

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 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 collaboration with a social media provider from the Metropolitan Police Service (the "MPS"). The MPS disclosed some information but would neither confirm nor deny ("NCND") holding further information, citing section 31(3) (law enforcement) of the FOIA.
2. The Commissioner's decision is that section 31(3) is not engaged. Furthermore, in failing to respond to the request within the statutory time limit, she finds that the MPS breached section 10(1) of the FOIA.
3. The Commissioner requires the MPS to take the following steps to ensure compliance with the legislation:
 - issue a fresh response which must confirm or deny whether the information is held; and,
 - either disclose the requested information or issue a valid refusal notice compliant with section 17 of the FOIA.
4. The MPS must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 7 November 2019, the complainant wrote to the MPS and requested information in the following terms:

"I'm writing to you as a member of Liberty Investigates, an editorially independent journalism unit that sits within the human rights organisation Liberty.

The Met Police is using body worn cameras provided by Facebook during training exercises.

Can you provide:

- 1. Any MOU/contract with Facebook about this partnership*
- 2. Guidance pertaining to the use of the cameras which was given to police trainers/trainees as part of this partnership*
- 3. Description of the types of data provided to Met Police by Facebook in return*
- 4. Has the Met Police partnered with Facebook on any other initiatives?*

If the release of any of this information is prohibited on the grounds of breach of confidence, please supply me with copies of the confidentiality agreement. I wish to remind you that information should not be treated as confidential if such an agreement has not been signed".

6. On 20 December 2019, the MPS wrote to the complainant to apologise for the delay in acknowledging her request. It advised that it needed further time in which to consider the public interest in respect of section 31 of the FOIA, and provided a revised response date of 7 January 2020.
7. On 28 January 2020, the MPS responded and disclosed some of the requested information. In respect of part (1), it refused to disclose some of the requested information, citing section 40(2) (personal information) of the FOIA. In respect of part (4), it refused to confirm or deny holding any information, citing section 31(3) (law enforcement) of the FOIA.
8. On 10 February 2020, the complainant requested an internal review of the response to part (4) of the request only. The MPS provided an internal review on 19 February 2020. It maintained its position.

Scope of the case

9. The complainant contacted the Commissioner on 19 February 2020, to complain about the way her request for information had been handled.
10. The complainant asked the Commissioner to consider the following grounds of complaint:

"[The MPS] say that merely confirming or denying the existence of any partnership across the whole of the Met with Facebook could prejudice law enforcement, particularly the action of the Counter Terrorism Internet Referral Unit [CTIRU]. They rely in their response on the "mosaic effect". This seems a stretch to me and an inappropriate use of the exemption. The acknowledgment of the mere existence of any kind of partnership with Facebook would not compromise the work of the CTIRU. Even if it did, the Met Police could choose to answer the question with regards other parts of its operations and exclude the CTIRU. Releasing the information is in the public interest. It would instead shed a very small amount of light on whether and how the Met Police partner with Facebook, a company about whom the public have some legitimate concerns regarding their data etc".

11. She also complained about the delay in responding to the request.
12. The Commissioner will consider timeliness and the application of section 31(3) to part (4) of the request, below.

Reasons for decision

Section 10 – time for compliance

13. Section 10 of FOIA states that:

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

14. The MPS should therefore have either issued a full refusal notice, or disclosed the requested information, within 20 working days.
15. The MPS did not respond to the complainant within 20 working days thereby breaching section 10.

16. 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 Strategy¹ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her Regulatory Action Policy².

Neither confirm nor deny ('NCND')

17. Section 1(1)(a) of the FOIA requires a public authority to inform a requester whether it holds the information specified in a request.
18. 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.
19. 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.
20. The MPS has taken the position of neither confirming nor denying whether it holds the requested information, citing section 31(3) 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 any information of the type requested by the complainant.
21. Put simply, in this case the Commissioner must consider whether or not the MPS is entitled to NCND whether it holds any further information about initiatives where it has collaborated with Facebook.
22. The Commissioner is unaware as to whether or not any information is actually held. She does not consider this to be necessary for her to reach a decision in this particular case.

¹ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

² <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Section 31 – law enforcement

23. Section 31(3) of the FOIA excludes a public authority from complying with the duty to confirm or deny in relation to information if to do so would, or would be likely to, prejudice any of the functions in sections 31(1).
24. The MPS initially advised that the function it is relying on is section 31(1)(a), the prevention or detection of crime. In later correspondence with the Commissioner it added reliance on section 31(1)(b), the apprehension or prosecution of offenders, and advised:
- "... the MPS are relying primarily on Section 31(1)(a) as 'would prejudice' and then as a secondary Section 31(1)(b) as 'would be likely to prejudice'".*
25. When considering a prejudice based exemption such as section 31, the Commissioner will:
- identify the applicable interests within the relevant exemption;
 - examine the nature of the prejudice, the likelihood of it occurring and that the prejudice claimed is real, actual and of substance; and
 - examine whether there is a causal link between confirming / denying and any prejudice claimed.
26. The MPS has identified the applicable interests, namely that confirmation or denial would, or would be likely to, prejudice the prevention or detection of crime and the apprehension or prosecution of offenders.
27. In respect of the actual harm envisaged, the MPS explained:

"Confirming or denying whether the MPS has collaborated with Facebook on any other initiatives is likely to prejudice law enforcement. Any information identifying the focus or non-focus of policing activity could be used to the advantage of those with criminal intent, which would not be in the public interest. Information that undermines the operational integrity of any possible activity will adversely affect public safety and have a negative impact on law enforcement. Information disclosed under the Act is considered to be a release to the world as once the information is published the public authority in this case the MPS has no control over what use is made of that information. Whilst not questioning the motives of the applicant it could be of use to those who seek to disrupt any police activity.

This could also result in releasing sensitive operational information into the public domain, which would enable those with the time,

capacity and inclination to try to map strategies used by the MPS. Additionally, MPS resources and its ability to operate effectively and efficiently would be affected as this information could be manipulated by those with criminal intent”.

28. The Commissioner notes that the request refers to an initiative between the MPS and Facebook which is already in the public domain, namely the provision of body worn cameras which have been used during training exercises³. The issue for the Commissioner to consider is if a confirmation or denial regarding any further collaboration is harmful in itself.
29. The Commissioner considers that the scope for any such collaboration is vast and it is highly unlikely that anyone could 'second guess' what any collaboration may amount to. For example, the provision of body worn cameras would not necessarily be an obvious choice for the public to associate with Facebook, which is a social media provider. It could be anything from the provision of other equipment, clothing or IT (a partnership which would not necessarily be directly related to law enforcement), or it may relate to something more closely aligned to its social media provision which obviously has the potential to be more sensitive, eg something related to personal information or the investigation of online crimes.
30. The Commissioner accepts that, were the MPS required to reveal a particular policing technique or, for example, a technical project or investigation which it is working on with Facebook, then this may be detrimental as it could reveal something about the force's capability in respect of law enforcement and the applicable interests identified. However, we are only considering the provision of a confirmation or denial in this decision notice.
31. Conversely, were the MPS to reveal that there is no further collaboration with Facebook then it could be argued that potential 'offenders' may think that the MPS isn't undertaking work in the social media field. However, this is unrealistic as it would not indicate that work isn't being done with other social media providers or third parties – or that work is not due to commence in the future.
32. The MPS has also referred to: "*cumulative prejudice' or the 'mosaic effect' whereby the information requested may be of increased*

³ <https://www.theguardian.com/technology/2019/sep/17/facebook-teams-up-with-police-to-stop-live-streaming-of-terror-attacks>

significance when combined with other information obtained through other means and/or at a later date”.

33. The Commissioner can see the potential for harm should further requests be made for details of any collaboration which may exist. However, she does not consider this to be an issue at this stage as it has not yet even been established whether there is any further collaboration. The MPS will therefore need to manage any further requests that it receives.
34. The Commissioner also notes the rationale which the complainant included in her grounds of complaint, whereby she accepts that the MPS could choose to withhold information relating to the work of the CTIRU and disclose anything else, ie she accepts that there is the potential for some collaboration, if it exists, to be 'sensitive'.
35. The Commissioner can see the potential for harm, were the MPS required to disclose the actual details of any collaboration which may exist, and, depending on what that collaboration actually is, this could be detrimental to law enforcement. However, she is not satisfied that the MPS has demonstrated that the prejudice which it says would, or would be likely to occur if confirmation or denial was given, is realistic, actual or of substance in itself. Accordingly, she finds that section 31(3) of the FOIA is not engaged.

Right of appeal

36. 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

37. 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.
38. 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
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