Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 June 2016

Public Authority: Commissioner of the Metropolitan Police Service

Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant has requested information concerning its use of Equipment Interference ("EI") from the Metropolitan Police Service (the "MPS"). The MPS would neither confirm nor deny ("NCND") holding any information by virtue of sections 23(5) (information supplied by, or relating to, bodies dealing with security matters), 24(2) (national security), 30(3) (investigations and proceedings) and 31(3) (law enforcement). The Commissioner finds that sections 23(5) and 24(2) have been appropriately applied. No steps are required.

Background

2. According to a Government factsheet for the Investigatory Powers Bill[1]:

> *"Equipment interference (EI), sometimes referred to as computer network exploitation, is the power to obtain a variety of data from equipment. This includes traditional computers or computer-like devices such as tablets, smart phones, cables, wires and static*

[1]https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/473740/Factsheet-Targeted_Equipment_Interference.pdf

storage devices. EI can be carried out either remotely or by physically interacting with equipment".

And:

"Equipment interference capabilities have made a vital contribution to counter the increased threat to the UK from Islamist terrorism and have also enabled the disruption of paedophile-related crime. Without EI the ability of the security and intelligence agencies, armed forces and law enforcement agencies to protect the public from terrorism, cyber-attack, serious crime, including child sexual exploitation, and a range of other threats would be seriously degraded".

Request and response

3. On 6 November 2015, the complainant wrote to the MPS and requested information in the following terms:

"Under the Freedom of Information Act 2000, I request the following information:

- How many investigations conducted by the Metropolitan Police force have involved the use of 'Equipment Interference' (EI) capabilities or technologies, from 1st January 2010 to the date of this request?

- How much has been spent on the acquisition, maintenance or upgrades of EI capabilities or technologies, from 1st January 2010 to the date of this request?

- What types of crimes are EI capabilities or technologies used by the Metropolitan Police force to combat? i.e., terrorism, cybercrime, organised crime, etc.

- How many EI warrants has the Metropolitan Police force applied for in total since 1st January 2010 to the date of this request?

- How many of those EI warrants were ultimately declined or unsuccessful?

- How many of those EI warrants were accepted or successful?

For context, point 29) on page 16 of the Draft Investigatory Powers Bill, says "Equipment interference is currently used by law

enforcement agencies and the security and intelligence agencies; more sensitive and intrusive techniques are generally available only to the security and intelligence agencies and a small number of law enforcement agencies, including that National Crime Agency." The Draft Investigatory Powers Bill can be found here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/473770/Draft_Investigatory_Powers_Bill.pdf

'Equipment Interference', according to a government issued factsheet entitled "Factsheet—Targeted Equipment Interference," is also known as "computer network exploitation." That factsheet can be found here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/473740/Factsheet-Targeted_Equipment_Interference.pdf

I would prefer my request to be processed electronically".

4. The MPS responded on 4 December 2015. It refused to confirm or deny holding information citing the following exemptions: 23(5), 24(2), 30(3) and 31(3).

5. Following an internal review the MPS wrote to the complainant on 12 February 2016. It maintained its position.

Scope of the case

6. The complainant contacted the Commissioner on 29 March 2016 to complain about the way his request for information had been handled. He disagreed that the MPS was able to NCND holding any of the requested information as he believed that such confirmation was already in the public domain. Within his grounds of complaint he stated:

"In sum, the agency refuses to neither confirm nor deny the existence of any records relating to Equipment Interference, despite voluminous information being available about the practice in the public domain. On top of this, senior Met officials have publicly stated the heavy use of Equipment Interference".

7. The Commissioner will consider whether or not the MPS is entitled to NCND holding any information below.

Reasons for decision

8. Under section 1(1)(a) of the FOIA, a public authority is obliged to advise an applicant whether or not it holds the requested information. This is known as the "duty to confirm or deny". However, the duty to confirm or deny does not always apply and authorities may refuse to confirm or deny through reliance on certain exemptions under the FOIA.

9. In its refusal notice the MPS provided the following response to demonstrate the overall harm in support of its NCND position:

> *"Any disclosure under FOIA is a disclosure to the world at large, and confirming or denying the use of specialist techniques which may or may not exist, and which (should they exist) the police service may or may not deploy in specific circumstances would prejudice law enforcement. If the requested information was held by the force, confirmation of this fact would reveal that the police have access to sophisticated communications analysis techniques. This would be damaging as it would (i) limit operational capabilities as criminals / terrorists would gain a greater understanding of the police's methods and techniques, enabling them to take steps to counter them; and (ii) provide an indication to any individual who may be undertaking criminal / terrorist activities that the police service may be aware of their presence and taking counter terrorist measures.*
>
> *Conversely, if information was not held by the force, and a denial was issued, this would reveal to those same individuals that their activities are unlikely to have been detected by the police. It may also suggest (whether correctly or not) the limitations of police capabilities in this area, which may further encourage criminal / terrorist activity by exposing a potential vulnerability. Disclosure of the information could confirm to those involved in criminality or terrorism that they are or have been the subject of such activity, allowing them to gauge the frequency of its use and to take measures to circumvent its use. Any compromise of, or reduction in such techniques by forces would substantially prejudice the ability of forces to police such events.*
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> *This detrimental effect is increased if the request is made to several different law enforcement bodies. In addition to the local criminal fraternity now being better informed, those intent on organised crime throughout the UK will be able to 'map' where the use of certain tactics are or are not deployed.*
>
> *This can be useful information to those committing crimes of drugs and terrorist activities. For example, to state that no information is*

held in one area and then exempt information held in another, would itself provide acknowledgement that the technique has been used at that second location. This could have the likelihood of identifying location-specific operations, enabling individuals to become aware of whether their activities have been detected. This in turn could lead to them moving their operations, destroying evidence, or avoiding those areas, ultimately compromising police tactics, operations and future prosecutions.

Any information identifying the focus of policing activity could be used to the advantage of terrorists or criminal organisations. Information that undermines the operational integrity of these activities will adversely affect public safety and have a negative impact on both national security and law enforcement".

10. The Commissioner notes that the complainant is of the view that the MPS's use of EI is already in the public domain and it cannot therefore choose to NCND holding information. In support of his views the complainant provided various pieces of evidence which he considered to demonstrate the MPS's use of EI which included a video link to a session in parliament. However, as per section 1(4) of the FOIA, the Commissioner can only consider the circumstances at the time that a request is made and, because this video link postdates the request, it cannot be taken into consideration.

11. In respect of the other evidence provided, the complainant argued:

"I believe the neither confirm nor deny stance from the Metropolitan Police Service (MPS) around equipment interference is untenable, because documents published by the government before the date of my request clearly show that the MPS has access to such capabilities.
…

EI is used by a number of law enforcement agencies, according to the draft Investigatory Powers Bill published 3rd November 2015. On page 16, the draft Bill says "Equipment interference is currently used by law enforcement agencies and the security and intelligence agencies; more sensitive and intrusive techniques are generally available only to the security and intelligence agencies and a small number of law enforcement agencies, including the National Crime Agency."

One of the agencies that uses EI includes the MPS. "As some equipment interference techniques ***are used by all law enforcement agencies*** *[emphasis added], the draft Bill will permit all police forces to undertake equipment interference." Logically, the*

MPS is included in that statement.

…

It is untenable for the MPS to neither confirm nor deny that it has access to EI capabilities, and refuse to answer very basic, non-invasive questions around their use, when the government is plainly stating that the agency uses them, like every other UK law enforcement agency".

12. The Commissioner has noted the complainant's submissions above. However, whilst he accepts that this indicates that EI is available for use by the MPS, as well as other forces, he has not viewed any evidence which specifically states whether the MPS itself has actually used EI.

Section 23 – information supplied by, or relating to, bodies dealing with security matters & Section 24 – national security

13. Information relating to security bodies specified in section 23(3) is exempt information by virtue of section 23(1). 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. The MPS considers that both sections 23(5) and 24(2) are engaged in this case. The Commissioner does not consider the exemptions 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.

16. 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) 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).

17. This exemption is absolute, meaning that, if engaged, there is no requirement to consider whether the public interest nevertheless favours confirming or denying whether information is held.

18. The test as to whether a disclosure would relate to a security body listed in section 23(3) is decided on the normal civil 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 section 23 exemption would be engaged.

19. 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.

20. There is clearly a close relationship between the public authority in this case and security bodies and it is inevitable that it works closely with security bodies in carrying out its role. Therefore, in respect of the public authority's role and the subject matter being requested, the Commissioner finds that, on the balance of probabilities, any information about the MPS's use of EI, if held, could be related to one or more bodies identified in section 23(3) of the FOIA. The Commissioner is therefore satisfied that, on the balance of probabilities, the requested information, if held, could relate to or have been supplied by one or more bodies identified in section 23(3) FOIA. He therefore finds it is properly engaged.

21. 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.

22. With regard to section 24(2), the Commissioner again considers that this exemption should be interpreted so that it is only necessary for a public authority to show that either a confirmation or a denial of whether requested information is held would be likely to harm national security. The Commissioner interprets the phrase 'required' in the context of this exemption as '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.

23. In relation to the application of section 24(2) the Commissioner notes that the First-tier Tribunal has indicated that only a consistent use of an NCND response on matters of national security can secure its proper purpose. Therefore, in considering whether the exemption is engaged, and the balance of the public interest, 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.

24. The MPS has explained that were it to confirm that it holds any information this would have the potential to inform criminals / terrorists regarding its operational capabilities and give them a better understanding of the methods it employs. As such this could enable them to take steps to counter the police's tactics and could encourage them to use other methods if EI were known to be in use. Conversely, if the MPS were to confirm that no information is held, this would give evidence to those same parties that their activities are likely to go unnoticed. This would reveal the limitations of police capabilities in this area of work and potentially encourage further criminal / terrorist activity using this methodology as it would be known that their actions were unlikely to be discovered.

25. In the context of section 24 the Commissioner notes that the threshold to engage the exemption is relatively low. Furthermore, as a general approach the Commissioner accepts that withholding information in order to ensure the protection of national security can extend, in some circumstances, to ensuring that matters which are of interest to the security bodies are not revealed. Moreover, it is not simply the consequences of revealing whether information is held in respect of a particular request that is relevant to the assessment as to whether the application of the exemption is required for the purposes of safeguarding national security, but the consequences of maintaining a consistent approach to the application of section 24(2).

26. On this occasion the Commissioner is satisfied that complying with the requirements of 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.

27. 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. For the reasons set out above, the Commissioner is satisfied that the MPS is entitled to rely on sections 23(5) and 24(2) in the circumstances of this case. 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).

28. Section 23(5) provides an absolute exemption, but section 24(2) is qualified. Therefore the Commissioner is required to 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 MPS holds relevant information.

Public interest arguments in favour of confirming or denying that information is held

29. The MPS acknowledge that the public is entitled to know where public funds are being spent and also accepts that a better informed public can take steps to protect themselves.

30. The Commissioner also notes that furthering public knowledge on this subject matter could better inform public debate.

Public interest arguments in favour of maintaining the refusal to confirm or deny that information is held

31. The MPS has argued that confirming or denying any use of specialist techniques could render security measures less effective. It advised that this could lead to the compromise of ongoing or future operations to protect the security or infra-structure of the UK and increase the risk of harm to the public.

32. The MPS has also argued that 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.

33. The Commissioner understands that to confirm or deny whether the MPS holds information relevant to the request would allow inferences to be made about the nature and extent of its capacity to use EI. Such confirmation or denial could enable a terrorist group to either take steps to avoid detection or encourage it to continue its activities if no information is held, which would not be in the public interest.

Balance of the public interest arguments

34. The Commissioner recognises that there is a substantial inherent public interest in safeguarding national security. Although section 24(2) is qualified, the Commissioner believes that there would need to be truly exceptional circumstances in order to override national security considerations which justify the exclusion from the duty to confirm or deny that information is held. The Commissioner acknowledges that the subject matter associated with the request has generated some controversy within the UK generally as methods of surveillance and the extent of power which the police have has been questioned. However, he considers that such questions have been put to public scrutiny and debate and justification of the use of EI has, and is being, thoroughly explored. Whilst the complainant may be of the view that for the MPS to NCND its use of EI is untenable, it is important to recognise that the

MPS's response considers matters from a national security perspective. Therefore, whilst on the surface the MPS's stance may seem to be over cautious, it has to consider the effect of disclosure to the public at large and the wider ramifications of any such confirmation or denial.

35. The MPS has stated:

> *"The security of the country is of paramount importance and the Police service will not divulge whether information is or is not held if to do so could undermine National Security or compromise law enforcement. Whilst there is a public interest in the transparency of policing operations and in this case providing assurance that the police service is appropriately and effectively engaging with the threat posed by the criminal fraternity, there is a very strong public interest in safeguarding both national security and the integrity of police investigations and operations in this area.*
>
> *As much as there is public interest in knowing that policing activity is appropriate and balanced in matters of national security this will only be overridden in exceptional circumstances. Therefore it is our opinion that for these issues the balancing test for confirming or denying whether any other information is held regarding this technique is not made out. This argument is obviously transferable to all police tactics.*
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> *There is also no requirement to satisfy any public concern over the legality of police operations and the tactics we may or may not use. The force is already held to account by statute, for example the Police and Criminal Evidence Act and the Regulation of Investigatory Powers Act and independent bodies such as Her Majesty's Inspectorate of Constabulary, the Independent Police Complaints Commission and the Office of the Surveillance Commissioner. Our accountability is therefore not enhanced by confirming or denying that any information is held".*

36. Therefore, whilst the information requested may appear to the complainant to be relatively harmless in nature, the Commissioner considers that the public interest in safeguarding national security is of such weight that it can only be outweighed in exceptional circumstances. He also places significant weight on the requirement to maintain consistency when applying a neither confirm nor deny response in these circumstances.

37. Taking all the above into account, the Commissioner accepts that in this case, the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether or not the MPS holds the requested information. He therefore finds that, in all the circumstances of the case,

the public interest in maintaining the exemption at section 24(2) outweighs the public interest in complying with the duty imposed by section 1(1)(a).

38. In view of his findings, the Commissioner has not found it necessary to consider the application of sections 30(3) and 31(3)of the FOIA.

Other matters

39. The Commissioner notes that there has been a change in circumstances since this request was made and that this was something which the complainant wished to rely on. It is important to understand that the FOIA "date stamps" a request to the circumstances at the time a request is made – something which is necessary as otherwise it would be impossible to reach a decision if matters are in constant flux. The Commissioner did suggest to the complainant that he made a further, new request which could take these circumstances into account, something which the complainant indicated he may do. However, he still required the Commissioner to make this decision based on the situation at the time of the request.

Right of appeal

40. 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
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

41. 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.

42. 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 .....

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