

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 June 2020

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 about an undercover police officer from the Metropolitan Police Service (the "MPS"). The MPS refused to confirm or deny whether it held the information, citing sections 30(3) (investigations and proceedings) and 40(5) (personal information) of the FOIA.
2. The Commissioner's decision is that the MPS met with its obligations under section 1 of the FOIA in respect of one part of the request. In respect of the remainder, she finds that section 40(5) is properly engaged. No steps are required.

Background

3. The complainant is a solicitor acting on behalf of a client.
4. The request refers to Operation Herne. The terms of reference for this Operation are available on the MPS website¹.

¹ https://www.met.police.uk/cy-GB/SysSiteAssets/foi-media/metropolitan-police/priorities_and_how_we_are_doing/corporate/operation-herne---terms-of-reference

5. In respect of this particular request, the MPS has explained to the Commissioner:

"In 2018 The Chairman of the Undercover Policing Inquiry ('UCPI'), Sir John Mitting issued a ruling in respect of restricting the real identity of 'Carlo Neri'. The two reasons being:

- 1. it would be an unwarranted interference with the private lives of Carlo Neri's two teenage children for the Inquiry to publish this information; and*
- 2. the Chairman defers to the wishes of the children's mother in terms of how best to protect their interests.*

<https://www.ucpi.org.uk/2018/08/07/ruling-on-an-application-for-a-restriction-order-over-the-real-name-of-special-demonstration-squad-officer-hn104-carlo-neri/>

The UCPI website also lists the names of those officers who have had their undercover names released - Carlo Neri has not been named as one of these officers".

Request and response

6. On 22 May 2018, the complainant wrote to Operation Herne, as part of that enquiry, raising the following questions:

"The questions relate to 'Carlo Neri' an undercover officer and are, please confirm:

- 1. When Neri went on long term sick leave and what steps if any were taken to support him to return him to work.*
- 2. On what date Neri applied to retire on grounds of ill health.*
- 3. That appropriate medical evidence was provided in support of the officer's claim for ill health retirement.*
- 4. Whether his request for ill health retirement was expedited.*
- 5. Whether Neri would have been permitted to retire were Operation Herne aware before its authorisation that our client would now assist their investigation.*
- 6. That Neri was interviewed for the purposes of your investigation before he retired on the basis of the publicly available allegations made by '[name removed]' including on*

the basis of the [television] interview in [date removed] referred to below. If not, please explain why he was not.

7. *What assurances were sought from and provided by Neri regarding his cooperation with your investigation and/or that he would not leave the jurisdiction pending its conclusion.*
8. *What stage your investigation was at before our client indicated her intention to assist.*
9. *That gross misconduct proceedings against Neri will still be considered by virtue of Regulation 5.*
10. *That the Assistant Commissioner [name removed] you refer to as authorising the retirement is [name removed].*
11. *How many officers who will be witnesses for the purposes of Operation Herne and / or the Undercover Policing Inquiry have sought and been granted early or ill health retirement”.*

Please provide a copy of the internal MPS policy on ill health retirement. In our view this query, and question 10, are answerable in the context of our client’s complaint. If you do not agree, the answers are otherwise sought under the Freedom of Information Act”.

7. On 31 May 2018, Operation Herne responded saying that a response had already been provided in respect of part (10); a link to the requested policy was also provided. It added that the remaining request had been passed to the appropriate section at the MPS to be dealt with under the terms of the FOIA.
8. On 4 June 2019, over a year later, the MPS responded. It again provided the relevant policy but refused to confirm or deny holding the remaining information. It cited sections 40(5) and 30(3) of the FOIA as its basis for doing so.
9. The complainant requested an internal review on 25 July 2019.
10. The MPS sent the outcome of its internal review on 2 September 2019. It maintained its position.
11. During the Commissioner’s investigation the MPS revised its position in respect of part (11) of the request. It advised the complainant:

“No Information Held. To date the MPS do not have a list of police officers that will be giving evidence on behalf of Op Herne or in connection with the Undercover Policing Inquiry”.

Scope of the case

12. The complainant contacted the Commissioner on 20 December 2019 to complain about the way her request for information had been handled. She did not consider that what she was requesting was personal data and also did not agree that any prejudice would be caused to on-going investigations were the MPS to respond to her questions.
13. In respect of the MPS's revised response to part (11) of the request, the Commissioner asked the complainant whether she was happy to accept its amended position. She responded:

"The request is not how many officers who are on the witness list for Operation Herne and / or the Undercover Policing Inquiry have sought and been granted early or ill health retirement but to know :

(a) how many police officer witnesses in Operation Herne have sought and been granted early or ill health retirement. Firstly, it would be extremely surprising if Operation Herne did not have a list of police witnesses who assisted their investigation. That list must exist unless something is remiss with the investigation. However, if there really is no list of police witnesses, then the statements are available so the information provider must establish, with reference to the relevant personnel records, which of those who gave statements to Operation Herne sought and were granted early or ill health retirement.

(b) Similarly it would be very surprising if the police did not hold a list of police witnesses to the Inquiry. (The Inquiry has, incidentally, released the cover names of 69 undercover officers from the SDS on the Undercover Policing Inquiry website). Whether or not a list exists, however, is not relevant. The Metropolitan Police Service is a Core Participant in the Inquiry proceedings and the Metropolitan Police Service's Designated Lawyer team is representing around 80 of what are known as the police witnesses. The majority if not all of these witnesses represented by the MPS Directorate of Legal Services have already given evidence to the inquiry in the context of their anonymity applications. Others will also have given a formal statement to the inquiry or be about to. The MPS holds all of this material and the identities of these individuals in its role as a Core Participant to the Inquiry and a representative of the majority of the individuals in question so the information provider must establish, with reference to the relevant personnel records, which of those individuals sought and were granted early or ill health retirement".

14. The Commissioner will consider the MPS's interpretation of this part of the request below.
15. As a response was provided in respect of part (10) of the request and the requested policy these elements are removed from the scope of the investigation.
16. The complainant also referred to "*significant abuses by a State body of rights afforded by the Human Rights Act*", saying:

"Our client is concerned that the handling of the complaint investigation and response to her FOI request are part of an attempt to cover up those abuses".
17. The Commissioner is unable to comment on such allegations. She can only consider the complainant's access rights within the terms of the FOIA, which she has done below.
18. The Commissioner will consider the MPS's interpretation of part (11) of the request and the citing of exemptions for parts (1) to (9) below.

Reasons for decision

Section 1 – general right of access

19. The Commissioner has initially considered the MPS's interpretation of the wording of part (11) of the request.
20. Section 1 of FOIA states:

"(1) 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".
21. Mindful of the wording of the request in this case, and the grounds cited in paragraph 13 above, the Commissioner has considered whether the request may have had more than one possible interpretation. The request states:

"How many officers who will be witnesses for the purposes of Operation Herne and / or the Undercover Policing Inquiry have sought and been granted early or ill health retirement".
22. The Commissioner here notes that the crux of this part of the request is knowing which officers 'will be' witnesses for Operation Herne and / or

the UCPI. Knowing whether or not an officer has asked for, or been granted, ill health retirement is therefore irrelevant until it is first established whether or not that officer 'will be' asked to be a witness.

23. In this respect the MPS has advised the complainant that it does not have a list of police officers that will be giving evidence as witnesses. It has further explained to the Commissioner:

"The MPS is not the decision maker of who the UCPI will be calling to give evidence. It is for the chair of the Inquiry to determine this. Therefore the MPS does not hold the information. The information being requested is in the future tense therefore we are unable to predict which officers will be called as witnesses. Our understanding is that the UPCI is currently not at a stage of deciding which witnesses will be called".

24. The Commissioner considers that the wording of the request, and the rationale provide by the MPS above, are both clear. The FOIA only applies to recorded information which is held at the time a request is made, whereas the request is seeking details which have not yet occurred, ie a list of witnesses that will be called in the future, which has not yet been compiled. Whilst the complainant is of the view that she has asked for something else, the Commissioner does not agree that there is a different way of interpreting the actual wording of the request.
25. Accordingly, the Commissioner is therefore satisfied that the MPS has complied with its obligations under section 1 of the FOIA in respect of this part of the request.

Neither confirm nor deny

26. Section 1(1)(a) of the FOIA requires a public authority to inform a requester whether it holds the information specified in the request. This is commonly known as 'the duty to confirm or deny'. However, there may be occasions when complying with the duty to confirm or deny under section 1(1)(a) would in itself disclose sensitive or potentially exempt information. In these circumstances, section 2(1) of the FOIA allows a public authority to respond by refusing to confirm or deny whether it holds the requested information.
27. The decision to use a 'neither confirm nor deny' response will not be affected by whether a public authority does or does not in fact hold the requested information. The starting point, and main focus for a neither confirm nor deny response in most cases, will be theoretical

considerations about the consequences of confirming or denying whether or not particular information is held. The Commissioner's guidance² explains that there may be circumstances in which merely confirming or denying whether or not a public authority holds information about an individual can itself reveal something about that individual. For example, where a request is made for information about staff disciplinary records in respect of a particular individual, to confirm or deny that that information is held would be likely to indicate that the person was, or was not, the subject of a disciplinary process. This is, of itself, a disclosure of information about that person.

28. A public authority will need to issue a neither confirm nor deny response consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held. The issue that the Commissioner has to consider is not one of the disclosure of any requested information that may be held, it is solely the issue of whether or not the public authority is entitled to neither confirm nor deny whether it holds the information requested by the complainant.
29. Furthermore, in this particular case, it is noted that whilst the complainant may have personal knowledge regarding these matters, such knowledge has not been gained under the terms of the FOIA; rather, it has been gained through access to confidential information, as a result of her being a solicitor acting on behalf of a client. Obtaining information in such circumstances is not the same as obtaining it under the terms of the FOIA. Considerations for accessing information under FOIA are different, as disclosure under the FOIA is disclosure to the world at large, rather than for specified, restricted, policing purposes, such as the investigation of alleged crimes.
30. It is further noted that no formal public statement about the officer has been made by the MPS in respect of any of these matters.

Section 40 – personal information

31. This has been cited in respect of all the remaining parts of the request. Parts 1 – 7 and 9 all relate to the health of the officer and his alleged ill health retirement. Part 8 relates to whether or not an investigation has been conducted in respect of the officer.

² <https://ico.org.uk/media/for-organisations/documents/2614719/neither-confirm-nor-deny-in-relation-to-personal-data-section-40-5-and-regulation-13-5-v20.pdf>

32. Section 40(5B)(a)(i) of the FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.
33. Therefore, for the MPS to be entitled to rely on section 40(5B) of the FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request, the following two criteria must be met:
- Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - Providing this confirmation or denial would contravene one of the data protection principles.

Would confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

34. Section 3(2) of the Data Protection Act 2018 ('DPA') defines personal data as:-

"any information relating to an identified or identifiable living individual".

35. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
36. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
37. It is clear to the Commissioner that all nine parts of the request under consideration directly refer to the named officer and that confirmation or denial as to whether any of the requested information is held would reveal something about that officer. Whilst his real name has not been revealed, he is still known to the complainant and her client (and, therefore, 'identifiable' to them) and it is obviously an approach for information about him personally. Furthermore, although there is information available online which has been published in relation to his involvement with the UCPI, there is nothing available in the public domain which reveals any of the more detailed information being sought here.
38. Whilst the complainant is of the opinion that no parts of the request "*would reveal personal information*", the Commissioner does not agree. The Commissioner considers that these parts of the request all relate to either the health of the officer, and his alleged ill health retirement, or whether he has been the subject of an investigation. These clearly concern him personally.

39. For the reasons set out above, the Commissioner is satisfied that, if the MPS confirmed whether or not it held the requested information, this would result in the disclosure of a third party's personal data, ie the named officer. The first criterion set out above is therefore met.
40. Parts 1 – 7 and 9 of the request relate to the health of the officer and require a confirmation or denial as to whether or not he has now left on ill health retirement before they can be addressed. Part 8 relates to whether or not he has been subject to an investigation. As the data protection considerations for these types of data are different, the Commissioner will consider them separately below.

Parts 1 – 7 and 9 of the request

41. In its response to her investigation enquiries, the MPS advised:

"... we would not be in a position to confirm or deny matters relating to an individual's ill health/medical history was or was not held, as to do so would inadvertently disclose personal information about the individual. The information requested relates to an individuals, [sic] medical history which would only be held on their personnel file and would clearly 'relate to them' by having the individual as its focus. There is a clear expectation from all MPS staff that the personal details contained within their file are held in confidence and are in fact 'sensitive'".

42. It further added:

"Special Category Data is defined in Article 9 of the GDPR. In this instance, special category data would relate to information if held relating to various aspects of Carlo Neri's medical information from sickness, ill health retirement and medical evidence. We have not approached the data subject for consent, as we do not believe it would be appropriate".

43. Article 9 of the GDPR defines 'special category data' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the generic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
44. These parts of the request refer to the officer's sick leave, alleged ill health retirement and medical evidence about him. Any relevant information held would clearly be data concerning his health. Accordingly, any confirmation or denial as to whether this information is held would result in the disclosure of special category data about him.
45. Special category data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes confirming

whether or not information is held in response to a FOI request, if one of the stringent conditions of Article 9 can be met.

46. The MPS provided links to some published statements made by the officer ^{3, 4, 5} and advised:

"Carlo Neri's statement in support of anonymity dated 1/11/2016 clearly describes his concerns regarding the effect of non-anonymity and how the release of his personal information could [sic] have if disclosed. In light of the data subjects [sic] statement the MPS have not approached him to establish if he is willing to consent to the release of his personal information".

47. The MPS added that it had:

"... conducted an open source search and found no trace of any information confirming or denying matters relating to the individuals [sic] ill health retirement. As the individual has not made any information public or consenting, none of the conditions have been satisfied therefore it would be unlawful and unfair for the MPS to confirm or deny".

48. The MPS has therefore informed the Commissioner that none of the conditions in Article 9 can be met. Having regard for the restrictive nature of the Article 9 conditions, the Commissioner considers this to be entirely plausible.
49. As none of the conditions required for processing special category data are satisfied, there can be no legal basis for the MPS confirming or denying that it holds the requested information; such a confirmation or denial would breach principle (a) and therefore the second criterion of the test set out in paragraph 33 above is met. It follows that the MPS is entitled to refuse to confirm or deny whether it holds the requested information on the basis of section 40(5)(B) of the FOIA.

³ <https://www.ucpi.org.uk/wp-content/uploads/2017/08/HN104-Open-personal-statement-from-Slater-Gordon.pdf>

⁴ <https://www.ucpi.org.uk/wp-content/uploads/2017/08/HN104-Open-medical-assessment.pdf>

⁵ <https://www.ucpi.org.uk/wp-content/uploads/2017/08/HN104-Open-additional-personal-statement-from-Slater-Gordon.pdf>

Part 8 of the request

50. The MPS has provided the Commissioner with a confidential submission for her to consider in respect of this part of the request. Whilst she has taken it into consideration it has not been cited in her analysis here.
51. Part 8 of the request is predicated on the assumption that an investigation into the named officer has taken place. The MPS has advised that there is no public statement as to whether or not any investigation into the officer has ever taken place. It further advised that, were it to publicly confirm or deny whether any such investigation occurred, this would disclose criminal offence data about the officer, ie it would reveal whether or not a criminal investigation into allegations against him had taken place.
52. Information relating to criminal convictions and offences is given special status in the GDPR. Article 10 of the GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA 2018 personal data relating to criminal convictions and offences includes personal data relating to:
 - (a) the alleged commission of offences by the data subject; or
 - (b) proceedings for an offence committed or alleged to have been committed by the data subject of the disposal of such proceedings including sentencing.
53. Clearly the requested information relies on a public confirmation (or denial) that an investigation into the officer has been, or is being, undertaken into the officer. Were the MPS to confirm or deny that the information is held, this would place in the public domain personal data as to whether or not it had investigated the alleged commission of offences by him.
54. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes confirming or denying whether the information is held in response to a FOI request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.
55. The Commissioner therefore asked the MPS to consider each of these conditions and whether any of them could be relied on to confirm or deny whether it held criminal offence data falling within the scope of this request. The MPS has informed her that:

"We have no consent from Mr Neri for his data to be disclosed in fact as previously mentioned under our section 40 response to the ICO Mr Neri has not consented to the release of his personal information and neither has Mr Neri deliberately made this data

public (see below background information provided to the ICO. Therefore as none of the conditions required for processing criminal offence data are satisfied there is no legal basis for its disclosure. It would be unlawful and breach principle (a) and exempt under FOIA".

56. Having regard for the restrictive nature of the Schedule 1, Parts 1 to 3 conditions, the Commissioner considers this response to be entirely plausible.
57. As none of the conditions required for processing criminal offence data are satisfied there can be no legal basis for confirming or denying that the requested information is held; providing such a confirmation or denial would breach data principle (a) and therefore the second criterion of the test set out above is met. It follows that the MPS is entitled to refuse to confirm or deny whether it holds the requested information on the basis of section 40(5)(B) of FOIA.
58. As the Commissioner has found that the MPS was entitled to rely on section 40(5) of the FOIA she has not gone on to consider its application of section 30(3).

Other matters

59. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.
60. The complainant did not specifically refer to the time taken for the MPS to respond to her request so the Commissioner has not considered it formally above. However, she does note that the response was significantly delayed, taking over a year, so she has noted it here for monitoring purposes.
61. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft Openness by Design strategy⁶ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity

⁶ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

through targeting of systemic non-compliance, consistent with the approaches set out in our Regulatory Action Policy⁷.

⁷ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

62. 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@justice.gov.uk

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

63. 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.

64. 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

Carolyn Howes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF