

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 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 operational instructions for police handlers and discipline-related information about seven of its officers from the Metropolitan Police Service (the "MPS"). The MPS directed the complainant to some of the information but refused to confirm or deny holding any information about the named officers, citing section 40(5)(personal information) of the FOIA.
2. The Commissioner's decision is that section 40(5) is properly engaged. No steps are required.

Background

3. The MPS has explained to the Commissioner that the complainant is a solicitor acting on behalf of a client who is currently in prison serving a life sentence for murder.

Request and response

4. On 27 November 2019, the complainant wrote to the MPS and requested information in the following terms:

"Since 2007 any changes? Request for new or updated operational instructions for police handlers dealing with informants in line with

police code of ethics/ pace / legal frameworks - relevant legal standards / Human rights acts/ common law. what are the standards and operational environment police are expected to conform to or is it any mean to an end?

Relevant data laws: request misconduct disciplinary demotions or dismissals of following

Operation [name redacted] June 2007

[Seven officer's names redacted]. Recognise some may be promoted or left the service but require information".

5. On 17 December 2019, the MPS responded and refused to provide the requested information. For the first part of the request it advised that this was reasonably accessible by other means and therefore exempt under section 21 of the FOIA. In respect of the latter part of the request relating to the named officers, it refused to confirm or deny whether any information is held, citing section 40(5) (personal information) of the FOIA.
6. The complainant requested an internal review on 19 December 2019.
7. The MPS provided an internal review on 23 December 2019 in which it maintained its position.

Scope of the case

8. The complainant contacted the Commissioner on 26 January 2020 to complain about the way his request for information had been handled. The Commissioner required further information from him which was provided on 27 February 2020.
9. The complainant asked the Commissioner to consider the following:

"Metropolitan Police Service has refused to provide information regarding [sic] Officers [sic] disciplinary records or potencial [sic] conflicts of interests unconstitutional actions and breach's [sic] of their own ethical code Their response refusing to confirm or deny regarding information request is we believe an attempt not to be publicly held to account. They have an obligation to be open and transparent re their policies and actions therefore as a public service can be challenged regarding [sic] possible illegal unlawful or unethical actions by their staff. We require candidness from the Met not obviscation [sic]".

10. The Commissioner will consider the citing of section 40(5) of the FOIA below.
11. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the FOIA. The FOIA is concerned with transparency and provides for the disclosure of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held by public authorities. The FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.

Reasons for decision

Neither confirm nor deny ('NCND')

12. Section 1(1)(a) of the FOIA requires a public authority to inform a requester whether it holds the information specified in a request.
13. The decision to use a NCND 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 NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.
14. A public authority will need to use the NCND 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.
15. The MPS has taken the position of neither confirming nor denying whether it holds any of the requested information, citing section 40(5) of the FOIA. The issue that the Commissioner has to consider is not one of disclosure of any requested information that may be held, it is solely the issue of whether or not the MPS is entitled to NCND whether it holds the information requested by the complainant.
16. Put simply, in this case the Commissioner must consider whether or not the MPS is entitled to NCND whether it holds any discipline-related information about the officers named in the request.

Section 40 – personal information

17. 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.

18. 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?

19. Section 3(2) of the DPA 2018 defines personal data as:-

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

20. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
21. 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.
22. The main focus of this part of the request are the disciplinary records of seven named officers which, if held, would clearly be their personal data.
23. 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. The first criterion set out above is therefore met.
24. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent the MPS from confirming whether or not it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.
25. The Commissioner agrees that the most relevant data protection principle is principal (a).

Would confirming whether or not the requested information is held contravene one of the data protection principles?

26. Article 5(1)(a) of the GDPR states that:-

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject"

27. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed – or as in this case the MPS can only confirm whether or not it holds the requested information - if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) of the GDPR), be fair, and be transparent.

Lawful processing: Article 6(1)(f) GDPR

28. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.

29. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) of the GDPR which provides as follows:-

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"¹.

¹ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA 2018) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

30. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA it is necessary to consider the following three-part test:-

(i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

(ii) **Necessity test:** Whether confirmation as to whether the requested information is held (or not) is necessary to meet the legitimate interest in question;

(iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

31. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

(i) Legitimate interests

32. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

33. The complainant advised the Commissioner as follows:

"We seek only to free our client [name removed] who is held unlawfully in prison for a crime he did not commit that the Met police officers fabricated and conspired! The ICO will be held to account if it simply thinks it can apply a law to cover up the misdeeds of The Metropolitan Police. It is the [sic] public interest that officers who fail to act lawfully are subjected to scrutiny in this case. If ICO will collude with power to bury the truth therefore you are as guilty as they are or are you? Prove whose side your [sic] on if you are truly independent and defend the rights of those you serve".

34. The Commissioner understands that the information being requested relates to police officers who the complainant believes were linked to the murder investigation involving his client in 2007.
35. The Commissioner accepts that there is a legitimate interest in the public having confidence in the accountability and transparency of the police, although she is unaware of any formal criticism of the way in which the MPS conducted this particular investigation. No explanation has been provided by the complainant as to how provision of a confirmation or denial under the FOIA would assist with his pursuit.

(ii) Is confirming whether or not the requested information is held necessary?

36. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under the FOIA as to whether the requested information is must therefore be the least intrusive means of achieving the legitimate aim in question.

37. The MPS has explained to the Commissioner that the complainant:

"... has been advised that if he wishes to complain about the conduct of any MPS police officers or if it is his view the officers failed to meet the standards expected from MPS employees then he can complain through the MPS complaints procedure or through the Independent office for police conduct (IoPC)".

38. However, it further explained that he had been advised:

"... due to the delay between the time of the alleged conduct and the making of the complaint (in this case approximately 13 years) the matter may not be investigated as the legislation governing police complaints requires a balance between the severity of the alleged misconduct and fairness to those officers allegedly involved".

39. Although there may be an issue with timeliness for investigating any potential complaint against the named officers, nevertheless the Commissioner considers that the complainant still has this formal option open to him. This therefore means that, at this stage, confirmation or denial under FOIA as to whether the requested information is held is not the least intrusive means of achieving the legitimate aim in question.

40. Furthermore, the MPS advised the complainant:

"This matter has been heard at court. The Freedom of Information Act is not the means to have such matters reviewed. There are remedies in place for such matters. For example, the Criminal Cases Review commission²".

41. From the complainant's comments in paragraph 33 above, it seems clear to the Commissioner that he is seeking information in an effort to clear his client's name. However, he has employed a 'fishing expedition' style to attempt to gather information which, under the FOIA, would be disclosed (by way of confirmation or denial) to the world at large, rather than privately and for a specific purpose. In view of this, the Commissioner agrees with the MPS that there are more appropriate, formal channels for pursuing his concerns about the safety of his client's conviction.
42. The Commissioner considers that public disclosure of whether or not the requested information is held is *not* the least intrusive method of achieving the legitimate interest. Such processing is thus not *necessary* to satisfy any legitimate interest.
43. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is thus unlawful. Given this conclusion, the Commissioner considers that she does not need to go on to separately consider whether confirming or denying whether the information is held would be fair and transparent.

² <https://ccrc.gov.uk/>

Right of appeal

44. 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

45. 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.

46. 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
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