

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 4 April 2013

**Public Authority:** Commissioner for the Metropolitan Police Service

**Address:** Public Access Office  
PO Box 57192  
London  
SW6 1SF

#### **Decision (including any steps ordered)**

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1. The complainant has requested information about the location of mobile telephones. The Metropolitan Police Service Commissioner has applied sections 23(5), 24(2), 30(3) and 31(3).
2. The Commissioner's decision is that:
  - the public authority was entitled to rely on sections 23(5) and 24(2) FOIA to neither confirm nor deny whether it held information within the scope of the request.
3. The Commissioner does not require the Metropolitan Police Service to take any steps.

#### **Request and response**

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4. On 11 January 2012 the complainant wrote to the Metropolitan Police Service (MPS) and requested information in the following terms:
  - 1) *Any information or policy held by the Metropolitan police on the use of 'silent' SMS or voice calls used to determine the location of a mobile phone.*
  - 2) *Does the Met use this technology?*
  - 3) *In the past 12 months how many 'silent' SMS or calls have been made. (please divide by SMS and calls).*

5. The MPS responded on 13 March 2012 citing sections 23(5), 24(2), 30(3) and 31(3).
6. Following an internal review the MPS wrote to the complainant on 6 July 2012 withholding confirmation as to whether the information was held on the same grounds.

### **Scope of the case**

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7. On 7 August the complainant contacted the Commissioner to complain about the MPS withholding the requested information. He stated that the German authorities have disclosed how many times they used similar equipment. He also said that it was possible to ascertain a similar figure by looking at the MPS's use of the Regulation of Investigatory Powers Act 2000 (RIPA) and location data. The Commissioner contacted the MPS to establish whether it was possible to do this.
8. The MPS explained that the main purpose of Part III Police Act 1997 and RIPA is to ensure that the various investigatory techniques covered are exercised lawfully and are compatible with the European Convention on Human Rights. If the police wish to collect mobile phone data this can only be done with the prior authorisation under RIPA and/or Part III Police Act 1997.
9. Section 19 of RIPA places a duty on specified individuals, including every person holding office under the Crown, to keep secret matters relating to warranted interception. These matters are set out in section 19(3) and include the existence and content of a warrant.
10. 'Silent' SMS would fall within the category of 'property interference' and would be covered by the Home Office guidance, Chapter 7.<sup>1</sup>
11. The Commissioner is satisfied that sections 23(5) and 24(2) are engaged therefore he will not be considering the application of sections 30(3) and 31(3).

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<sup>1</sup> <http://www.homeoffice.gov.uk/publications/counter-terrorism/ripa-forms/interception-comms-code-practice?view=Binary>

## Reasons for decision

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### Sections 23(5) and 24(2)

12. Information relating to security bodies specified in section 23(3) is exempt information by virtue of section 23(1).
13. Information which does not fall under section 23(1) is exempt from disclosure under section 24(1), if it is required for the purpose of safeguarding national security.
14. Sections 23(5) and 24(2) exclude the duty of a public authority to confirm or deny whether it holds information which, if held, would be exempt under section 23(1) or 24(1) respectively.
15. By virtue of section 23(5) the duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a)<sup>2</sup> would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to any of the bodies specified in section 23(3).
16. By virtue of section 24(2) the duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.
17. The MPS explained that both sections 23(5) and 24(2) were engaged and that this approach had been endorsed by the Commissioner and the First-tier Tribunal. The Commissioner does not consider the exclusions at section 23(5) and 24(2) to be mutually exclusive and he accepts that they can be relied upon independently or jointly in order to conceal whether or not one or more of the security bodies has been involved in an issue which might impact on national security.
18. The MPS explained that it would not confirm or deny whether it held the requested information or not. It confirmed that to do so would involve disclosure of information regarding specific capabilities which the police service may or may not utilise, including in support of the national security objectives.

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<sup>2</sup> Section 1(1)(a) provides 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 information of the description specified by the request.

19. The Commissioner is satisfied that the MPS is entitled to rely upon section 23(5) in the circumstances of this case. He accepts that revealing whether or not it holds information about the use of "silent" SMS or voicemail calls would reveal information relating to one or more of the security bodies listed in section 23(3).
20. The Commissioner is also satisfied that the MPS is entitled to rely upon section 24(2). He accepts that confirming or denying whether the requested information is held would reveal operational information about the nature and extent of MPS activity in tackling perceived threats to national security. Therefore neither confirming nor denying whether the relevant information is held is required for the purpose of safeguarding national security.
21. The Commissioner wishes to emphasise that nothing should be inferred from this notice as to whether the MPS actually holds any information within the scope of the request which, if held, would be exempt by virtue of sections 23(1) or 24(1).

### **Section 24(2) – Public Interest Test**

22. Section 24(2) is a qualified exemption subject to a public interest test. The Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information.
23. The MPS acknowledged that disclosure would enhance the public's knowledge about potential intelligence techniques. However, it argued that the public interest in safeguarding national security objectives outweighed the public interest in confirming or denying whether it holds the information required for the purposes of safeguarding national security.
24. The Commissioner accepts that disclosure could help the public's understanding of potential intelligence gathering techniques. However, he considers that there is a stronger public interest in protecting information required for the purposes of safeguarding national security.
25. Therefore the Commissioner finds that in all the circumstances of the case, the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information.

## **Procedural matters**

26. The complainant submitted his request on 11 January but the MPS did not respond until 13 March 2012.
27. Section 10(1) of FOIA provides that a public authority must respond to a request for information within 20 working days after the date of receipt. In this case, the MPS took longer than 20 working days to respond and so has breached section 10(1).

## **Other matters**

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28. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his '*Good Practice Guidance No 5*', the Commissioner considers that these internal reviews should be completed as promptly as possible.
29. While no explicit timescale is laid down by FOIA, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner notes that in this case, the MPS received the request for an internal review on 13 March 2012 but did not respond until 6 July 2012.

## Right of appeal

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30. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

31. 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.
32. 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 .....**

**Graham Smith**  
**Deputy Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**