

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 August 2023

Public Authority: Commissioner of Police of the Metropolis
Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant has requested discipline-related information about officers in its Domestic and Sexual Offences Unit from the Metropolitan Police Service (the "MPS"). The MPS initially refused to confirm or deny holding any information, citing sections 31(3) (Law enforcement) and 40(5) (Personal information) of FOIA. During the Commissioner's investigation it revised its position. It confirmed holding information but advised that it was exempt from disclosure under sections 40(2) and 31(1)(g)(2)(b) of FOIA.
2. The Commissioner's decision is that section 40 is properly engaged. No steps are required.

Background

3. The MPS has explained to the Commissioner:

"The MPS's Domestic and Sexual Offences (DASO) unit is a dedicated team of investigators that was set up in January 2022 within the Directorate of Professional Standards (DPS). The role of the DPS is to maintain professional standards on behalf of the MPS. The DASO unit was established to provide a robust response to public complaints and conduct matters in the areas of domestic

abuse and sexual offences involving police officers, police staff and volunteers working in the MPS. This unit remains in place to date of this notice”.

4. It also provided the following break down of staff who have worked in the unit during the time span of the request:

Rank / Position	Number of Officers (from January 2022 to 13th of October 2022)
Detective Superintendent	1
Detective Chief Inspector	2
Detective Inspector	4
Detective Sergeant	3
Detective Constable	24
Police Constable	7
Total	41

Request and response

5. On 13 October 2022, the complainant wrote to the MPS and requested the following information:

“1. Please provide a breakdown of police officers and police staff who have ever worked in the Met's Domestic and Sexual Offences Unit, who have been sacked, suspended or disciplined at any point since the Unit was launched. Please also include any officers or staff who are currently pending investigation or in the process of being investigated over disciplinary allegations who have ever worked in the Domestic and Sexual Offences Unit.

For each incident, please provide:

- the rank of the officer/ staff concerned,
- the date of the disciplinary action,
- the reason for the disciplinary action
- what action was taken against them
- whether the allegations related specifically to their work in the Domestic and Sexual Offences Unit.

2. Please provide a breakdown of police officers and police staff who have ever worked in the Met's Domestic and Sexual Offences Unit, who have been sacked, suspended or disciplined at any point since they started working for the Metropolitan Police. Please also include any officers or staff who are currently pending investigation or in

the process of being investigated over disciplinary allegations who have ever worked in the Domestic and Sexual Offences Unit.

For each incident, please provide:

- (a) the rank of the officer/ staff concerned,
- (b) the date of the disciplinary action,
- (c) the reason for the disciplinary action
- (d) what action was taken against them
- (e) whether the allegations related specifically to their work in the Domestic and Sexual Offences Unit".

6. On 10 December 2022, the MPS responded. It refused to confirm or deny whether it held any information, citing the exemptions at sections 31(3) and 40(5) of FOIA.
7. The complainant requested an internal review on 18 January 2023.
8. The MPS provided an internal review on 28 April 2023 in which it maintained its position.
9. During the Commissioner's investigation the MPS revised its position. It confirmed holding the requested information but refused to disclose it citing sections 40(2) and 31(1) of FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 28 April 2023 to complain about the way his request for information had been handled. He said:

"I think there is a misunderstanding. The Metropolitan Police's response refers to "identifiable individuals". However, my request does not seek to obtain any names or identifiable information. Instead, the only thing I am requesting is the specific information I have listed in my request, such as the rank of each officer, the reason for the disciplinary action, etc. I am not seeking the names of any officers or staff".

I would also note the very strong public interest for transparency in this area, and the Metropolitan Police's track record for failing to be accountable regarding this specific issue".

11. Following the MPS' revised response, the Commissioner contacted the complainant in case he wished to revise his views. He responded saying he wished to pursue his complainant on the same basis as before.

12. The complainant asked the Commissioner to consider the application of exemptions, he has done so below.
13. The Commissioner has viewed the withheld information.

Reasons for decision

Section 40 – personal information

14. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
15. In this case the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
16. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (DPA). If it is not personal data then section 40 of the FOIA cannot apply.
17. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

18. Section 3(2) of the DPA defines personal data as: "any information relating to an identified or identifiable living individual".
19. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
20. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
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 MPS has explained:

"This exemption has been claimed as disclosure of the requested information would identify living individual(s). This would occur as only 41 police officers were attached to the DASO unit from the 1st of January 2022 to the 13th of October 2022. Each of these 41 police officers is identifiable in that they are known to each other, given that they are a relatively small team of investigators working together on internal investigations. Equally the team are known, in their entirety, to colleagues within the DPS and more widely, to other MPS colleagues outside of the DPS. The information held would provide the following information to persons who are aware of the identities of members of the DASO unit:

- a. The rank of each police officer subject of a misconduct allegation
- b. Whether investigations are ongoing/live or concluded.
- c. The date of any disciplinary action where/if applicable.
- d. The reason for any disciplinary action where/if applicable.
- e. The nature of any disciplinary action taken where/if applicable.
- f. Whether the allegations concern each officer's work/role within the DASO Unit.

Given the small number of officers attached to the DASO unit from the 1st of January 2022 to the 13th of October 2022 and the knowledge/likely knowledge that persons would have about officers in this unit (particularly those within the unit), each piece of information would provide information that can be linked to an identifiable police officer within the DASO unit".

Motivated intruder

23. A test used by both the Commissioner and the First-tier tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of reidentification of an individual from information which, on the face of it, appears truly anonymised.

24. The ICO's Code of Practice on Anonymisation¹ notes that: "The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA".
25. In summary, the motivated intruder test is that if the risk of identification is "reasonably likely" the information should be regarded as personal data.
26. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to officers working in a fairly small team. Accordingly, were the information provided as requested it is likely that colleagues may recognise each other from that information. For example, were there a disciplinary matter recorded against the Detective Superintendent then it is obvious who that would be. Or, knowing that there is no information held against that rank also says something about that person. Even for the ranks with more officers, colleagues may be able to work out who the relevant parties are and why they are, or have been, under investigation.
27. The Commissioner has also taken into account further information that has been provided to him in confidence by the MPS which he is unable to reproduce in this notice.
28. The Commissioner is satisfied that the risk of identification is reasonably likely. Therefore, the information both relates to and identifies those concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
29. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
30. The most relevant DP principle in this case is principle (a).

¹ <https://ico.org.uk/media/fororganisations/documents/1061/anonymisation-code.pdf>

Would disclosure contravene principle (a)?

31. Article 5(1)(a) of the UK GDPR states that: "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
32. In the case of an 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 if to do so would be lawful, fair and transparent.
33. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

34. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"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".²

35. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under 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;

² 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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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".

ii) **Necessity test:** Whether disclosure of the information 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.

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

Legitimate interest

37. In considering any legitimate interest(s) in the disclosure of the requested information under 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.

38. The Commissioner understands the concerns raised by the complainant. The MPS itself also recognised that:

"A number of recent high profile incidents involving former police officers and members of the public have damaged the public's relationship and trust in the MPS. Greater transparency about the alleged misconduct of police officers may help to rebuild trust and confidence in the MPS. More broadly, the MPS also recognises that there is a legitimate interest inherent in the disclosure of information upon receipt of a request under the Act given the benefits associated with transparency and the accountability of public authorities. Greater transparency may also improve public confidence and provide a more comprehensive understanding of the MPS".

39. The Commissioner accepts that there is a clear legitimate interest on these bases.

Is disclosure necessary?

40. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under

FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

41. In this regard, the MPS has recognised:

“This request for information is focused on the DASO unit, being a small team of investigators whose role is to investigate alleged misconduct in the areas of domestic abuse and sexual offences. There are no publicly available sources of information that would address this specific request of information. Disclosure of the information held is accordingly necessary to satisfy, in part, the legitimate interests identified in connection with this request. Whilst the MPS acknowledges that the disclosure of information about the alleged misconduct of police officer(s) attached to the DASO unit would satisfy a legitimate interest, the MPS does satisfy the legitimate interests in transparency and accountability in other ways.

The MPS publishes information about upcoming and concluded gross misconduct hearings on its website³. Additionally the MPS publishes all responses to requests for information on its publication scheme⁴. This includes a range of disclosures about misconduct allegations in the MPS and importantly includes a recent disclosure about upheld disciplinary proceedings about police officers and members of police staff attached to the DPS which includes police officers within the DASO unit⁵. The MPS has accordingly and where legally possible, already disclosed information about misconduct in satisfying the identified legitimate interests in transparency and accountability”.

42. The Commissioner understands that the specific requested information is not available via any other means. Therefore, disclosure under FOIA is the least intrusive means of achieving the legitimate aim in question.

³ <https://www.met.police.uk/advice/advice-and-information/mis/misconduct-hearings/>

⁴ <https://www.met.police.uk/foi-ai/af/accessing-information/>

⁵ <https://www.met.police.uk/foi-ai/metropolitan-police/disclosure-2023/july-2023/information-about-professional-standards-department/>

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

43. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

44. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure may cause;
- whether the information is already in the public domain;
- whether the information is already known to some individuals;
- whether the individual expressed concern to the disclosure; and
- the reasonable expectations of the individual.

45. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

46. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

47. The MPS has argued:

"In the context of disclosing the personal information requested under the Act, the MPS has to consider the possible consequences of disclosure on the individuals that disclosure would affect. Police officers subject of misconduct allegations and/or any related proceedings, would not reasonably expect their personal data to be released or published by the MPS (aside from gross misconduct hearings that are published on the MPS website). Disclosure under the Act would accordingly, have an unjustified adverse effect on the individuals concerned. This would occur as the officer(s) subject of this request and the misconduct allegations, would not reasonably expect such sensitive information to be disclosed under the Act without their knowledge or consent. This would be unfair to the individual(s) concerned in this request and would also constitute a disproportionate and unwarranted level of interference with their rights and freedoms. Whilst it is acknowledged that disclosure

would satisfy legitimate interests in transparency and accountability, the MPS has already gone some way to satisfying these interests given its publication of upcoming and concluded gross misconduct hearings, various responses to requests about misconduct allegations in the MPS and importantly, a recent disclosure about disciplinary action taken against officers within the DPS [Directorate of Professional Standards] which includes officers within the DASO unit⁶. This demonstrates the willingness of the MPS to be transparent about misconduct where it is legally able to do so.

On balance, the MPS believes that the provision of misconduct data about a small team of 41 police officers within the DPS, would disclose information in an identifiable way constituting a disproportionate and unwarranted level of interference with the rights and freedoms of these police officers”.

48. The withheld information provides details concerning MPS officer/s who are or have been subject to allegations of misconduct, any such officer working in a team which focuses on vulnerable groups of people. As such, their conduct is of particular interest to the general public and the Commissioner therefore understands the wider concerns surrounding officers working in such roles. However, any such allegation may still be under investigation and may not be upheld, or any that may have been considered could already have been proved to be unfounded. In such circumstances, disclosure would be misleading and would not accurately reflect the reality. Also, if any allegation had been proven then an appropriate sanction will have already been given and any officer will only remain in the DASO if it is deemed appropriate for them to do so.
49. In the Commissioner’s view, whilst disclosure may be of genuine interest to the public, this does not mean that it is necessary. The MPS has processes for dealing with the sacking, suspension or disciplining of staff, and disclosure of allegations against identifiable officers would be counter to these processes. (It is further noted that the most serious cases are now published on its website⁷.) Put simply, any allegation/s either is/are being addressed, or will have already been addressed, and will have been dealt with appropriately by suitably qualified personnel. In the Commissioner’s view, disclosure to the world at large via FOIA

⁶ <https://www.met.police.uk/foi-ai/metropolitan-police/disclosure-2023/july-2023/information-about-professional-standards-department/>

⁷ <https://www.met.police.uk/advice/advice-and-information/mis/misconduct-hearings/about-misconduct-hearings/>

will likely hinder the disciplinary process and cause considerable distress to the identifiable parties.

50. In circumstances such as these, the law provides that there must be a pressing social need for any interference with privacy rights and that the interference must be proportionate. As there is information already available regarding the sacking, suspension or disciplining of its officers, the Commissioner does not find that providing a smaller subset of this type of information is necessary to meet the legitimate interests.

The Commissioner's view

51. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.

Right of appeal

52. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

53. 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.
54. 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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