ico. Information Commissioner's Office

Freedom of Information Act 2000 (FOIA)

Decision notice

Date:	**16 November 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 three files from the Metropolitan Police Service (the "MPS"). The MPS refused to comply with the request on the basis that it was burdensome, citing section 14(1) (Vexatious requests) of FOIA.

2. The Commissioner's decision is that the request was vexatious. No steps are required.

Request and response

3. On 20 March 2023, the complainant wrote to the MPS and requested the following information:

> "I'm making an FOI request for the following files:
>
> MEPO 26/377 - Antony Claud Frederick LAMBTON MP (formerly Viscount Lambton): allegations of possession of drugs following his association with Honora Mary (Norma) LEVY and her ring of prostitutes. Subsequent resignation of Lord Lambton from his position as junior minister at the Ministry of Defence. Statements 1-294; original statements; exhibits book; statements book.

MEPO 26/378 - Antony Claud Frederick LAMBTON MP (formerly Viscount Lambton): allegations of possession of drugs following his association with Honora Mary (Norma) LEVY and her ring of prostitutes. Subsequent resignation of Lord Lambton from his position as junior minister at the Ministry of Defence. Statements 295-502; documents 48- 312; index to statements and documents; schedule of events and tape transcriptions.

MEPO 26/379 - Antony Claud Frederick LAMBTON MP (formerly Viscount Lambton): allegations of possession of drugs following his association with Honora Mary (Norma) LEVY and her ring of prostitutes. Subsequent resignation of Lord Lambton from his position as junior minister at the Ministry of Defence. Police statements; tape transcriptions; Report of the Security Commission, July 1973".

4. On 17 April 2023, the MPS responded. It advised that the request was vexatious because of the disproportionate burden that complying with it would impose. It further advised that it had been unable to locate one of the files.

5. The complainant requested an internal review on 21 April 2023. He questioned the missing file and also said:

"As you point out 'Under the Public Records Act 1958, files that are approaching the time period of 30 years (to be gradually reduced to 20 years Section 45 of the Constitutional Reform and Governance Act 2010) are routinely reviewed for their suitability for transfer to a public record office. The MPS routinely transfers such files to the National Archives. The MPS Records Management Manual states the following in relation to the Transfer of Records to the National Archives:

'6.2.1 The Public Records Act 1958 requires records over 20 years old that are of historical value, to be selected and transferred to The National Archives (TNA). This review is carried out by Records Management Branch, in accordance with the agreed Operational Selection Policy. 6.2.2 Where records are required to be retained beyond 20 years of creation an application to do so must be submitted to the Lord Chancellor's Advisory Council on National Records and Archives. This will be completed by RMB

6.2.3 These records may be sent as either 'closed' or 'open' records.

> 6.2.4 Closed records are those records where the content is of continuing sensitivity and cannot be made available for public inspection. Closed records are accompanied by a date by which all sensitivity concerns will have passed and the record is opened by the TNA on that date. Where no sensitivity exists records are open for public inspection and are included in TNA's catalogues which are available on the Internet.'

Of course, as 6.2.1 states the period is now 20 years. TNA's records merely state that the three files have been retained under s. 3(4) of the PRA [Public Records Act]. No Lord Chancellor's Instrument is cited. The three files are now 50 years' old. Thus, MPS should have, in any event, reviewed them in accordance with their own 'Records Management Manual'. Plainly, any such review would require the sort of time expended which is described in the letter to me pleading s.14.

The letter does not mention any such review or any application under s.3 (4) for approval of retention. The files surely fall within PRA as 'records which ought to be permanently preserved' [s.3(1)] and MPS cannot avoid its obligations under PRA to review a file for transfer to TNA simply because the file is lengthy and/or complex".

6. The MPS provided an internal review on 15 June 2023 in which it maintained its position. It also advised that MEPO 26/379 was the missing file.

Scope of the case

7. The complainant contacted the Commissioner on 3 August 2023 to complain about the way his request for information had been handled. His grounds of complaint were as follows:

"The Metropolitan Police Service has refused a request to release a number of files on 'The Lambton Affair' which the Internal Review confirmed by using Section 14(1) exemption using the burden argument as it only has one member of staff dealing with 'Special Operations'. Given the public interest case, which the MPS accepts, this would appear to go against the appeal in Cabinet Office vs

Information Commissioner and Ashton [2018] UKUT 208[1] (AAC) – 21 June 2018. Given that very large files on the similar 'Profumo Affair' were released by the National Archives from the Security Service in March 2023 it is not a persuasive argument to be used to deny the public access to this information. Some pages were redacted as per the OSA [Official Secrets Act] and identities of some informants ('sources') but not personal references as the majority of people were dead, as in the Lampton case".

8. The complainant did not refer to the file that the MPS advised was missing. The commissioner has therefore not further considered this point.

9. The Commissioner will consider the MPS' application of section 14(1) of FOIA to the request below.

10. It should be noted that the Commissioner will not take into account what the complainant considers to be a comparable disclosure made by TNA regarding the Profumo Affair. Having made enquiries, TNA were unaware of any Profumo-related FOIA requests which resulted in any disclosure within the last year. They advised that 12 open files were transferred to them in October 2022[2]. The method for opening these records would have been via a sensitivity review before transfer to TNA as historical records[3]. This regime is outside of the Commissioner's jurisdiction and not comparable to FOIA.

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[1]https://assets.publishing.service.gov.uk/media/5b57139a40f0b6339963e8cf/GIA_2782_2017-00.pdf

[2]https://discovery.nationalarchives.gov.uk/results/r?_q=profumo&_ser=KV%202&id=C14997

[3] https://www.nationalarchives.gov.uk/information-management/manage-information/selection-and-transfer/sensitivity-reviews-on-selected-records/

Reasons for decision

Section 14 – Vexatious requests

11. Section 14(1) of the FOIA states that section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious. The section is not subject to a public interest test.

12. The term 'vexatious' is not defined in the FOIA. The Upper Tribunal considered the issue of vexatious requests in the case of the Information Commissioner v Devon CC & Dransfield (Dransfield). The Tribunal commented that vexatious could be defined as the "manifestly unjustified, inappropriate or improper use of a formal procedure". The Tribunal's definition clearly establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.

13. In the Dransfield case, the Upper Tribunal also found it instructive to assess the question of whether a request is truly vexatious by considering four broad issues:

    (1) the burden imposed by the request (on the public authority and its staff);
    (2) the motive of the requester;
    (3) the value or serious purpose of the request; and,
    (4) harassment or distress of and to staff.

14. The Upper Tribunal did, however, also caution that these considerations were not meant to be exhaustive. Rather, it stressed the:

    > "…importance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests" (paragraph 45).

15. The Commissioner has published guidance on dealing with vexatious requests[4]. That guidance includes a number of indicators that may apply

[4] https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-14-dealing-with-vexatious-requests/

in the case of a vexatious request. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of the case will need to be considered in reaching a judgement as to whether a request is vexatious.

16. As discussed in the Commissioner's guidance, the relevant consideration is whether the request itself is vexatious, rather than the individual submitting it.

17. Sometimes it will be obvious when a request is vexatious, but sometimes it may not. In this respect, the Commissioner's considers that the key question to consider is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.

18. In the Commissioner's view, section 14(1) is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress. This will usually involve weighing the evidence about the impact on the authority and balancing this against the purpose and value of the request. This should be judged as objectively as possible; in other words, would a reasonable person think that the purpose and value are enough to justify the impact on the public authority.

19. In particular, the Commissioner accepts that there may be cases where a request could be considered to be vexatious because the amount of time required to review and prepare the information for disclosure would place a grossly oppressive burden on the public authority. This is the position adopted by the MPS in this case.

20. The Commissioner believes that there is a high threshold for refusing a request on such grounds. This means that a public authority is most likely to have a viable case where:

    - the requester has asked for a substantial volume of information **and**
    - the authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the Commissioner **and**
    - any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.

21. It is the MPS's position that to comply with the request would be an unreasonable burden and would require a disproportionate effort which cannot be justified by the purpose and value of the request.

The complainant's view

22. The complainant's views are included in paragraphs 5 and 7 above.

The MPS' view

23. The MPS has explained that the request is vexatious on the basis of the substantial volume of information for consideration and that the files contain potentially exempt information. It provided a very detailed response to the complainant when refusing the request, which the Commissioner has taken into account, and he has covered some of the main points below. As the Commissioner considers this to be a lengthy but relevant response, the main content of the refusal has been reproduced in an annex at the end of this notice.

24. Regarding the substantial volume of information, the MPS explained to the complainant that the files were held in hard copy format by the MPS. In order to comply with the request it would be necessary to:

    - locate and retrieve all files relating to this subject matter
    - read all of this information

25. It explained that it had recovered three of the files which consisted of two very large files and one medium-sized file. A quick review of the largest file found that it had six sub folders containing over 1,000 single and double sided typed and handwritten documents; additionally it held three books containing hand written information. It advised that all of this material was classified as 'Secret'[5].

26. The MPS explained that in order to assess these documents additional time would be needed to:

    - Consider and determine what information should be redacted.
    - Consider potential exemptions – eg if the information relates to police intelligence, how it was obtained during the course of police enquiries ie was it provided in confidence and/or contains personal information such as names and addresses etc.
    - Consult relevant stakeholders.
    - Produce a redacted copy of the requested information.

    Adding that this may require the information to be read multiple times.

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[5] https://www.gov.uk/government/publications/government-security-classifications

27. The MPS also explained that the burden of the request was likely to place demands upon a single member of staff due to its sensitivity. This meant that there would be a significant opportunity cost associated with compliance as the work required would be at the expense of processing other FOIA requests or policing duties.

28. It added that, based on previous experience, most of the information would likely be exempt from disclosure as it contained personal data, including sensitive personal data.

29. In its internal review, the MPS said:

> "The MPS recognises that there is an inherent value in the disclosure of information upon request, given the associated benefits of openness and transparency. The MPS also appreciates that there is public interest in the subject matter of your request, that is, historic information pertaining to members of parliament. Additionally, the MPS acknowledges that all requests for information place some degree of demand on the MPS' resources in terms of costs and staff time, and we expect to absorb a certain level of disruption to meet our underlying commitment to transparency and openness under the Act, however, with respect to the information you seek, this has to be balanced against the burden that would be placed on the MPS in order to comply with your request given the volume of information within the scope of your request. It would take an excessive amount of time to review and prepare the requested information for disclosure...
>
> Whilst the MPS is a large public authority, the number of Freedom of Information Act requests that it receives is far beyond that of any other police service. For example, in 2022, the MPS received 4981 FOIA requests and 338 FOIA related complaint, appeals and tribunal matters[6]. There are currently 18 members of staff dealing with first stage FOIA requests. This equates to each member of staff dealing with approximately 277 requests per year in addition to any other ad hoc tasks they are required to undertake. This is a significant number of requests per member of staff. In respect of information requests concerning Specialist Operations, currently there is only one member of staff dealing with these requests which require a higher vetting level…

[6] https://www.met.police.uk/sd/stats-and-data/met/freedom-of-information-requests-dashboard/

> As detailed in our response to you, some of the information is classified as secret. The task of reviewing the information within the scope of your request to determine what potentially exempt information would need to be redacted would have to be conducted by the Information Manager concerned in conjunction with relevant stakeholders. This would be an onerous task as potentially exempt information cannot easily be isolated because it is scattered throughout the requested information which is in the form of paper records. To carry out this task would cause serious disruption to the day to day work of the individuals assigned to review the material and make it suitable for open publication. As there are only a limited number of individuals who would have the experience, knowledge of the information and sufficient clearances to process the request, the burden of the request is magnified".

Is the request vexatious?

30. In the Commissioner's view, section 14(1) of the FOIA is designed to protect public authorities by allowing them to refuse requests which have the potential to impose a disproportionate or unjustified level of burden, disruption, irritation or distress. Balancing the impact of a request against its purpose and value can help to determine whether the effect on the public authority would be disproportionate Was the request vexatious

31. It is for public authorities to demonstrate to the Commissioner why the exemption at section 14 applies and the Commissioner considers there to be a high threshold for refusing a request under section 14(1). The MPS has essentially argued that the request is vexatious because compliance with it would be burdensome; the burden would be disproportionate to the public benefit that would flow from disclosure in terms of the underlying purpose of the request.

32. In reaching a decision in this case the Commissioner has considered the submissions provided by the MPS and the arguments presented by the complainant.

33. The Commissioner notes that the main arguments for disclosure made by the complainant is that the files are now 50 years' old and that the MPS should already have reviewed them in accordance with its records management policy, any such review necessarily superseding the burden required for complying with his request.

34. However, this work has clearly not yet been undertaken and the Commissioner cannot comment on how the MPS chooses to use its resources or why it has not already undertaken the this work. This

argument therefore carries little weight as regards disclosure under FOIA.

35. The complainant has also referred to a decision made by the Upper Tribunal (UT) in his grounds of complaint whereby the significant public interest in disclosure 'trumped' the burden in compliance. In that case, the Commissioner's decision was that a request to the Cabinet Office was vexatious on the grounds of burden, however, this decision was subsequently over-turned by the First-tier Tribunal (FTT). On further appeal to the UT, the FTT's position was maintained. However, in its findings the UT did accept that 14(1) may still be engaged on the grounds of resources alone and commented that: "a substantial public interest underlying the request for information does not necessarily trump a resources argument". Regarding the FTT decision[7] it said:

> "…the [FTT] was engaged, as it had to be, on a holistic assessment of vexatiousness in the round, talking into account the appropriate constellation of relevant considerations. It did not simply (and simplistically) conclude that 'this is a request for information which is of great public value and significance' and therefore it necessarily overrode any consideration of the burden on the public authority. Rather, the scales of the various factors were weighed in the balance and an all-round assessment arrived at on the facts, namely that the request was not vexatious. In doing so the Tribunal acknowledged entirely properly that the threshold for a finding of vexatiousness is a high one and the strength of the public interest in the requested material is necessarily highly material (but not determinative) of that assessment". (paragraph 32)

36. In this regard, the Commissioner notes that the complainant did not present any arguments in support of the view that the requested information was of "great public value and significance", rather he considered that the information should have already been transferred to TNA. Whilst the Commissioner recognises that there will clearly be a public interest in the disclosure of such material, he considers that the MPS has evidenced a significant burden to comply with the request, which concerns more material at a higher classification than was considered in the case cited by the complainant.

[7] https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2042/Ashton,%20Prof%20Nigel%20EA-2016-0272%20(25.07.17)%20AMENDED.pdf

37. Furthermore, the Commissioner also notes that the MPS has accepted that there is the potential for the public interest to be served by the requested information being reviewed and transferred to TNA at a later date.

38. The Commissioner has also considered whether the purpose and value of the request are enough to justify the impact on the MPS and here he has taken into account the further arguments which have been provided by the MPS and the impact on its services. The Commissioner accepts that the large amount of data which is caught within the scope of the request is also likely to encompass information that is exempt from disclosure under further exemptions, such as sections 31 (Law enforcement) and 40 (Personal information) of FOIA and that this will be scattered throughout the material. The 'secret' categorisation may also mean that the MPS needs to consider the involvement of a section 23 body (Security services) or 24 (National security) of FOIA. It is therefore likely that further consultation may be required with other stakeholders.

39. In the Commissioner's opinion the MPS has evidenced a significant volume of work, one which would place a grossly excessive burden on the MPS to undertake. The Commissioner considers this burden is arguably amplified by the fact that only a limited number of individuals would have the experience/knowledge of the information, and sufficient clearances, to process the request. He is therefore satisfied that the MPS has demonstrated that complying with the request would place a grossly excessive burden on it.

40. The Commissioner has considered both the complainant's position and the MPS's arguments regarding the information request in this case. In reaching a decision he has balanced the purpose and value of the request (as he has determined) against the detrimental effect on the MPS of responding to it.

41. Taking all of the factors into consideration, the Commissioner does not agree that the purpose and value of the request is sufficient to justify the grossly oppressive and burdensome impact on the MPS. Despite any value in the disclosure of this requested information, he does not accept that this is sufficient to justify placing such a burden on the MPS. As estimated in its response to the complainant (see Annex at the end of this notice), a conservative estimate to consider 1,000 pages for disclosure, ie the largest file only, would necessitate this particular member of staff spending 8 hours per day, for over 20 days in total, just to process this part of the request, noting that in practice this may take considerably longer.

42. He therefore finds that the request is vexatious and that the MPS was entitled to rely on section 14 of FOIA to refuse it.

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Right of appeal

43. 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

44. 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.

45. 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
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Other matters

46. Although they do not form part of this notice the Commissioner wishes to highlight the following.

47. The Commissioner would like to thank TNA for their assistance with this case.

Non-confidential Annex - refusal of request

Burden on the MPS

Under the heading 'Burdensome requests', the ICO's guidance cites the circumstances relating to First-Tier Tribunal case EA/2011/0222 and states:

> '…the Tribunal found that the March 17 request was vexatious and suggested that, **under certain circumstances, it would be appropriate to refuse a burdensome request under section 14, even if the information was also covered by section 12.** In allowing the IPCC's appeal the Tribunal observed that:
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> > ''**A request may be so grossly oppressive in terms of the resources and time demanded by compliance as to be vexatious, regardless of the intentions or bona fides of the requester. If so, it is not prevented from being vexatious just because the authority could have relied instead on s.12** [section 12 of the FOIA].'(paragraph 15)' [Emphasis added]

The First-Tier Tribunal decision[8] further stated:

> 'In our view, the ICO and the Tribunal should have no hesitation in upholding public authorities which invoke s.14(1) in answer to grossly excessive or ill–intentioned requests and **should not feel bound to do so only where a sufficient number of tests on a checklist are satisfied**.' [emphasis added]

The ICO's section 14 guidance further states:

> '67. An authority cannot claim section 12 for the cost and effort associated with considering exemptions or redacting exempt information.
> 68. Nonetheless, it may apply section 14(1) where it can make a case that the amount of time required to review and prepare the information for disclosure would impose a grossly oppressive burden on the organisation.

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[8] http://www.informationtribunal.gov.uk/DBFiles/Decision/i725/20120329%20Decision%20EA20110222.pdf

69. However, we consider there to be a high threshold for refusing a request on such grounds. This means that an authority is most likely to have a viable case where:

- The requester has asked for a substantial volume of information **AND**
- The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the ICO **AND**
- Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.'

Burden on the MPS - Substantial volume

The ICO's guidance titled 'Requests where the cost of compliance exceeds the appropriate limit'[9]4 states:

> '14…a public authority cannot include the staff time taken, or likely to be taken, in considering whether any exemptions apply in the costs estimate as this activity does not fall within the list of permitted activities.
> 15. Also, the staff time taken, or likely to be taken, in removing any exempt information in order to leave the information that is to be disclosed, often referred to as 'redaction', cannot be included as part of the costs of extracting the requested information.'

MEPO 26/377, 26/378 and 26/379 consists of 5 parts. A large volume of information relating to Antony Claud Frederick Lambton MP (formerly Viscount Lambton) and allegations of possession of drugs following his association with Honora Mary (Norma) Levy and her ring of prostitutes and his subsequent resignation as junior minister at the Ministry of Defence are held in hard copy format by the MPS. In order to comply with your request it would be necessary to:

- locate and retrieve all files relating to this subject matter
- read all of this information

I can advised that three files have been recovered (Part 2, 2a and 5) which consists of two considerably large files and one medium-sized file. A quick review of the largest file, Part 2, note that it is divided into 6 sub folders

[9] https://ico.org.uk/media/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

containing over 1,000 single and double sided typed and handwritten documents in total. In addition, there are three books containing hand written information. All of these are marked at 'Secret'.

Burden on the MPS - Potentially Exempt Information

Given the title of each file and the allegations made, to assess these documents additional time would also be required to:

- Consider and determine what information should be redacted
- Consider potential exemptions – e.g. if the information relates to police intelligence, how it was obtained during the course of police enquiries i.e. was it provided in confidence and/or contains personal information such as names and addresses etc.
- Consult relevant stakeholders
- Produce a redacted copy of the requested information

This may also require the requested information to be read multiple times.

The nature of the information contained within these files, is internally sensitive as it relates to allegations against a former MP. As previously advised the files and content are protectively marked 'Secret'.

A practical consequence of this is that the 'burden' of your request is likely to place demands upon one member of staff. It is likely that there would be a significant opportunity cost associated with complying with your request. For example, any 'man-hours' spent reading the requested information or performing related tasks would probably be at the expense of processing other FOIA requests or policing duties.

Past experience, supported by previous ICO decision notices and First-Tier Tribunal decisions, suggests that most of the information would be exempt from disclosure as it contains personal data, including sensitive personal data.

The requested information would also contain free text in a hard copy format that may contain personal data that may not be easy to identify, assess and/or remove. In relation to personal data, the ICO's code of practice titled 'Anonymisation: Managing Data Protection Risk'[10] states:

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[10] https://ico.org.uk/media/for-organisations/documents/1061/anonymisation-code.pdf

> 'The definition of 'personal data' can be difficult to apply in practice for two main reasons:
> • the concept of 'identify' – and therefore of 'anonymise' - is not straightforward because individuals can be identified in a number of different ways. This can include direct identification, where someone is explicitly identifiable from a single data source, such as a list including full names, and indirect identification, where two or more data sources need to be combined for identification to take place; and
> • you may be satisfied that the data your organisation intends to release does not, in itself, identify anyone. However, in some cases you may not know whether other data is available that means that re-identification by a third party is likely to take place.'
>
> '…Note that 'identified' does not necessarily mean 'named'. It can be enough to be able to establish a reliable connection between particular data and a known individual…'

With this in mind, even with the redaction of specific information, it may still be sufficient 'to establish a reliable connection between particular data and a known individual'. It is also pertinent to note that individuals such as family and friends of the individual(s) concerned may be able to ascertain or infer new information from such a disclosure which may in the circumstances be unfair to the data subject. For example, where the identification of an individual would involve disclosing or inferring very personal and/or potentially sensitive personal data where they may not have been known to have been of interest in this investigation.

The Information Tribunal decision in relation to Case No. EA/2009/0070 states:

> '…Since the public interest must be assessed in all the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought.'

Therefore, public authorities are required to consider each item of information based upon the specific circumstances of the case. The circumstances relating to each individual or data subject whose personal data is contained within MEPO 26/377, MEPO 26/378 and MEPO 26/379 files will also vary. Furthermore, the information recorded within these files may be insufficient to identify or determine the harm in disclosure. Consequently, there are likely to be a large number of variables, potentially requiring:

- consultation with multiple stakeholders
- research to determine the public interest factors relevant to the circumstances of the request and any potential disclosure.
- time to determine and carry out any necessary redactions

The Information Tribunal decision in relation to Case No. EA/2013/0270 related to the use of section 14(1) in response to a 'burdensome' request and stated:

> '10. It has often been observed that FOIA is a statute dealing with the disclosure of information, not the discovery of documents. A request which "describes the information requested" by reference to a set of documents often requires a public authority to consider its duties as a controller of personal data. The disclosure of documents, if they contain personal data, will amount to a processing of that data and must therefore comply with the Data Protection Act (DPA). **The right to information under FOIA does not trump the rights to privacy contained in the DPA**.' [Emphasis added]

The requested information consists of 'a set of documents' containing a large volume of sensitive personal data, as the files refer to an alleged offence committed by a named individual, but also may include any interested parties. Therefore, it is to be expected that information relating to this might contain details relating to:

- the commission or alleged commission of any offence
- any proceedings for any offence committed or alleged to have been committed by the data subject, the disposal of such proceedings or the sentence of any court in such proceedings.

The requested information may also contain information relating to other categories of sensitive personal data such as information relating to:

- Race or ethnicity
- Political Opinions
- Trade Union membership
- Religious beliefs or beliefs of a similar nature
- The physical or mental health or condition of an individual
- Sexual life

In relation to 'sensitive personal data', the ICO Guidance titled 'Key definitions of the Data Protection Act'[11] states:

> 'The presumption is that, because information about these matters could be used in a discriminatory way, and is likely to be of a private

[11] https://ico.org.uk/for-organisations/guide-to-data-protection/key-definitions/

> nature, **it needs to be treated with greater care than other personal data**.' [Emphasis added]

This again illustrates the fact that reading the requested information at least once is the bare minimum amount of work that would be necessary to comply with your request.

The purposes for which the MPS uses personal data are stated within the MPS Fair Processing Notice[12]. Section 1 of this document outlines 2 broad purposes for which the MPS obtains, holds, uses and discloses personal data:

- The Policing Purpose - which includes the prevention and detection of crime; apprehension and prosecution of offenders; protecting life and property; Preserving order; maintenance of law and order; rendering assistance to the public in accordance with force policies and procedures; National security; defending civil proceedings and any duty or responsibility of the police arising from common or statute law.

- The provision of services to support the Policing Purpose Individuals have a reasonable expectation of confidentiality to the extent that any allegations of wrongdoing are unproven, related information would have the potential to cause unwarranted and/or disproportionate harm.

The Ministry of Justice guidance on publishing sentencing outcomes[13] sets out an approach to disclosing information relating to criminal offences and outlines a number of factors that should be taken into consideration, including a checklist that in part states:

> 'Such publicity should be time-limited. The objective is to draw attention to the conviction and sentence when they are handed down, not to provide any kind of ongoing record. The longer information is retained on a website, the greater the opportunity for that information to be misused or subjected to secondary processing by third parties, and the greater the risk that it will become out of date and/or inaccurate. As a general rule, information should be removed from websites after a month.'

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[12] http://www.met.police.uk/foi/pdfs/other_information/corporate/mps_fair_processing_notice.pdf

[13] http://webarchive.nationalarchives.gov.uk/20130206003712/http://www.justice.gov.uk/downloads/courts/sentencingoutcomes/publishing-sentencing-outcomes-guidance.pdf

While these timescales may not be directly transferable to the circumstances of your request, the above quote highlights the difficulty in controlling or recalling information once it has been published and harm that may be caused by sensitive personal data remaining in the public domain for a prolonged period of time.

Volume II of the Leveson Report on page 791, paragraph 2.39[14] states Lord Leveson's view on the naming or release of identifying details as follows:

> 'I think that it should be made abundantly clear that save in exceptional and
> clearly identified circumstances (for example, where there may be an immediate risk to the public), the names or identifying details of those who are arrested or suspected of a crime should not be released to the press nor the public.'

It is also pertinent to note that the time period relevant to the investigation into these allegations against Antony Claud Frederick LAMBTON MP predated the Freedom of Information Act and that prior to the Act, public interest immunity would have been claimed in relation to investigating officer's reports. A response to this effect was provided in the House of Commons in 1998 in response to requests for disclosure regarding Operation Countryman[15].

I am also mindful of ICO decision notice FS50431011[16] which stated the following in relation to a request for a file containing personal data held by The National Archives (TNA):

> 'Given that the file covers information from the period 1952 to 1969 it is possible that some of the people involved in the case are now deceased. Although some of the people referred to in the file may be deceased the Commissioner's position in this case is to be cautious and

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[14] http://webarchive.nationalarchives.gov.uk/20140122144905/http://www.officialdocuments.gov.uk/document/hc1213/hc07/0780/0780.asp

[15] https://www.publications.parliament.uk/pa/cm199798/cmhansrd/vo980204/text/80204w22.htm
http://www.publications.parliament.uk/pa/cm199798/cmhansrd/vo980326/text/80326w06.htm

[16] https://ico.org.uk/media/action-weve-taken/decision-notices/2012/735786/fs_50431011.pdf

> assume that the information is personal data because he does not have the capability or resource to investigate this and nor, for the same reason, does he expect TNA to have done so.'

Similar considerations would apply to these files as they would primarily relate to an investigation conducted in 1973 and some of the people involved in the case may now be deceased.

Therefore, with the above in mind, it would be reasonable for an individual to expect that any information that the MPS holds in relation to them would only be used to support a policing purpose and would not be unlawfully disclosed to 3rd parties.

The ICO decision notices and Tribunal decision quoted above demonstrate that it would not be simple matter to determine whether personal data, in the context of alleged wrongdoing and/or commission of offences, would be suitable for disclosure. Furthermore, I believe they also demonstrate that in the majority of cases (if not all cases) disclosing information of this nature would breach the 1st data protection principle relating to fair and lawful processing and would therefore be exempt from disclosure under section 40(2) and 40(3)(a)(i) of the Freedom of Information Act 2000.

The burden on the MPS would be multiplied in the event of any internal reviews or appeals in relation to any disclosure decision. Furthermore, complying with your request would divert MPS resources away from responding to other FOIA requests and the provision of policing services.

Irrespective of personal data, the requested information is also sensitive in the context of law enforcement. For example, the following table displays the time periods within which exemptions relating to investigations and law enforcement can be applied to information requested under the Freedom of Information Act 2000.

Exemption	Applicable time period[17]
Section 30(1)	Was 30 years. Now 20 years (subject to transitional provisions)
Section 30(2)	No time limit
Section 31	100 years

These time periods could be seen as indicative of the time periods in which information can realistically prejudice investigations and law enforcement. It is pertinent to note that police evidence may be circumstantial. The value of circumstantial evidence is cumulative. In relation to circumstantial evidence, Wikipedia states[18]:

> 'On its own, it is the nature of circumstantial evidence for more than one explanation to still be possible. Inference from one piece of circumstantial evidence may not guarantee accuracy. Circumstantial evidence usually accumulates into a collection, so that the pieces then become corroborating evidence. Together, they may more strongly support one particular inference over another. An explanation involving circumstantial evidence becomes more valid as proof of a fact when the alternative explanations have been ruled out.'

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[17] Section 62 and 63(1) of the Freedom of Information Act states:
62(1) For the purposes of this Part, a record becomes a "historical record" at the end of the period of thirty years beginning with the year following that in which it was created.
62(2) Where records created at different dates are for administrative purposes kept together in one file or other assembly, all the records in that file or other assembly are to be treated for the purposes of this Part as having been created when the latest of those records was created.
62(3) In this Part "year" means a calendar year.
63(1) Information contained in a historical record cannot be exempt information by virtue of section 28, 30(1), 32, 33, 35, or 42'
Section 63(4) of the Freedom of Information Act 2000 prohibits section 31, relating to law enforcement, from being applied to records created more than 100 years ago.
http://www.legislation.gov.uk/ukpga/2000/36/part/VI
Schedule 7(4) of the Constitutional Reform and Governance Act 2010 amends section 62 of the Freedom of Information Act 2000 so that the definition of an historical record has been reduced to 20 years subject to transitional provisions.
http://www.legislation.gov.uk/ukpga/2010/25/schedule/7
[18] http://en.wikipedia.org/wiki/Circumstantial_evidence

Cumulative prejudice may also result from disclosure. For example, the information requested may be of increased significance when combined with other information obtained through other means and/or at a later date. This is also referred to as the 'mosaic' effect which has been described as follows:

> 'The "mosaic theory" describes a basic precept of intelligence gathering: Disparate items of information, though individually of limited or no utility to their possessor, can take on added significance when combined with other items of information. Combining the items illuminates their interrelationships and breeds analytic synergies, so that the resulting mosaic of information is worth more than the sum of its parts.'[19]

The ICO's guidance in relation to Law Enforcement[20] acknowledges the harm that may be caused by the mosaic effect where it states:

> 'Mosaic and precedent effects
>
> 21. The prejudice test is not limited to the harm that could be caused by the requested information on its own. Account can be taken of any harm likely to arise if the requested information were put together with other information. This is commonly known as the 'mosaic effect'. As explained in the Information Commissioner's guidance information in the public domain, the mosaic effect usually considers the prejudice that would be caused if the requested information was combined with information already in the public domain.'

Due to the nature of 'circumstantial evidence' and the 'mosaic effect, the significance of a single item of information may change over time and/or when viewed in a different context.

The control of information held for the purpose of an investigation is also important to the effective conduct of an investigation. The College of Policing website contains specific information relating to investigations and communications strategies and states:

> 'The way in which investigators manage communications will have a

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[19] Source: David Pozen, The Mosaic Theory, National Security, and the Freedom of Information Act, 115 Yale L. J. 628, 630 (2005).

[20] http://www.ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/law-enforcement-foi-section-31.ashx

significant effect on the investigation they are conducting. The main purpose of this strategy is to communicate or receive information which assists investigators to progress their enquiries. This can be achieved through internal communications by using colleagues and partners within the criminal justice system and through external communications by using partner agencies and community networks.'[21]

Purpose and value

The ICO's section 14 guidance further states:

> 'Assessing purpose and value
>
> 42. The Act is generally considered to be applicant blind, and public authorities cannot insist on knowing why an applicant wants information before dealing with a request.
>
> 43. However, this doesn't mean that an authority can't take into account the wider context in which the request is made and any evidence the applicant is willing to volunteer about the purpose behind their request.
>
> 44. The authority should therefore consider any comments the applicant might have made about the purpose behind their request, and any wider value or public interest in making the requested information publicly available.'

The MPS recognises that there is an inherent value in the disclosure of information upon request given the associated benefits of openness and transparency.

Furthermore, there is a legitimate value and purpose in disclosure to the extent that

- the requested information relates to alleged wrongdoing by an MP
- the investigation was high profile and/or of national interest
- the investigation required the significant use of public funds
- there is a public interest in being satisfied that the investigation was conducted properly

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[21] http://www.app.college.police.uk/app-content/investigations/investigative-strategies/communications-strategy

However, the public interest can be served by several other means that are less burdensome upon the MPS.

For example, MPS finances, actions and decisions are also subject to external scrutiny by a number of organisations such as:

- Her Majesty's Inspectorate of Constabularies (HMIC).
- The Houses of Parliament
- The Independent Police Complaints Commission (IPCC)
- The Information Commissioner's Office (ICO).
- The Mayor's Office for Policing and Crime (MOPAC),
- The National Audit Office
- The Office of Surveillance Commissioners (OSC)

Under the Public Records Act 1958, files that are approaching the time period of 30 years (to be gradually reduced to 20 years Section 45 of the Constitutional Reform and Governance Act 2010) are routinely reviewed for their suitability for transfer to a public record office. The MPS routinely transfers such files to the National Archives.

The MPS Records Management Manual states the following in relation to the Transfer of Records to the National Archives:

> '6.2.1 The Public Records Act 1958 requires records over 20 years old that are of historical value, to be selected and transferred to The National Archives (TNA). This review is carried out by Records Management Branch, in accordance with the agreed Operational Selection Policy.
>
> 6.2.2 Where records are required to be retained beyond 20 years of creation an application to do so must be submitted to the Lord Chancellor's Advisory Council on National Records and Archives. This will be completed by RMB
>
> 6.2.3 These records may be sent as either 'closed' or 'open' records.
>
> 6.2.4 Closed records are those records where the content is of continuing sensitivity and cannot be made available for public inspection. Closed records are accompanied by a date by which all sensitivity concerns will have passed and the record is opened by the TNA on that date. Where no sensitivity exists records are open for public inspection and are included in TNA's catalogues which are available on the Internet.'

This illustrates the potential for the public interest to be served by the requested information being reviewed and transferred to The National Archives at a later date.

It is also pertinent to note that a disclosure under the Freedom of Information Act is not a private transaction and in effect constitutes disclosure to the world at large. Therefore, when considering a FOIA request, it is necessary to consider the harm in disclosure to any individual, including those who may be the focus of investigations and those who may be in a position to assist police investigations. Such disclosure may enable potential suspects to adapt their behaviour to evade detection or deter individuals from assisting police investigations. Such individuals are typically aware of policing techniques and procedures and may use such knowledge to avoid detection and/or prosecution. With any investigation the potential exists for new lines of enquiry and/or further matters requiring investigation to be identified. Consequently the significance of any related information may be subject to change.

Such information is likely to constitute personal data including 'sensitive personal data', which is defined in the Data Protection Act 1998 as including data relating to the commission or alleged commission of an offence and any proceedings for any offence committed or alleged to have been committed, the disposal of such proceedings or the sentence of any court in such proceedings. The disclosure of such information is likely to be in breach of one or more data protection principles and may cause unwarranted harm. The legitimate public interest can be served via other means and in relation to personal data, there is no presumption of disclosure.

To the extent that there is any public interest in relation to potentially criminal behaviour, I am mindful of the Information Tribunal judgement in the case of Armstrong v Information Commissioner and HRMC[22] which stated:

> '93. Criminal investigations are the responsibility and statutory duty of regulated bodies, such as the police or HMRC. We are not persuaded that there is public interest in disclosing material that may lead to the discovery of further offences or other matters requiring criminal investigation. We also consider that there is strong public interest in ensuring that the operations of authorities which are responsible for

[22] http://www.informationtribunal.gov.uk/DBFiles/Decision/i260/David%20Armstrong%20v%20ICO%20%28EA-2008-0026%29%20Decision%2014-10-08.pdf

conducting criminal investigations are not jeopardised or thwarted through disclosures of information under FOIA.'

Section 14(1) - Conclusion

In the circumstances of your request, I recognise that it may not have been your intent to submit a request that would impose a disproportionate burden upon the MPS.

Although it is not possible to provide an exact calculation on how long it would take to review and prepare the requested information, if we used the calculation for Part 2 and 1,000 pages, with a conservative estimate of 10 minutes to review, copy and apply any redactions for each page; this would equate to over 166 hours. This would mean a member of staff spending 8 hours per day, for over 20 days in total, to undertake this piece of work. It should be noted that there is a possibility this process may take much longer than has been estimated and only relates to one file.

Therefore, I am satisfied that this request would impose a grossly oppressive burden on the MPS, sufficient to engage section 14(1) of the Freedom of Information Act 2000, due to the fact that:

- You have asked for a substantial volume of information
- The MPS has real concerns about potentially exempt information
- Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material
- The purpose and value of the information is disproportionate to the time/cost required to comply with the request

Advice and assistance

I am unable to offer any suggestion as to how your request can be redefined so that it can be answered within the appropriate cost limit or without imposing a disproportionate burden on the MPS. This is due to the volume, age and sensitivity of the information that is held in relation to Antony Claud Frederick Lambton MP. Even if this were possible, it is likely that one or more FOIA exemptions would apply to the requested information.

You may be interested in the decision notices listed below that relate to similar requests where public authorities have cited section 14(1) in response to burdensome requests.

ICO Decision Notice FS50544833 (Request for e-mail metadata)
https://ico.org.uk/media/action-weve-taken/decisionnotices/2014/1042812/fs_50544833.pdf

First-Tier Tribunal (Information Rights) EA/2013/0270 (Request for 839 letters)
http://www.informationtribunal.gov.uk/DBFiles/Decision/i1322/Department%20for%20Education%20EA.2013.0270%20%2802.07.14%29.pdf

In addition, I would like to take this opportunity to advise that one of the files is now classified as 'missing', following searches in relevant areas of the MPS."