Reference to 'commissioner' includes 'associate commissioner'

original investigation was overseen by a Commission Delegate<sup>4</sup>). The CEO or their delegate should also be consulted on the decision making, as detailed below.

5. A decision must be made and documented as to whether the commissioner/Commission Delegate responsible for the original investigation should be the decision maker on reopening. In many cases they will be best placed to consider the arguments for and against reopening. There may however be circumstances which give rise to reasonable concerns that the original commissioner may have a conflict of interest e.g. where it is argued that that the flaws in the original investigation relate to that commissioner's decision making.
6. The four stages of decision making are:
  - A. scoping exercise to consider whether a review is necessary;
  - B. review and, if appropriate, notification of, and consultation with, affected parties;
  - C. final decision whether to reopen; and
  - D. deciding whether a quashing order is necessary.
7. The judgment of the Court of Appeal in the MPS case highlighted the need for there to be "compelling reasons" to reopen an investigation. A review will only be commenced if the commissioner/Commission Delegate is satisfied that a review is necessary. There is no "right of review" following independent or managed investigations. Therefore the fact that a third party disagrees with the findings of a report or a tribunal, such as an inquest, reaches different conclusions on the evidence, does not necessarily mean that the process outlined above will be invoked.
8. In some cases it may be appropriate to seek representations from affected persons before reaching the final decision whether or not to reopen.

#### **A. Is a review necessary?**

9. The IPCC may, on its own initiative or following a request from another party, decide that a closed investigation should be reviewed where:

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<sup>4</sup> In relation to delegated investigations, the Commission Delegate decision-maker will be an Operations Manager or a more senior member of the Executive. Reopening decisions on delegated investigations may also be taken by commissioners

*The commissioner/Commission Delegate has reason to believe that:*

- *the original investigation may be flawed in a manner which had a material impact on subsequent decisions on discipline, performance<sup>5</sup> and/or referral to the CPS; or*
- *there is significant new information which, had it been available, may have led, wholly or partly, to different decisions on discipline, performance and/or referral to the CPS.*

10. Given the potential resource implications for the organisation, the CEO must be consulted on the decision about whether a review is necessary and subsequently, before any final decision to reopen is reached.

11. The fact that a third party argues that one of the above conditions is satisfied will not automatically invoke a review of the original investigation. The IPCC must reach its own assessment on the material available to it.

12. *“Material flaw”*: The IPCC does not have to be persuaded that the original investigation was so flawed as to give grounds for judicial review e.g. that it was irrational or perverse in a public law sense. The following arguments, which are commonly advanced in applications for judicial review, will however be taken into account when considering whether a review is required:

- a failure to take proper account of relevant evidence or affording undue weight to irrelevant evidence;
- a failure to pursue a relevant line of enquiry;
- a failure to observe significant procedural requirements; or
- findings or conclusions which are illogical or irrational. The proper approach to this question is to consider the connection between the evidence available to the writer of the report and the conclusions drawn from that evidence. In cases where there is no logical connection on an objective analysis, the conclusions might be found to be irrational.

13. *“New information”*: Only new information which may be capable of affecting the original findings should prompt a review. It will therefore usually be necessary for the IPCC to conduct a preliminary assessment of the nature and quality of the new evidence e.g. is it capable of belief and is

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<sup>5</sup> References throughout this policy to “...decisions on discipline, performance...” are references to IPCC decision-making concerning whether to recommend the bringing of disciplinary or performance proceedings against persons serving with the police, further to paragraphs 23(8)(b)&(c) and 27(3)&(4) of schedule 3 of the Police Reform Act 2002.

it admissible. The new information should also be relevant to a significant issue i.e. if it is capable of affecting decisions on discipline, performance or referral to the CPS.

## **B. Review**

14. The review will not involve or constitute a further investigation by the IPCC. The Commissioner will consider whether or not, on examination of the original investigation and consideration of any alleged flaw or new information, they are satisfied that the investigation should be reopened.

15. Consultation: It is not always necessary to consult with affected parties when considering reopening. However, in some circumstances, consultation with other parties may help to inform the decision maker when considering some of the factors outlined in paragraph 17 below. For example:

- where a significant period of time has elapsed since the original investigation, representations may be sought from the subjects as to potential prejudice to them in any new investigation/proceedings;
- the views of the complainant/interested person may also be sought if considering the likely impact of any reopening on them; or
- it may be appropriate to consult with the CPS, Coroner or other investigative bodies where they have considered the original investigation or conducted their own linked investigation.

16. Where representations are being sought the IPCC should explain that a decision to review does not necessarily mean that the investigation will be reopened and an assurance should be given that representations submitted within the stated time frame will be considered before a final decision is reached. Adequate time should be given for the formulation and submission of representations e.g. 14 to 28 days and any request for further time to respond should be considered, having regard to the reasons for that request and the consequence of any delay arising from it.

17. It is not possible to set out an exhaustive list of factors to be considered when reaching the final decision, but the following potentially competing issues, should be considered:

- whether a fresh decision on recommending disciplinary proceedings, that performance is unsatisfactory,<sup>6</sup> or referral to the CPS,<sup>7</sup> can and

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<sup>6</sup> Further to paragraph 27(3) of Schedule 3 of the Police Reform Act 2002

<sup>7</sup> Further to paragraph 23(2) of Schedule 3 of the Police Reform Act 2002

should be made by a commissioner/Commission Delegate without the need for any further investigative steps;

- seriousness of the allegations, including whether they would, if proven, constitute gross misconduct or a criminal offence. The seriousness of the allegation will be directly relevant to the second part of the decision whether to reopen, as set out in Part C below i.e. *whether it is necessary, in the public interest, to reopen the investigation*;
- cogency/reliability of the new evidence or information and the reasons why it was not considered in the original investigation;
- prejudice to subjects of investigation e.g. due to the passage of time since the events in question and availability of witnesses/other evidence;
- any authoritative promises or representations given to the subjects that the allegations would not be revisited following the conclusion of the original investigation and the extent to which those representations have been relied upon;
- impact of reopening on complainant(s)/interested person(s);
- community impact of the incident under investigation;
- findings of other tribunals which have examined the same incident e.g. civil courts or inquests;
- extent to which any identified flaw is likely to have impacted on the outcome of the investigation/disciplinary proceedings; and
- whether the subjects of the investigation have already faced disciplinary or performance proceedings flowing from the investigation.

### **C. The final decision**

18. The decision to reopen will be determined on the following basis:

*Having consulted with the CEO/their delegate, the commissioner/Commission Delegate is satisfied that*

- *the original investigation or conclusions following investigation were flawed, in a manner which had a material impact on subsequent decisions on discipline, performance and/or referral to the CPS; or*
- *there is significant new information and a real possibility that the new information, had it been available, would have led, wholly or partly, to different decisions on discipline, performance and/or referral to the CPS;*

***and***

*it is necessary, in the public interest, to reopen the investigation.*

19. Final decision minute: It is imperative that the rationale behind the decision is contemporaneously recorded. It should explain how all relevant factors have been balanced in the final decision and should demonstrate that careful consideration has been given to any representations made by or on behalf of affected parties. It will be necessary to evaluate those representations by reference to their relevance, in particular whether they are underpinned by logical supporting argument and/or evidence. Legal advice may be sought to assist in that evaluation exercise.

**D. Do the findings of the original investigation require quashing before the investigation can be reopened (or discipline/performance decisions revisited)?**

20. When the decision maker has decided in principle that they wish to reopen the investigation, they will need to decide whether reopening can take place lawfully without the need to apply to quash the findings of the original investigation. The decision maker should seek legal advice on this issue.

21. On the facts of the MPS case, the Court of Appeal found that the IPCC did not need to apply to quash the findings of the original investigation before reopening the investigation. However, the court was clear that it would not go beyond the bounds of this case and make any general determination as to when and in what circumstances the IPCC will generally become *functus officio*<sup>8</sup> under the PRA regime.

22. The court made clear that schedule 3 of the PRA seeks to set out a holistic regime for handling police complaints and misconduct matters from end to end and, whilst there are a series of intermediate stages, “...*the process should not be regarded as a number of self-contained steps that must be undertaken without regard to the overall statutory objective which is to handle complaints and deal with conduct and DSI matters efficiently, effectively and with public confidence.*”

23. The court recognised that there was more force in the argument that there is no express provision in schedule 3 for review in a number of cases but that this is not sufficient to outweigh the “...*clear definition of the IPCC’s*

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<sup>8</sup> *Functus officio* means no more than that a judicial, ministerial or administrative actor has performed a function in circumstances where there is no power to revoke or modify it. 2015 EWHC 593 (Admin) [para 36]

*functions and to allow for an interpretation of the steps in schedule 3 that makes every one finally and irrevocably concluded without the possibility of review for good cause if such a course is later shown to be desirable in the public interest. I do not see how it can be desirable or appropriate for the IPCC to be 'stuck with' a questionable decision until, at least, the entire handling of the complaint has been concluded. I would not want to comment in the context of this case on when that stage would be reached. I would not wish to delineate the precise circumstances in which it would be appropriate for the IPCC to re-open an investigation or a decision not to recommend proceedings. Suffice it to say that, as the Divisional Court's decision to quash the relevant findings of the investigation make clear, there was an overwhelming basis in this case for the IPCC to decide to do so."*

24. Therefore, there is no certainty as to how the courts will apply the *functus officio* principle in relation to any and all possible circumstances where the IPCC may wish to reopen an investigation.
25. However, in circumstances where the entire handling of a complaint, conduct matter or DSI matter (including all disciplinary or performance proceedings flowing from the investigation), under the PRA and related regulations, has been completed, the decision maker should consider carefully, with the benefit of legal advice, whether it is necessary for the IPCC to apply to quash the findings of the original investigation before any re-investigation can take place.
26. Applying for a quashing order involves the use of further resources and therefore, the decision maker should consult with the CEO.
27. Once the decision has been finalised and a decision taken as to whether it is necessary to apply to quash the findings of the original investigation, the decision and next steps should be disseminated to the affected parties subject to considerations regarding prejudice to any resulting investigation.

**IPCC**

**19 August 2016**