

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 November 2020

Public Authority: Commissioner of the Metropolitan Police
Service

Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant has requested information about an alleged incident from the Metropolitan Police Service (the "MPS"). The MPS would neither confirm nor deny (NCND) whether it held any information, citing the exemptions at sections 40(5B)(a)(i) (personal information), section 30(3) (investigations and proceedings) and section 31(3) (law enforcement) of the FOIA.
2. The Commissioner's decision is that the MPS was entitled to rely on section 30(3). No steps are required.

Request and response

3. On 14 November 2019, the complainant wrote to the MPS and requested information in the following terms:

"Under the Freedom of Information Act - please provide me with the following information:

1) On the 11 August 2014 the Met Police searched the [location removed] company at [location redacted] after receiving a call from the company that it could smell cannabis inside the facility. Could I please get the incident number / CAD reference and crime reference numbers that were generated as a result of this

phone call.

2) The search led to two operations being set up. Operation [name redacted] and Operation [name redacted]. Please detail what each operation did specifically and separately.

3) The unit that was searched in the [location redacted] was rented in the name of an individual, making them a suspect in the investigation with restraining order applications made against a bank account. When did police start and later stop seeking to restrain this bank account and why?

4) Please say the date that the suspect above in 3) ceased to be a suspect and what was the reason why they ceased to be a suspect in the case".

4. On 23 December 2019, the MPS responded. It refused to confirm or deny that it held the requested information citing section 40(5B)(a)(i) (personal information) and section 30(3) (investigations and proceedings) of the FOIA.
5. On 24 December 2019, the complainant requested an internal review. The MPS sent the outcome of its internal review on 31 January 2020. It revised its position, adding reliance on section 31(3) (law enforcement) of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 9 May 2020 to complain about the way his request for information had been handled. His grounds of complaint were as follows:

"I believe the ICO should find that the Met has wrongly applied the refusal to confirm and [sic] deny so it should now confirm or deny if it holds the information in 1) & 2) and then send the reference number and brief details of the operations as requested".

7. The Commissioner also notes the complainant's views which were raised when he requested an internal review. He stated:

"...you could not withild [sic] an crime ref or CAD number on sec 30/31 grounds either as these are routinely released to the public. So I argue that this reference should be provided, or at the very least you must provide a Met Police official record of the call being made as in a log of the call, time it was made etc,

redacting any individual person's name if one was recorded alongside this. There is an established practice of police confirming incidents that have been reported to them.'

'...I am simply asking for a line or two detail what each was - such as [name redacted] was an operation to investigate [sic] suspected cannabis supply following a report from a storage company about a smell of cannabis - and [name redacted] was a linked operation into XYZ triggered by ABC received during [name redacted] - no more further detail is request - again this is routine information that police would provide on its day to day work so section 30 or 31 could not apply...'

'...I am simply asking for the date of when a police decision was taken to no longer seek to freeze the bank account of an unnamed individual or to no longer treat them as a suspect - the record of those decisions are the property of the met Police, not any third party individual - therefore providing those dates would not release any personal data or any information exempt by section 30 or 31...''.

8. A confirmation or denial in respect of any of these points would place something into the public domain about an incident which the MPS has not previously made public – if the incident did indeed occur – which is what the MPS is seeking to protect.
9. The Commissioner will consider below whether the MPS was required to confirm or deny whether it held any information.

Reasons for decision

Neither confirm nor deny (NCND)

10. Section 1(1)(a) of the FOIA requires a public authority to inform a requester whether it holds the information specified in the request.
11. The decision to use a NCND response will not be affected by whether a public authority does or does not in fact hold the requested information. The starting point, and main focus for NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.
12. 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.

13. The MPS has taken the position of neither confirming nor denying whether it holds any of the requested information in its entirety, citing sections 40(5B)(a)(i) (personal information), 30(3) (investigations and proceedings) and 31(3) (law enforcement) of the FOIA. The issue that the Commissioner has to consider is not one of disclosure of any requested information that may be held, it is solely the issue of whether or not the MPS is entitled to NCND whether it holds any information of the type requested by the complainant.
14. Put simply, in this case the Commissioner must consider whether or not the public authority is entitled to NCND whether it holds any information about the incident described by the complainant.
15. The MPS has said that the information described in the request, if it was held, would be fully exempt from disclosure by virtue of sections 40(5B)(a)(i), 30(3) and section 31(3) of the FOIA.
16. The Commissioner also notes that, although the section 30 and 31 exemptions from the duty to communicate information are mutually exclusive, the NCND provisions in section 30(3) and 31(3) are not mutually exclusive and can be applied to the same information.

Section 30 – investigations and proceedings

17. This has been cited in respect of the request in its entirety.
18. Section 30(3) of the FOIA provides an exclusion from the duty to confirm or deny whether information is held in relation to any information which, if held, would fall within any of the classes described in sections 30(1) or 30(2) of the FOIA. The MPS confirmed that, if held, section 30(1)(a) would be the appropriate limb of section 30.
19. Section 30(1)(a) of the FOIA states:

“Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-
(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained –
(i) whether a person should be charged with an offence, or
(ii) whether a person charged with an offence is guilty of it”.
20. The Commissioner considers that the phrase “*at any time*” means that information can be exempt under section 30(1) if it relates to a specific ongoing, closed or abandoned investigation. The information

requested (if it is held) must be held for a specific or particular investigation and not for investigations in general. Although the MPS did not state which limb of section 30(1) it was relying on, this premise applies to all parts of sub-section (1).

21. Consideration of section 30(3) is a two-stage process. First, the exemption must be shown to be engaged. Secondly, as section 30 is a qualified exemption, it is subject to the public interest test: whether, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in confirming or denying whether the public authority holds the information.
22. The MPS has explained:

"... Whilst there is no evidence that information relating to this case has ever been placed officially by the MPS into the public domain, it is recognised that any acknowledgement under FOIA will do just that. In this instance, a statement confirming or denying whether information is held in relation to any part of [the complainant]'s request would primarily require disclosing to the world at large whether or not an investigation existed in relation to a particular incident.

The MPS have to adopt a consistent approach when responding to similar requests in relation to investigations whether they have been conducted or not. If the MPS routinely confirmed they were not investigating an individual and this was the case. Then when we were actually investigating an individual, we adopt a 'neither confirm nor deny' approach. Then this decision to do so could be assumed that we were in fact investigating the individual, which would undermine the whole rationale for adopting the 'neither confirm nor deny' responses in the first place.

In arriving at this conclusion, I have taken into consideration the Information Commissioners' own guidance on the duty to confirm or deny which states:

'The wording of the request for information will affect whether or not a public authority will confirm or deny it holds that information. In many cases the more specific the request, the lower the likelihood of the duty arising'.

[The complainant]'s request is indeed focused on a specific investigation rather than investigations in general and this fact

increases the harm that would be caused by confirming or denying information is held in relation to this specific request”.

23. Clearly, the requested information, if held, would relate to a specific police investigation. Therefore, the Commissioner is satisfied that the requested information, if held, would relate to investigations conducted by the MPS.
24. The Commissioner is therefore satisfied that the exemption provided by section 30(3) of the FOIA is engaged.

Public interest test

25. Section 30(3) is a qualified exemption. Therefore, the Commissioner must consider the public interest test contained at section 2 of the FOIA and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in confirming whether or not the requested information is held.
26. In accordance with her guidance, when considering the public interest in maintaining exemptions, the Commissioner considers that it is necessary to be clear what they are designed to protect.
27. In broad terms, the section 30 exemptions exist to ensure the effective investigation and prosecution of offences and the protection of confidential sources. They recognise the need to prevent disclosures that would prejudice either a particular investigation or set of proceedings, or the investigatory and prosecution processes generally, including any prejudice to future investigations and proceedings.

Public interest arguments in favour of confirming whether or not the requested information is held

28. The MPS has argued:

“ It is recognised that the police service has a duty to enforce the law and investigate crime and in this case confirming or denying would potentially highlight the effectiveness of police in combating allegations of drug related crime in the capital. There would also be potential to reinforce public confidence in the MPS concerning investigations related to drugs crime ...”.

Public interest arguments against confirming whether or not the requested information is held

29. At internal review stage the MPS advised the complainant:

"To confirm or deny whether information is held ... would be likely to prejudice our law enforcement functions of preventing and detecting crime, and apprehending and prosecuting offenders. Issuing confirmation or denial responses ... would enable the public to build up a picture of who may have been subject of any allegations".

30. It also advised the Commissioner:

"The MPS believe it is not in the public interest to disclose any information held regarding any investigations under FOIA. It is important the MPS protect the integrity of investigations and information is only released through DMC [Directorate of Media & Communications] in a careful and managed way and not under FOIA ...

The importance of the present response does not just relate to what a straight forward confirm or deny response may reveal about the operation but what it would reveal about other investigations if compared to future requests. The MPS also need to consider the consequences of disclosure into the public domain given that disclosure under the Act is disclosure to the world not just the individual making the request therefore must be suitable for all. Once information is in the public domain, it may be difficult to reverse a disclosure decision, as the MPS would no longer have control of the information disclosed ...

In addition, it would not be in the public interest to disclose information (even inadvertently, through a confirmation or denial) which could identify our investigative activity and subsequently undermine those processes, to do so would hinder the prevention or detection of crime and apprehension and prosecution of offenders.

It is pertinent to note that even when investigations and proceedings appear to have been concluded or closed, there is often a realistic possibility of an investigation being reopened. In order to investigate new lines of enquiry, or review existing evidence, the scope of an investigation being broadened or narrowed to even new investigations being carried out that relate to, or overlap with earlier enquiries.

Any disclosure under the Act, would also be likely to inhibit our ability to prevent and detect crime, as individuals may well be less inclined to come forward and provide intelligence and co-operate with the police. Especially if they were aware that the information they provided would be likely to be disclosed to the

world at some time in the future in circumstance sitting outside of the criminal justice process.

Our ability to gather information to perform our public service functions is paramount. Releasing information would therefore have a negative impact on the relationships we work hard to build to enable us to conduct our roles fully.

As explained earlier the MPS have not publicly confirmed details regarding the investigation only one media article written by [the complainant] appears on an open source search which is a snapshot in time and more importantly media articles do not constitute an 'official' disclosure as they may be wholly or partially inaccurate".

The Commissioner's view

31. The purpose of section 30 is to preserve the ability of relevant public authorities to carry out effective investigations. Key to the balance of the public interest in a case where this exemption is found to be engaged is whether confirmation or denial could have a harmful impact on the ability of the police to carry out effective investigations. Clearly it would not be in the public interest to jeopardise the ability of the MPS to investigate crime effectively.
32. However, the Commissioner also recognises the importance of the public having confidence in public authorities whose role is to uphold the law. She considers that confidence will be increased by allowing scrutiny of their performance, which may involve revealing whether or not any actions have been necessary, or are potentially ongoing, in particular cases such as this one.
33. The Commissioner also recognises that a confirmation or denial in relation to an investigation might be harmful to the MPS's responsibility to manage its investigations effectively. She considers that disclosure of information could undermine the MPS's present and future investigations and therefore hinder its ability to conduct its policing functions, which would not be in the public interest.
34. The Commissioner accepts that a public authority may need to issue a NCND response consistently, over a series of separate requests, regardless of whether 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. For example, were no information held in this case, then it would be a simple matter for the MPS to confirm this. However, when a similar request is made and information is held and the MPS does not wish to reveal

this to be the case, by taking a NCND stance on that occasion only, it may be inferred that information is held.

35. This does not mean, however, that public authorities should use a NCND response in a blanket fashion. They should base their decision on the circumstances of the particular case with regard to the nature of the information requested and with appropriate consideration given to the public interest test.
36. In reaching a conclusion on the balance of the public interest the Commissioner has considered the public interest in the MPS confirming or denying whether the requested information is held. She has also considered whether such a confirmation or denial would be likely to harm the alleged investigation concerned, which would be counter to the public interest, and what weight to give to these competing public interest factors.
37. Whilst, on the face of it, the public interest in confirmation or denial in this case is limited, as the request relates to an incident which is alleged to have occurred more than five years ago (at the time of the request), the Commissioner notes that there is always a public interest in transparency and accountability in relation to information held by public authorities.
38. As a counter to this, she recognises the inherent need to protect police investigations.
39. Taking all of the above into account, the Commissioner is satisfied that section 30(3) has been applied appropriately in this case and that the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the MPS holds the information.
40. The Commissioner has therefore not gone on to consider the other exemptions cited.

Right of appeal

41. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

42. 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.
43. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Carolyn Howes
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