

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 February 2014

Public Authority: Commissioner of the Metropolitan Police Service

Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant requested information regarding the use of unmanned aerial vehicles by the Metropolitan Police Service (MPS). The MPS denied that it held information within the scope of the request that related to overt policing. In relation to covert policing, the MPS refused to confirm or deny whether it held this information and cited the exemptions provided by sections 23(5) (information supplied by, or relating to, security bodies), 24(2) (national security) and 31(3) (prejudice to law enforcement) of the FOIA.
2. The Commissioner's decision is that the MPS stated correctly and in line with section 1(1)(a) of the FOIA that it did not hold relevant information relating to overt policing. He also finds that the MPS applied sections 23(5), 24(2) and 31(3) correctly in relation to covert policing and so was not obliged to confirm or deny whether the requested information was held.

Request and response

3. On 19 December 2012 and 14 January 2013 the complainant wrote to the MPS and requested information in the following terms:

"Is the Metropolitan Police Service using drones or unmanned

surveillance vehicles?"

"(1) Whether the Metropolitan Police Service is permitted to use unmanned aircraft of any size or any particular size? If it is the case that the MPS is not permitted to use them why has it not simply said as much in its responses? There were comments in the media, such as this in the

Independent <http://www.independent.co.uk/news/uk/crime/drones-to-patrol-the-skies-above-olympic-stadium-6267107.html> which suggested that drones are in use and would be used during the Olympics. I understand that you will not confirm or deny this information about their use but in light of these reports and for the sake of clarity.

(2) I would appreciate it if you could inform me whether the use of unmanned aircraft by the police is allowed as opposed to whether it has occurred and if so under what circumstances it is allowed and under what circumstances it is forbidden. I believe the organisation which would have to authorise their use is the Civil Aviation Authority.

(3) Is this so or is the MPS governed regarding these aircraft by some other authority? If so which authority? From media reports, for example <http://www.wired.co.uk/news/archive/2012-10/01/british-police-more-drones> and the article above in the Independent, it seems there have recently been discussions in particular with the CAA but possibly elsewhere, concerning the use of these aircraft. Once again I would be grateful.

(4) If you could clarify whether these discussions have occurred and whether the use of such aircraft has been or is about to be authorised in London, and if so what conditions apply to their use."

4. The MPS responded on 9 January 2013 and 21 March 2013. In both of these responses it refused to confirm or deny whether the requested information was held and relied on the exemptions provided by sections 23(5) (information relating to, or supplied by, security bodies), 24(2) (national security) and 31(3) (prejudice to law enforcement). These refusals were later upheld at internal review.
5. During the investigation of this case, the MPS changed its position. In a response sent to the complainant on 10 December 2013 the MPS stated that it did not hold any information falling within the scope of the requests that related to "*overt policing methods*". In relation to covert policing, the MPS maintained the refusal to confirm or deny under the exemptions cited previously.

Scope of the case

6. The complainant contacted the Commissioner on 8 July 2013 to complain about the refusal of his requests. He indicated at this stage that he did not agree with the reasoning given by the MPS for the refusal of his requests.
7. Following receipt of the reconsidered response, the complainant contacted the ICO on 21 December 2013. At this stage he confirmed that he wished this case to cover both whether it was correct to state that no information relating to overt policing was held, as well as the exemptions cited in relation to covert policing.
8. This decision notice therefore covers both the issue of whether the MPS was compliant with section 1(1)(a) of the FOIA in stating that some of the information requested was not held, as well as the exemptions from the duty to confirm or deny that the MPS cited.

Reasons for decision

Section 1(1)(a)

9. Section 1(1)(a) of the FOIA provides that, upon receipt of an information request, a public authority must respond confirming or denying whether it holds information falling within the scope of the request. This means that a public authority should take steps to identify all relevant information that is held upon receipt of a request.
10. The task for the Commissioner here is to determine whether the MPS is correct in stating that it does not hold some of the requested information. In line with the practice of the First-tier Tribunal (Information Rights), the test applied by the Commissioner is whether on the balance of probabilities the MPS holds further information.
11. The approach of the Commissioner where there is a dispute between public authority and requester on the extent to which information is held is to take into account a description of the searches carried out by the public authority, and / or any explanation provided by the public authority as to why it should not be expected to hold further information.
12. This analysis concerns whether the MPS was correct and in accordance with section 1(1)(a) of the FOIA in stating that it did not hold information that related to the use of unmanned aerial vehicles (UAVs) for overt – put simply, not secret - policing.

13. The MPS provided to the ICO an explanation of the searches it had carried out for information within the scope of the request. It stated that appropriate senior officers were contacted and asked whether relevant information was held. The response from these officers was that no such information was held.
14. It also described the automated searches that had been carried out, in the following areas.
 - MPS records management branch "*who have corporate responsibility and oversight for MPS records*".
 - The drive used to store information for "*corporate memory*".
 - The MPS website.

These automated searches located no relevant information.

15. The Commissioner notes that the MPS has attempted to locate relevant information both through asking appropriate individuals if they were aware of the existence of this information and by carrying out automated searches for this information. He also notes that these searches covered areas in which any information which was no longer current would have been retained.
16. The MPS also commented on how long it would have been obliged to retain any relevant information. It stated that information held for operational purposes would have been retained for as long as operationally necessary, but that the MPS was under no statutory obligation to retain it for any longer. It stated that it would be obliged to retain financial information for seven years. The searches referred to above, however, indicate that the MPS had located no relevant financial information.
17. On the basis of the representations given by the MPS, the Commissioner believes it made reasonable efforts to locate information relevant to the requests that related to overt policing. He also notes the absence of any convincing evidence suggesting that the MPS has erred on this point. For these reasons, his conclusion is that on the balance of probabilities the MPS does not hold any relevant information on overt policing and so it complied with section 1(1)(a) of the FOIA in stating that this information was not held.

Sections 23(5) and 24(2)

18. In relation to the use of UAVs for covert policing, the MPS cited the exemptions from the section 1(1)(a) duty provided by sections 23(5) and 24(2) of the FOIA. Section 23(5) removes the obligation to confirm

or deny where the information requested, whether or not it is held by the public authority, would relate to or have been supplied by any of a list of security bodies specified in section 23(3). Section 24(2) provides the same where this is required for the purpose of safeguarding national security.

19. The Commissioner does not consider the exemptions at sections 23(5) and 24(2) to be mutually exclusive and he accepts that they can be relied on 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. However, each exemption must be applied independently on its own merits. In addition, the section 24 exemption is qualified and is therefore subject to the public interest test.
20. The test as to whether a disclosure would relate to a security body is decided on the normal standard of proof, that is, the balance of probabilities. In other words, if it is more likely than not that the disclosure would relate to a security body then the exemption would be engaged.
21. From the above it can be seen that section 23(5) has a very wide application. If the information requested is within what could be described as the ambit of security bodies' operations, section 23(5) is likely to apply. This is consistent with the scheme of FOIA because the security bodies themselves are not subject to its provisions. Factors indicating whether a request is of this nature will include the functions of the public authority receiving the request, the subject area to which the request relates and the actual wording of the request.
22. There is clearly a close relationship between the MPS and security bodies in that the MPS plays a key role in protecting the UK from the threat of organised criminals including terrorists. It is inevitable that it works closely with security bodies in carrying out its role. It is well documented that UAVs are now a part of the surveillance measures used by the UK's military forces¹. Therefore, in respect of the MPS role and the subject matter being requested, the Commissioner finds that, on the balance of probabilities, any information about covert policing that is held could be related to one or more bodies identified in section 23(3) of the FOIA.
23. With regard to section 24(2), the requirement here is for a public authority to show that either a confirmation or denial of whether

¹ <http://www.bbc.co.uk/news/world-africa-22320767>

requested information is held would be likely to harm national security. The Commissioner interprets the word 'required' in the context of this exemption as meaning 'reasonably necessary'. In effect this means that there has to be a risk of harm to national security for the exemption to be relied upon, but there is no need for a public authority to prove that there is a specific, direct or imminent threat.

24. In relation to the application of section 24(2) the Commissioner notes that the First-tier Tribunal (Information Rights) has indicated that only a consistent use of a neither confirm nor deny (NCND) response on matters of national security can secure its proper purpose.² Therefore, regard has to be given to the need to adopt a consistent NCND position and not simply to the consequences of confirming whether the specific requested information in this case is held or not.
25. The public authority explained that to confirm or deny whether it holds any information about covert policing pertinent to the complainant's requests would be of use to criminals including terrorists, who might use the information to try and circumvent its law enforcement capabilities; this in turn could have a detrimental effect on national security.
26. As a general approach the Commissioner accepts that withholding information in order to ensure the protection of national security can be extended, in some circumstances, to ensuring that matters which are of interest to the security bodies are not revealed. Moreover, it is not only the consequences of revealing whether information is held in respect of a particular request that is relevant to the assessment of whether exemption is required in order to maintain national security, but also the consequences of maintaining a consistent approach to the application of section 24(2).
27. On this occasion the Commissioner is satisfied that complying with section 1(1)(a) would be likely to reveal whether or not the security bodies were interested in the subject matter which is the focus of these requests. The need for a public authority to adopt a position on a consistent basis is of vital importance in considering the application of an NCND exemption.
28. The Commissioner is satisfied that the MPS was entitled to rely on sections 23(5) and 24(2) in the circumstances of this case. He accepts that revealing whether or not information relevant to the complainant's

² See for example, *The All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and the Foreign and Commonwealth Office* – EA/2011/0049-0051

requests about covert policing was held would reveal information relating to the role of the security bodies and that this would also undermine national security. The Commissioner's conclusion is, therefore, that the exemptions provided by sections 23(5) and 24(2) of the FOIA are engaged.

29. The next step is to consider the balance of the public interest in relation to section 24(2). As section 23(5) is absolute, a similar exercise is not required in relation to that exemption.
30. Covering first those factors that favour disclosure of the confirmation or denial, there is a public interest in understanding the capabilities that the MPS has in order to safeguard national security and the information requested in this case is directly relevant to this point. Further to this there is also a legitimate public interest in understanding how the MPS has used public money, including whether it has been spent on UAVs.
31. Turning to those factors that favour maintenance of the exemption, clearly there is a very strong inherent public interest to section 24(2); maintaining national security is in the public interest. In any case where section 24(2) is found to be engaged, this must be recognised as a very weighty factor when considering the balance of the public interest.
32. Whilst the information requested may appear to the complainant to be relatively harmless in nature, the Commissioner's view is that the public interest in safeguarding national security is of such weight that it can only be outweighed in exceptional circumstances. The Commissioner does not believe that any such exceptional circumstances exist here and so his conclusion is, therefore, that the public interest in the maintenance of the exemption provided by section 24(2) outweighs the public interest in provision of the confirmation or denial.
33. Given this finding and that above on section 23(5), the MPS is not required to confirm or deny whether it holds information falling within the scope of the complainant's requests that relates to covert policing. As this conclusion has been reached, it has not been necessary to go on to also consider the exemption provided by section 31(3).

Right of appeal

34. 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: GRC@hmcts.gsi.gov.uk

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

35. 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.
36. 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