

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 May 2023

Public Authority: Chief Constable of Hertfordshire Constabulary
Address: Hertfordshire Constabulary Headquarters
Stanborough Road
Welwyn Garden City
Hertfordshire
AL8 6XF

Decision (including any steps ordered)

1. The complainant has requested copies of correspondence between senior officers and the Home Secretary, as well as specific public order incident command logs about climate activist protests, from Hertfordshire Constabulary. Hertfordshire Constabulary said some of the information was not held, which the complainant did not challenge. It would neither confirm nor deny ("NCND") holding the remaining information, citing sections 23(5) (Information supplied by, or relating to, bodies dealing with security matters), 24(2) (National security) and 31(3) (Law enforcement) of FOIA.
2. The Commissioner does not find any of the exemptions to be engaged. He requires Hertfordshire Constabulary to take the following steps to ensure compliance with the legislation:
 - Confirm or deny whether the public order incident command logs are held. If they are, it should either disclose them or issue a fresh refusal notice in line with section 17 of FOIA.
3. Hertfordshire Constabulary 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.

Background

4. The complainant has made the equivalent request to the Metropolitan Police Service ("MPS") which the Commissioner is currently investigating under reference IC-230070-B8N2. Regarding the public order incident command logs, the MPS has confirmed holding these but has refused to disclose them, citing sections 30(1) (Investigations and proceedings), 31(1) (Law enforcement) and 40(2) (Personal information) of FOIA.
5. There are several online media articles linking Hertfordshire Constabulary with protests by Just Stop Oil¹ and Insulate Britain² in 2021 and 2022.

Request and response

6. On 2 February 2023, the complainant wrote to Hertfordshire Constabulary and requested the following information:
 - "1. All emails and/or WhatsApp messages exchanged between Hertfordshire Constabulary chief constable Charlie Hall, or superintendent Sue Jameson, and home secretary Suella Braverman between 6-11 November 2022.
 2. All emails and/or WhatsApp messages exchanged between Hertfordshire Constabulary chief constable Charlie Hall, or assistant chief constable Genna Telfer, and home secretary Priti Patel between 13-23 September 2021.
 3. Copies of any Public Order Incident Command Logs completed in relation to the Just Stop Oil protests in November 2022.
 4. Copies of any Public Order Incident Command Logs completed in relation to the Insulate Britain protests in September 2021".
7. On 2 March 2023, Hertfordshire Constabulary responded. It said that no information was held in respect of parts (1) and (2) of the request. It would NCND holding any information in respect of parts (3) and (4) of the request, citing sections 23(5), 24(2) and 31(3) of FOIA.

¹ <https://www.bbc.co.uk/news/uk-england-beds-bucks-herts-63569177>

² <https://www.bbc.co.uk/news/uk-england-beds-bucks-herts-59184640>

8. The complainant requested an internal review on 3 March 2023 but has not been provided with one.

Scope of the case

9. The complainant contacted the Commissioner on 11 May 2023 to complain about the way his request for information had been handled; he specifically referred to not having received an internal review at that time.
10. As the complainant had already waited more than 40 working days for an internal review to be provided, the Commissioner has used his discretion and has proceeded directly to an investigation.
11. On 11 May 2023, Hertfordshire Constabulary was informed accordingly.
12. The Commissioner has taken the complainant's position when asking for an internal review as his being grounds of complaint. This was as follows:

"Thank you ... for confirming that Hertfordshire Constabulary does not hold information in relation to points 1 and 2 of my request.

I'm writing to request an internal review of your response to points 3 and 4, on the following grounds:

You have invoked Section 23(5), which relieves the duty on a public authority to confirm or deny that information exists, if disclosure would involve information that was directly or indirectly supplied by any of the bodies listed in Section 23(3). It is not clear why Section 23(5) would apply in this instance. The requested public order incident command logs would be prepared by Hertfordshire Constabulary, not any of the bodies listed in Section 23(3), and therefore Section 23(5) should not apply.

You state that confirming or denying the existence of the requested information, or providing any information that aids in identifying whether or not Hertfordshire Constabulary has conducted "Any other counter criminal or terrorist operations at protests", would "make security measures less effective" and "would provide those intent on committing such acts in the future with valuable information as to whether the police are targeting their investigations". It is already a matter of public record that Hertfordshire Constabulary conducted significant police operations in response to the Insulate Britain and Just Stop Oil protests:

Insulate Britain: Herts Police confirm 29 arrests³

Herts Police name man charged after M25 Just Stop Oil protests⁴

The College of Policing APP on public order command⁵ states that logs of incidents should be kept to provide a "clear audit trail". It is reasonable to assume that Hertfordshire Constabulary would adhere to this professional practice and hard to see how confirming the existence of these logs would have any impact on national security and therefore how Section 24(2) would apply.

You state that to confirm or deny that the requested information is held would "compromise law enforcement tactics" and "give vital information to criminals". As stated above, the Hertfordshire Constabulary policing operations with regards to Insulate Britain and Just Stop Oil are already a matter of public record - and keeping a public order incident command log is an established part of policing professional practice. On this basis, there is no reason why there would be any prejudice to the matters listed in Section 31(1) by confirming or denying the existence of this information".

13. The Commissioner will consider the application of exemptions to the request below.

Reasons for decision

Neither confirm nor deny ("NCND")

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

³ <https://www.hertfordshiremercury.co.uk/news/hertfordshire-news/insulate-britain-herts-police-confirm-5940392>

⁴ <https://www.hertfordshiremercury.co.uk/news/hertfordshire-news/herts-police-charge-person-after-7807050>

⁵ <https://www.college.police.uk/app/public-order/command>

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. Hertfordshire Constabulary has taken the position of neither confirming nor denying whether it holds the information requested in parts (3) and (4) of the request, citing sections 23(5), 24(2) and 31(3) of 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 Hertfordshire Constabulary 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 Hertfordshire Constabulary is entitled to NCND whether it holds any public order incident command logs in respect of the two incidents specified in the request.

Hertfordshire Constabulary's position

19. Hertfordshire Constabulary has provided the following "Overall Evidence of Harm" rationale to cover its citing of all three exemptions:

"Any release under FOIA is a disclosure to the world, not just to the individual making the request. Providing any notice that confirms or denies the existence of any other policing operations at protests would make security measures less effective. In addition, the Police are charged with enforcing the law, detecting, and preventing crime, and protecting the communities we serve. Confirming or denying whether any other information is held would impact on the effectiveness of police investigations, thereby hindering the prevention and detection of crime.

The threat from terrorism cannot be ignored. It is generally recognised that the international security landscape is increasingly complex and unpredictable. The current [UK threat level](#) from international terrorism, based on intelligence, is assessed as substantial which means that a terrorist attack is likely.

In order to counter criminal and terrorist behaviour, it is vital that the police have the ability to work together, where necessary covertly, to obtain intelligence within current legislative frameworks to assist in the investigative process to ensure the successful arrest

and prosecution of offenders who commit or plan to commit crime including acts of extremism and terrorism.

To achieve this goal, it is vitally important that information sharing takes place between police officers, members of the public, police forces as well as other law enforcement bodies within the United Kingdom. Such action would support policing and counter-terrorism measures in the fight to deprive criminals including extremists of their ability to commit crime.

The impact of providing information under FOI which aids in identifying whether or not Hertfordshire Constabulary has conducted any other counter criminal or terrorist operations at protests would provide those intent on committing such acts in the future with valuable information as to where the police are targeting their investigations”.

Section 23 – information supplied by, or relating to, bodies dealing with security matters

Section 24 – national security

20. Sections 23(5) and 24(2) exclude the duty of a public authority to confirm or deny whether it holds information which, if held, would be exempt under section 23(1) or 24(1) respectively.
21. Information relating to security bodies specified in section 23(3) is exempt information by virtue of section 23(1). Information which does not fall under section 23(1) is exempt from disclosure under section 24(1), if it is required for the purpose of safeguarding national security.
22. By virtue of section 23(5) the duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in section 23(3).
23. By virtue of section 24(2) the duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.
24. The Commissioner does not consider the exemptions at sections 23(5) and 24(2) to be mutually exclusive and he accepts that they can be relied on independently or jointly in order to conceal whether or not one or more of the security bodies has been involved in an issue which might impact on national security. However, each exemption must be applied independently on its own merits. In addition, the section 24 exemption is qualified and is therefore subject to the public interest test.

25. The test as to whether a disclosure would relate to a security body is decided on the normal standard of proof, that is, the balance of probabilities. In other words, if it is more likely than not that the disclosure would relate to a security body then the exemption would be engaged.
26. It is initially noted that Hertfordshire Constabulary's involvement with both protest groups during the time span of the request is clearly in the public domain. The groups staged largescale public protests which caused significant disruption and were widely reported in the media.
27. Hertfordshire Constabulary has referred to terrorism, but has not explained how its interaction with either of the two protest groups referred to could be classified as 'terrorism' or be of particular interest to any security body. The requested logs are, by their definition, "public order" logs and the Commissioner cannot therefore envisage a link with terrorism, security services or national security.
28. Having considered the wording provided by Hertfordshire Constabulary above, the Commissioner is not convinced that it has provided any realistic link between confirmation or denial as to whether or not any public order incident command logs exist and the likely possible involvement of any security body. He also is not convinced that confirmation or denial could in any way harm national security.
29. It also needs to be reiterated that the Commissioner is **not** considering the actual disclosure of any logs that may be held at this stage, only the confirmation of whether or not any exist.
30. From the rationale provided the Commissioner is not persuaded that either section 23 or 24 is engaged as the type of policing work that the logs refer to, if held, relate to "public order".

Section 31 – law enforcement

31. Section 31(3) provides that a public authority is not obliged to confirm or deny holding information described in a request if to do so would, or would be likely to, prejudice any of the matters mentioned in section 31(1). Hertfordshire Constabulary did not specify which limb it was relying on, however, based on the wording it provided, the Commissioner has taken this to be limb 31(1)(a), ie the prevention and detection of crime.
32. When considering a prejudice based exemption such as this, the Commissioner will identify the applicable interests within the relevant exemption; identify the nature of the prejudice and that the prejudice claimed is real, actual and of substance; consider whether there is a causal link between disclosure and the prejudice claimed; and, decide whether prejudice would, or would be likely to, occur.

33. The issue for the Commissioner to consider in this case is whether confirming or denying that public order incident command logs exist would, or would be likely to, prejudice the prevention or detection of crime.
34. Hertfordshire Constabulary has argued above that confirmation or denial would impact on the effectiveness of police investigations, however, it has not explained how confirming or denying whether it holds any public order logs would have this effect. The Commissioner accepts that the police need to be able to obtain intelligence within "current legislative frameworks", but this argument fails to explain why providing a confirmation or denial would impact on this ability.
35. Hertfordshire Constabulary also refers to information sharing being vitally important but, again, this does not seem to have any direct bearing on the NCND stance it has taken in respect of the logs.
36. Finally, it is not clear to the Commissioner how confirmation or denial under FOIA would aid in establishing whether Hertfordshire Constabulary "has conducted **any other** counter criminal or terrorist operations at protests" (Commissioner's emphasis). As stated above, the Commissioner is not considering the disclosure of the content of any public order logs that may be held, only the confirmation of whether or not any are actually held. Were they held, and were their content actually able to evidence any of the types of harm identified by Hertfordshire Constabulary, then relevant exemptions may then be appropriately engaged and cited.
37. Based on the information provided, the Commissioner is not persuaded that section 31(3) of FOIA is engaged.

The Commissioner's decision

38. The Commissioner considers that, in all the circumstances of this case, Hertfordshire Constabulary was not entitled to give a NCND response under any of the exemptions cited. Hertfordshire Constabulary should take the step at paragraph 2 of this notice.
39. For the avoidance of doubt, nothing in this decision notice should be taken to mean that Hertfordshire Constabulary does, or does not, hold the requested information. The Commissioner has focused on Hertfordshire Constabulary's NCND position in light of the arguments provided above and media articles which are in the public domain which identify its involvement with related protests. He also notes that, in its response to the equivalent request (see paragraph 4 above) the MPS has confirmed holding information and did not consider such a confirmation to be harmful.

Other matters

40. Although they do not form part of this notice, the Commissioner wishes to highlight the following matters of concern.

Section 45 – internal review

41. There is no obligation under FOIA for a public authority to provide an internal review process. However, it is good practice to do so, and where an authority chooses to offer one, the code of practice established under section 45 of FOIA sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales.
42. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
43. The complainant asked for an internal review of his request on 3 March 2023 and, more than 40 working days later, one had not been provided.
44. The Commissioner considers that in failing to conduct an internal review within the timescales set out above, Hertfordshire Constabulary has not acted in accordance with the section 45 code. This will be noted for monitoring purposes.

Right of appeal

45. 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

46. 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.
47. 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
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