

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 January 2021

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 from the Metropolitan Police Service (the "MPS") information about an alleged investigation. Having initially advised the complainant that his request was vexatious under section 14(1) of the FOIA, the MPS revised its position and would neither confirm nor deny holding any 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 was entitled to rely on section 40(5) to neither confirm nor deny holding the requested information. No steps are required.

Background

3. There are several articles available online about the 'fraudulent' diary which is the centre of this request. However, the Commissioner can find no information in the public domain which indicates whether or not the MPS formally pursued any criminal line of enquiry about the matter.

Request and response

4. On 25 February 2020, the complainant wrote to the MPS and requested information in the following terms:

"I wish to make an initial application under the Freedom of Information Act for the release of the case papers relating to an investigation carried out in 1992 by officers from the Metropolitan Police into allegations of conspiracy to defraud, and fraud by false representation.

I am a retired police detective and since 2002 have been conducting a cold case investigation into The Whitechapel Murders of 1888 which were attributed to a killer who became known as Jack the Ripper, who was never identified, and never brought to trial.

My investigation is almost concluded save for a few loose ends. One of which involves my investigation into a diary purporting to have been written by Jack the Ripper and allegedly penned by a Liverpool cotton merchant James Maybrick around 1888.

This diary came into the public domain in 1992 via a Liverpool scrap metal dealer [name redacted] who stated he had been given it by a friend who had now died, so the provenance at that time was questionable.

Despite that, and the worldwide public interest there was, and still is with this case [name redacted] was paid vast sums of money in advance royalties by the press, and television companies for his story, and access to the content on the diary.

After a short cooling-off period, it soon became clear that the diary may have been a modern-day forgery, and the matter was reported to the police, and pressure was put on [name redacted] to come clean. He then went to a solicitor in Liverpool and swore out an affidavit in which he sets out in great detail how he, [redacted], and at least one other set about forging this diary. A week later he goes back to the same solicitor and signs another affidavit retracting the first one.

I am aware that the main suspects in this, [name redacted], [redacted] and others were all interviewed by police and no further action was taken against any of them, which is something I would like to know why, and the case papers will have those answers and accounts they all gave when interviewed.

I am fully aware that you may come back and say that the case is still open and that the release may jeopardise any future prosecution. This I would challenge, having regards to the fact that the investigation was 22 years ago, and that I am of the opinion that the case is now dead in the water, having regards to the passage of time, which has passed, and more importantly the main suspects who were interviewed [name redacted], [name redacted], and [name redacted] are now deceased.

Should this request be refused I believe that I have a strong case for that decision to be overturned at any future tribunal hearing.

Given the historical aspect of the Jack the Ripper Murder for the past 131 years, I firmly believe that the public interest part of the Freedom of Information Act applies to this request.

That being said as initially stated my objective is to simply view the case papers to get a handle on the police investigation, and why no prosecution was brought against anyone despite strong evidence. If I could be allowed access to the file then I would be happy not to proceed with this request, as I realise that should my request be successful then that would open the case papers to all and sundry".

5. Following interim correspondence, on 21 April 2020 (during the first national lockdown of the Covid-19 pandemic) the MPS responded advising:

"We are currently unable to confirm or deny if any information is held at this stage, due to the difficulties in staff being able to travel and access some information.

We would therefore ask that you withdraw your FOI request at this stage and make a new FOI in possibly 3 months' time. This would be treated as a new request for information for consideration under the Act".

6. On the same day the complainant responded saying:

" ... I am not prepared to wait a further three months to then submit a further request.

So all I can ask is that this matter is dealt with as diligently and expeditiously as is possible given the current problems this country faces with the coronavirus which may see a reduction in the lockdown in the next few weeks".

7. On 15 May 2020, the MPS refused the request by virtue of section 14(1) (Vexatious requests) of the FOIA on the basis that it was unable to establish whether or not the information was held at that time.

8. The complainant requested an internal review on 18 May 2020.
9. The MPS provided an internal review on 9 July 2020 in which it maintained its position, explaining that it was not currently possible to complete a small number of FOIA requests which required access to paper files and documents.
10. During the Commissioner's investigation the MPS revised its position. It advised that it would neither confirm nor deny whether any information was held by virtue of sections 30 (Investigations and proceedings) and 40 (Personal information) of the FOIA.

Scope of the case

11. The complainant contacted the Commissioner on 10 July 2020 to complain about the way his request for information had been handled and its citing of section 14(1) of the FOIA.
12. Following the MPS's revised position, the Commissioner contacted him for his views. The complainant asked the Commissioner to consider the application of the revised exemptions to the request. The Commissioner will consider these below.
13. As well as responding to her enquiries, the MPS has provided the Commissioner with a confidential submission which she has taken into consideration.

Reasons for decision

Neither confirm nor deny ("NCND")

14. Section 1(1)(a) of the FOIA requires a public authority to inform a requester whether it holds the information specified in the request.
15. 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.
16. 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.

17. The MPS has taken the position of neither confirming nor denying whether it holds any of the requested information in its entirety, citing sections 30(3) and 40(5) of the FOIA. 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 MPS is entitled to NCND whether it holds any information of the type requested by the complainant.
18. Put simply, in this case the Commissioner must consider whether or not the MPS is entitled to NCND whether it holds any information about an alleged investigation into allegations of conspiracy to defraud, and fraud by false representation from 1992.
19. The MPS has said that the information described in the request, if it was held, would be fully exempt from disclosure by virtue of sections 30(3) and 40(5) of the FOIA. It explained:

"... there is no evidence that information relating to this case has ever been placed officially by the MPS into the public domain... In this instance, a statement confirming or denying whether information is held in relation to any part of [the] request would primarily require disclosing to the world at large whether or not an investigation existed in relation to a particular allegation.

The MPS have to adopt a consistent approach when responding to similar requests in relation to investigations whether they have been conducted or not".

Section 40 – personal information

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

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

21. The complainant claims that the people identified in his request are all now deceased. If that is the case, then section 40 of the FOIA could not be engaged.
22. Having conducted some online research, the Commissioner notes that one of the parties associated with the finding of the diary is, reportedly, now deceased. However, she can find no credible information which suggests that the other named parties associated with the diary are not still alive.
23. The Commissioner's approach in such cases is to be cautious. She does not have the capability or resources to investigate this point and nor, for the same reason, does she expect the MPS to do so.

24. In the absence of other officially verified information, the Commissioner, is guided by The National Archives' guidance on closure periods¹. When considering the release of information in transferred records which identifies an individual, it specifies that where it is not possible to ascertain whether or not that individual is still alive, a working assumption of a life expectancy of 100 years is a reasonable basis on which to proceed.
25. The information the Commissioner has viewed online indicates that the other named parties' ages would not exceed 100 years. She has therefore adopted the working assumption that they are still alive. This approach has previously been accepted by the First-Tier Tribunal (for example, *EA/2016/0060*).
26. 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.
27. Therefore, for the MPS to be entitled to rely on section 40(5B) of the FOIA to NCND 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?

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

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

29. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

¹ <https://www.nationalarchives.gov.uk/documents/information-management/closure-periods.pdf>

30. 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.
31. Clearly the request concerns named, living individuals and therefore confirmation or denial as to whether or not the requested information is held would reveal something about those persons (ie whether they had been the subject of a police investigation in connection with the diary).
32. For these reasons, 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 or parties' personal data. The first criterion set out above is therefore met.
33. The MPS has also argued that confirming or denying whether it holds information about an alleged criminal investigation would constitute a disclosure of criminal offence data.
34. 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, 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 or the disposal of such proceedings including sentencing.
35. The request clearly relates to an alleged criminal investigation into a named party or parties. The MPS has explained:

"The requested information would require a confirmation or denial that an investigation took place. In this instance it would clearly require a public confirmation or denial that an investigation was carried out in "1992 by officers from the Metropolitan Police into allegations of conspiracy to defraud, and fraud by false representation". Were the MPS to confirm or deny that the information is held, this would place in the public domain personal information as to whether or not it had investigated the alleged commission of offences".

36. The MPS further explained:

"It is appreciated that there is a legitimate public interest in confirming or denying whether the information requested is held. A legitimate interest is inherent in the disclosure of information upon request under the Freedom of information Act given the associated benefits of enhancing transparency and accountability of public

authorities. There is also a legitimate public interest in informing a public debate in relation to issues surrounding Jack the Ripper due to the fascination of related matters.

In considering the principle of fairness, the MPS has balanced the rights of the data subjects and the legitimate interest in disclosure. It could be considered there is a strong public interest in understanding the details of an investigation for example whether any action was taken or not by police and reason for those actions. However if held, the MPS has to be mindful of the impact of disclosure of personal information of all individuals involved.

In considering fairness in disclosure, the MPS has taken into account the reasonable expectations of the individuals who would be affected by disclosure if the information was held. The MPS is of the opinion anyone that makes an allegation of crime to police in order for them to investigate a crime would expect that information to be held in confidence. Likewise if the police are investigating someone suspected of a crime there would be an expectation that such information to be [sic] treated confidentially and only shared with those that needed to know professionally, not the MPS would contend to disclose under FOIA. If this information was held it would be held in the strictest of confidence. It would be reasonable for any individual, and those suspected of criminal offences, to expect any information the MPS holds in relation to them would only be used to support a policing purpose and not be unlawfully disclosed to 3rd parties.

The MPS have also considered the consequences of confirming or denying will not only amount to an infringement into the privacy of individuals but also has the potential to cause damage and distress, especially to the extent that there would not be any reasonable expectation of disclosure 28 years later. Therefore, confirmation or denial could potentially cause unexpected and unwarranted distress to individuals.

Therefore, the MPS have a legal obligation to take appropriate steps to protect personal data. One such organisational measure is the use of appropriate FOIA exemptions which in this case relate to the duty to confirm or deny.

A statement confirming or denying whether information is held would disclose personal data and/or impair the ability of the MPS to protect personal data in relation to similar requests for information in the future.

The MPS have to also balance the rights of the data subjects and the legitimate interests in disclosure. There is a legitimate public interest in furthering accountability and transparency however, disclosure under the Act is classed as a disclosure to the 'world' and not a private transaction with an applicant. The MPS conclude that the legitimate interest in disclosure does not outweigh the rights of the data subject(s) on this matter. It is also the case that the public interest in regards to the application of Section 40 does not presume disclosure.

For the reasons outlined above I have concluded that disclosure would contravene 'principle a', relating to lawful, fair and transparent processing of personal data.

A confirmation or denial statement would be unlawful and disproportionate in the circumstances of the request and may undermine related security measures to protect personal data which in the circumstances may also include criminal offence data.

Consequently, a confirmation or denial statement at this time would neither be lawful nor fair".

37. From the evidence available to the Commissioner, the MPS has made no formal statement to the media about the parties named in the request. Therefore, it is clear to the Commissioner that confirming or denying whether the requested information is held would result in the disclosure of criminal offence data, as defined in paragraph 34 above. This is information which has not already been formally placed in the public domain by the MPS. Whilst the complainant may have some personal knowledge about the matter, and there are some media articles available online about the diary, the Commissioner has seen no articles which confirm any alleged criminality or the MPS's confirmation of its involvement in investigating any such allegation. Whilst it is understood that the complainant is of the opinion that there was at least an initial investigation, he has also been unable to provide any evidence to support his view that there is any information in the public domain which formally confirms that an investigation took place.
38. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes confirming or denying whether such 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.
39. 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 none of the conditions can be

met. Having regard for the restrictive nature of the Schedule 1, Parts 1 to 3 conditions, the Commissioner considers this to be entirely plausible.

40. As none of the conditions required for processing criminal offence data are satisfied, there can be no legal basis for confirming whether or not the requested information is held; providing such 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 the FOIA.
41. As she has concluded that section 40(5) of the FOIA is properly engaged, the Commissioner has not gone on to consider the citing of section 30(3).

Other matters

42. Within his grounds of complaint the complainant raised the following matter:

"... how can an internal review be impartial when the police themselves are reviewing a police decision?"

43. There is no statutory requirement to conduct an internal review under the terms of the FOIA. However, such a provision does apply under the EIR² and the Commissioner considers it is best practice to adhere to the same principles under the terms of the FOIA.
44. Within these guidelines the Commissioner considers that the review procedure should involve a thorough re-examination of the original decision and handling of the request and that it should be genuinely possible to have a previous decision amended or reversed; that review will necessarily be conducted by the public authority itself.
45. The Commissioner has no specific authority to specify who should undertake an internal review within a public authority. However, it is her view that, ideally, it should be carried out by someone senior to the person who dealt with the original request and who was not involved in the original decision. Where this is not possible it should be undertaken by someone trained in, and who understands, the FOIA.

² https://ico.org.uk/media/for-organisations/documents/1613/internal_reviews_under_the_eir.pdf

Right of appeal

46. 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

47. 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.
48. 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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