

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 14 August 2014

**Public Authority:** Commissioner of the Metropolitan Police  
Service

**Address:** New Scotland Yard  
Broadway  
London  
SW1H 0BG

### **Decision (including any steps ordered)**

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1. The complainant has requested the ages of those deceased children whose identities were used by the Metropolitan Police Service's 'Special Demonstration Squad' (SDS). The Metropolitan Police Service (the "MPS") refused to disclose the information citing the exemptions in sections 30(1)(a) & (2)(a)(i) & (b) (investigations and proceedings), 40(2) (personal data), 38(1)(a)(b) (health and safety) and 24(1) (national security). The Commissioner's decision is that sections 40, 38 and 24 are not engaged. Whilst he considers that section 30 is engaged, he finds that the public interest warrants disclosure therefore:
  - the MPS should disclose the requested information.
2. The MPS 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

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3. A published report entitled "*Operation Herne – Report 1. Use of covert identities*<sup>1</sup>" is relied on by both parties. It is undated but, because both parties have relied on it, the Commissioner has also relied on it in his reasoning in this notice. (In this notice it is referred to as "The Operation Herne Report").
4. A second report has since been released<sup>2</sup>.

## Request and response

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5. On 27 February 2013, the complainant wrote to the MPS and requested information in the following terms:

*"I would be grateful if you could provide a summary of the ages of any deceased children whose identities were used by the Special Demonstration squad.*

*The ages presented in complete years would be sufficient, and should not cause data protection issues. For this request, please consider a child to be anyone who has not yet reached their 18th birthday."*

6. The MPS responded on 7 June 2013. It confirmed that the information was held but refused to provide it citing the exemptions in sections 30(2)(a)(i) & (b), 31(1)(a) & (b) and 31(2)(i) of the FOIA.
7. Following an internal review the MPS wrote to the complainant on 24 October 2013. It revised its position, now relying on sections 30(1)(b), 30(2)(a)(i) & (ii), 40(2), 38(1), 24(1) and 23(5) to forego disclosure.
8. During the course of the Commissioner's investigation the MPS confirmed that it was now relying on 30(1)(a)(i), 30(2)(a)(i) & (b), 40(2), 38(1)(a)(b) and 24(1).

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<sup>1</sup> <http://www.derbyshire.police.uk/Documents/About-Us/Herne/Operation-Herne---Report-1--Covert-Identities.pdf>

<sup>2</sup> <http://www.derbyshire.police.uk/Documents/About-Us/Herne/Operation-Herne---Report-2---Allegations-of-Peter-Francis.pdf>

## Scope of the case

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9. The complainant contacted the Commissioner on 16 January 2014 to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider the citing of exemptions, but stated that he did not wish him to consider timeliness. Timeliness is therefore not covered in this notice, but the Commissioner has logged the delays for on-going monitoring purposes.
10. The MPS has relied on the following extract from the Operation Herne Report referred to above, which states:

*"6.3 To date Operation Herne has verified one hundred and six (106) covert names that were used by members of the SDS. Of these one hundred and six (106), forty two (42) have been either confirmed or can be treated as highly likely to have used a genuine deceased child's identity. These numbers should not be treated as absolute and may change as the enquiry continues".*

With regard to this it advised the Commissioner:

*"Given that Forty Two (42) is the number of children's details identified at the time of this request being made to the MPS, this is the information deemed pertinent to and therefore the exemptions currently being applied to withhold disclosure".*

11. The Commissioner has therefore based his investigation on this basis.

## Reasons for decision

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### Section 40 – personal information

12. As the MPS's submissions all rely heavily on the issue as to whether or not the requested ages are 'personal data' the Commissioner has initially considered this exemption.
13. Section 40(2) of the FOIA says that information is exempt if it is the personal data of a third party (ie someone other than the requester) and disclosing it would breach any of the data protection principles.
14. The Commissioner therefore first considered whether the requested information is, as the MPS maintains, the personal data of a third party.
15. Personal data is defined in the Data Protection Act (DPA) as:

*"data which relate to a living individual who can be identified –  
(a) from those data, or  
(b) from those data and other information which is in the  
possession of, or is likely to come into the possession of, the data  
controller."*

16. The information that has been requested is the age of 42 deceased children whose identities were used by undercover officers at some point during a 40 year period from 1968 to 2008. The actual date of birth and gender has not been requested.
17. The MPS has provided lengthy submissions as to how the ages could be used to identify officers and the inherent harm in doing so. Whilst the Commissioner accepts that such harm would be significant if it were to occur, he has not found these arguments compelling for the following reasons.

**Is an individual identifiable from the information?**

18. The Commissioner issued a Data Protection Code of Practice on Anonymisation<sup>3</sup> in 2012 and he has drawn on it when making his decision in this case. He has applied the test of whether it is *reasonably likely* that an individual data subject can be identified – from the data and other information.
19. The complainant drew the Commissioner's attention to part of the Operation Herne Report which states:

*"3.4 ... In preference, children were chosen that would have died between four (4) and eight (8) years of age and would be of broadly the same age as the UCO. Given the fact that the unit was established in 1968, and the youngest officers at that time would probably have been in their mid-twenties, it is the case that some of the identities used could relate to children born as early as 1940.."*

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<sup>3</sup>[http://ico.org.uk/for\\_organisations/data\\_protection/topic\\_guides/~media/documents/library/Data\\_Protection/Practical\\_application/anonymisation-codev2.pdf](http://ico.org.uk/for_organisations/data_protection/topic_guides/~media/documents/library/Data_Protection/Practical_application/anonymisation-codev2.pdf)

20. The complainant expanded on this saying:

*"My request does not ask for the numbers of children of each age, their genders, or other information such as the years in which they died. The period covered by the recent Operation Herne report is 1968 to 2008, although media reports have suggested that the practice of using deceased children's identities would have ceased or significantly reduced from 1994 with the digitisation of death records. According to statistics from the ONS, some 336,052 children aged between 0 and 17 years old died between 1968 and 1994. Identifying some 42 individuals from this data set would seem so improbable as to appear impossible and I have not been presented with any plausible argument as to a chain of causation whereby individual officers would be tracked down and harmed by releasing this data.*

*I appreciate the importance of considering information mosaics, and how the information I have requested could be pieced together with other information already in the public domain. I am not aware, however, of any other information in the public domain with which the data I have requested could be combined to make its disclosure harmful."*

21. Based on these criteria, the Commissioner does not see how the age of a deceased child could be said to be the personal data of an undercover officer. The Operation Herne Report clearly states the ages which were 'preferred' as being 4 to 8 years. The Commissioner does not accept that a further breakdown of this, for example saying that some were aged 4, some aged 7 and so on, is any more likely to allow for identification of the officers who used the identity.
22. The Commissioner has also taken into account that it is unlikely that an officer would have been exactly the same age as the child, ie the same date of birth. More likely is that an officer would chose an identity that was approximately the same age and the officers' actual precise age would be likely to have been different from that of their assumed identity in the majority of cases. However, what disclosure may allow is for an affected family to be satisfied that their child was not one of those identities used as they died, for example, at the age of 2 and no officer used the details of a child of this age.
23. Whilst the MPS has submitted detailed arguments, which the Commissioner does not intend to reproduce here, the Commissioner does not consider the age of a child who dies at some point over a forty year period meets the criteria of being the 'personal data' of an

undercover officer as the age alone is simply too far removed to make any such link.

24. Having considered the MPS's arguments, the Commissioner does not find it reasonably likely that individual officers could be identified. This is because the complainant has requested only the whole year age of the deceased children, not the gender, the date of birth or the actual year that they died (which might possibly increase the possibility of leading to the identification of the likely age of the officer concerned). The Commissioner therefore does not accept that it would be possible to identify specific individuals from the requested information.
25. Notwithstanding the above, given the sensitivity of the area of policing that the requested information relates to, the Commissioner has also considered the 'motivated intruder' test detailed in pages 22 – 24 of his Anonymisation Code. Finally, the Commissioner has taken into account pages 24 – 25 of the Code, which cover prior knowledge and re-identification.
26. The Commissioner accepts that the MPS needs to be cautious as it will understandably want to rigorously protect the identity of its undercover officers for their own safety and for the safety of their families. He further notes that the MPS will have concerns regarding the difficulties it will have in attracting officers to undertake this sort of work if they fear that they may be subsequently identified.
27. The 'motivated intruder' test involves considering whether someone without any prior knowledge would be able to achieve re-identification by combining requested information with other information available from public sources *if* motivated to attempt this. Such an individual might, for example, carry out a web search, search archives or use social networking in order to identify an individual from anonymised data.
28. The Commissioner does not consider such identification would be possible in this case. As explained above, the information within the scope of the request is insufficiently detailed for it to be possible to make the link to any specific individual, even applying the 'motivated intruder' test.
29. Accordingly, the Commissioner finds that the requested information is not personal data and the section 40 exemption is therefore not engaged.

## **Section 38 – health and safety**

30. Section 38(1) of the FOIA provides that:

*"Information is exempt information if its disclosure under this Act, would, or would be likely to –*

- (a) endanger the physical or mental health of any individual, or*
- (b) endanger the safety of any individual".*

31. For the exemption to be engaged it must be at least likely that the endangerment identified would occur. Even if the exemption is engaged, the information should nevertheless be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

32. In this case, the MPS has advised that it considers sections 38(1)(a) and (b) to be engaged. It explained to the Commissioner:

*"This exemption is, for the purpose of likely prejudice, intrinsically linked to arguments put forward in regard to section 40, in that those likely to be affected by disclosure is two pronged. Therefore, in answer to the first question Section 38(1)(a)(b) is believed to be engaged in this instance.*

*For 38(1)(a) The MPS would suggest that the undercover officer, his or her family and the family members of the deceased child would fall into this category.*

*For 38(1)(b) The MPS would suggest that the undercover officer and or his / her family would fall into this category.*

*In regard to the likelihood of prejudice, it is suggested that 'would be likely to' is relevant in this instance.*

*As mentioned, I would draw the ICO's attention to the arguments put forward in the personal information part of this response and the likely identification or misidentification, however remote, of undercover officers / family of deceased children following the disclosure of the information related to this request".*

### ***Is the exemption engaged?***

33. The Commissioner takes the view that the phrase "would be likely to" prejudice or endanger means that there should be evidence of a



significant risk to the physical or mental health or the safety of any individual.

34. The Commissioner has already concluded above that the ages in isolation are not 'personal data' and therefore none of the parties mentioned by the MPS would be identifiable.
35. As the Commissioner's view is that no individual could be identified from the requested information he therefore concludes that the MPS has failed to demonstrate a causal link between the disclosure of the withheld information and endangerment to any individual. Accordingly he finds that the section 38 exemption is not engaged in this case.

### **Section 24 – national security**

36. Section 24(1) of the FOIA states:

*"Information which does not fall within section 23(1) [information supplied by, or relating to, bodies dealing with security matters] is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security."*

Section 1(1)(b) imposes a duty on public authorities to disclose recorded information upon request, subject to exemptions.

37. In broad terms, section 24(1) allows a public authority not to disclose information if it considers that the release of the information would make the United Kingdom or its citizens vulnerable (or more vulnerable) to a national security threat.
38. When investigating complaints about the application of section 24(1), the Commissioner will need to be satisfied that the exemption from the duty to communicate the information is required for the purpose of safeguarding national security.
39. The approach of the Commissioner is that *required* in this context means reasonably necessary. It is not sufficient for the information sought simply to relate to national security, there must be a clear basis for arguing that disclosure would have an adverse effect on national security before the exemption can be engaged.
40. In the Commissioner's view, safeguarding national security includes, amongst other things, protecting potential targets even if there is no evidence that an attack is imminent.



41. At internal review stage, when first citing this exemption, the MPS identified the following harm:

*"To disclose the detailed information you have requested, particularly in light of the fact Operation Herne is ongoing, would undermine the trust and confidence undercover officers (relevant or not to this particular investigation) have in the MPS. Officers would be fearful the MPS will disclose information that could potentially identify them in an undercover role. Whilst the report makes clear that the MPS have not used the identities of deceased children for many years, there is a high risk that officers who assist in covert operations that relate to national security would or may be less inclined to undertake such roles should they fear the MPS will disclose information relating to their undercover identity.*

*Likewise, civilians are likely to be less inclined to act or co-operate as a Covert Human Intelligence Sources in connection with investigations related to national security if they fear information related to their identities may be disclosed.*

*It is vital the public, police officers, staff as well as other government bodies and authorities have complete trust and confidence in the ability of the MPS to handle matters that relate in any way to national security in an appropriate and sensitive manner. To date, the MPS have built that trust by publishing Operation Herne's interim report which assures the public that the MPS has been in contact with families who have raised concerns about tactics employed by the SDS.*

*Disclosure potentially threatens the safety and well-being of the nation in respect of our ability to protect its security in connection with possible terrorism, espionage and subversion. It does so by threatening to destabilize the faith and confidence third parties have in the ability of the MPS to handle information that relates to covert identities".*

42. In correspondence with the Commissioner the MPS added:

*"As highlighted previously for the information specific to this request, the age of the deceased child was instrumental as the basis upon which an undercover officer built his or her legend. The purpose of forming a legend was to adopt a false identity in order to infiltrate extremist organisations in order to obtain intelligence for potential law enforcement action.*

*The officers concerned belonged to the SDS, which in turn operated within what was then MPS Special Branch, now Counter Terrorism Command SO15, who also operate in conjunction with Section 23(3) defined bodies.*

*All of this has been acknowledged publicly including the fact that the role of Special Branch centers on safeguarding National Security. The argument therefore that the MPS is putting forward is that should this further information be disclosed into the public domain, there is a likelihood, however remote, that an officer previously or actually performing undercover duties is identified. Such identification then compromises their ability to perform the prescribed duties and associated activities in regard to law enforcement and safeguarding national Security. i.e. unable therefore to obtain evidence on potentially subversive extremist groups, this, by association means that the ability of the police service to obtain such evidence on activities seriously undermines the ability of the police service to fulfill law its law enforcement role and weakens our ability to safeguard national interests”.*

43. In reaching his conclusion in this case, the Commissioner does not dispute the MPS's concerns. However, he notes that those concerns are all centred on the ability to potentially identify the parties concerned. As explained above, he does not accept that the requested information is 'personal data' and does not accept that disclosure of the ages of the deceased children whose identities were used would facilitate the identification of any living person.
44. The Commissioner has given serious consideration to the arguments regarding the potential undermining of the trust and confidence of undercover officers. He accepts that, if made out, such arguments would be a significant factor militating against disclosure. However, in all the circumstances, and given his conclusion as to the impossibility of using the requested information to identify such an officer, he does not consider those arguments to be objectively reasonable in this case. This is particularly so in the context of the risks that are always inherent in undercover operations.
45. Having carefully considered all the arguments and representations, the Commissioner does not accept that an exemption from disclosure of this information is required to safeguard national security. Therefore, the Commissioner finds that the exemption is not engaged.

## **Section 30 – investigations and proceedings**

46. The MPS has advised the Commissioner:

*"The MPS believes that whilst Section 30(1)(a) is engaged the recorded ages of those deceased children are in fact also pertinent to Section 30(2)(a)(i) and 30(2)(b)".*

47. Section 30(1)(a)(i) of FOIA states that:

*"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".*

48. Section 30(2)(a)(i) and (2)(b) states that:

*"(2) Information held by a public authority is exempt information if-*

*(a) it was obtained or recorded by the authority for the purposes of its functions relating to-*

*(i) investigations falling within subsection (1)(a) or (b),  
and*

*(b) it relates to the obtaining of information from confidential sources".*

49. The phrase "at any time" means that information is exempt under section 30(1) if it relates to an ongoing, closed or abandoned investigation. It extends to information that has been obtained prior to an investigation commencing, if it is subsequently used for this purpose.

50. Section 30 of the FOIA is a class-based exemption, which means that there is no need to demonstrate harm or prejudice in order for the exemption to be engaged. In order for the exemption to be applicable, any information must be held for a specific or particular investigation and not for investigations in general. Therefore, the Commissioner has initially considered whether the requested information would fall within the class specified in section 30(1)(a)(i).

51. The public authority in this case is the MPS. As a police force it clearly has the power to conduct criminal investigations. The Commissioner is

therefore satisfied that it has the power to carry out investigations of the sort described in section 30(1)(a).

52. As to the nature of the investigation/s concerned, in response to the Commissioner's enquiries, the MPS advised that the request:

*"... was submitted to the MPS on 27 February 2013 and at this time the investigation into the SDS had already commenced, October 2011, and the fact that the investigation was in progress at the time of the request is confirmed in the evidence provided to the Home Affairs Select Committee by Deputy Assistant Commissioner Gallan on 5 February 2013<sup>4</sup>".*

53. The MPS added:

*"... the MPS is satisfied that the information held pertinent to this request is directly related to an investigation falling within the description of Section 30(1)(a), in that the investigation being undertaken by officers attached to Operation Herne may lead to a decision as to whether or not a person should be charged with an offence and or a determination as to whether an individual charged within an offence may be guilty of it.*

*In respect of the forty two (42) individuals whose ages are recorded as being those likely to relate to a deceased child, this information is indeed held as part of the investigation ... and ... the actual age of the deceased child was pivotal to undercover officers when commencing any research in the formulation of their respective legend".*

54. In further support of its position the MPS provided the Commissioner with a copy of terms of reference for Operation Herne. This shows that a variety of lines of investigations and complaints were under consideration, including those which could be classed as criminal if they were to proceed.
55. In respect of confidential sources, the MPS included the following submission:

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<sup>4</sup> <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmhaff/uc837-ii/uc83701.htm> (DAC Gallan evidence to the HASC pages 18 - 28 inclusive).

*"Given that the MPS considers the 'age' sets the parameters for an undercover officers legend, they contend that the statement within the ICO's own guidance<sup>5</sup> sums up the link perfectly: "Such officers can only operate effectively and safely if their true identities remain unknown" and indeed the comment at Para 43, where it states; "the exemption not only covers the information but procedures, including administrative processes relating to confidential sources", the MPS is of the opinion that this would include an officer's legend and therefore the age. " And, as the Tribunal [EA/2008/0078, Information Commissioner v Metropolitan Police]<sup>6</sup> ruled in another request pertaining to Covert Human Intelligence Source (CHIS) identities, for that is what these officers are, (Defined by Section 26(8) of the Regulation of Investigatory Powers Act 2000<sup>7</sup> (RIPA)) the overriding factor for non-disclosure and the judgment of the tribunal; 'represents the overwhelming importance of the longstanding policy adopted by the MPS that informants can be assured that their names and identities will not be disclosed even after they die'."*

56. The Commissioner accepts that a 'confidential source' is a person who provides information on the basis that they will not be identified as the source of that information. As a rule, confidential sources will be third parties. In most circumstances an authority's own officers are unlikely to be considered confidential sources. However, undercover police officers and others working undercover for law enforcement bodies are an exception. The concealment of their true identity is an essential feature of their work.
57. Accordingly, the Commissioner is satisfied that both limbs of the exemption are properly engaged.
58. Section 30 is a qualified exemption and therefore the Commissioner must consider whether the public interest in maintaining this exemption outweighs the public interest in disclosing the information.

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<sup>5</sup>[http://ico.org.uk/for\\_organisations/guidance\\_index/~/media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/investigations-and-proceedings-foi-section-30.ashx](http://ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/investigations-and-proceedings-foi-section-30.ashx)

<sup>6</sup><http://www.informationtribunal.gov.uk/DBFiles/Decision/i301/MPS%20v%20IC%20%28EA-2008-0078%29%20Decision%2030-03-09.pdf> (Paragraph 22 refers)

<sup>7</sup> <http://www.legislation.gov.uk/ukpga/2000/23/section/26>

59. In considering where the public interest lies in this case, the Commissioner has been guided by the Information Tribunal in the case of *Toms v Information Commissioner & Royal Mail* where it stated:

*"... in striking the balance of interest, regard should be had, inter alia to such matters as the stage or stages reached in any particular investigation or criminal proceedings, whether and to what extent the information has already been released into the public domain, and the significance or sensitivity of the information requested".*

### **Public interest in disclosing the information**

60. The MPS did not include any arguments in favour of disclosure at refusal stage. However, at internal review it advised:

*"The SDS was an undercover unit formed by the Metropolitan Police's Special Branch. It operated between 1968 and 2008, during which time it infiltrated and reported on groups concerned in violent protest.*

*The published Operation Herne interim report highlights that much of the work carried out by the SDS was highly sensitive and placed the undercover officers (UCO) at considerable risk for a number of reasons. This led the UCO's to have to create false identities using the details of deceased children. The report has publicly acknowledged that forty-two [42] covert identities are either confirmed or highly likely to have used the details of a deceased child.*

*Due to the public interest in this now high profile unit and current investigation into their actions, I appreciate there is a public interest in disclosing the ages of any deceased children whose identities were used by the SDS. This would demonstrate the MPS to be open and transparent in respect of this matter, disclosure of which may be likely to impact on families related to the deceased children".*

### **Public interest in maintaining the exemption**

61. In its refusal notice the MPS made reference to the First-Tier Tribunal case EA/2011/0057, citing the following:

*"The general public interest by section 30(1) exemption is the effective investigation and prosecution of crime, which itself requires in particular (a) the protection of witnesses and informers*



*to ensure that people are not deterred from making statements or reports by the fear that they may be publicised, (b) the maintenance of the independence of the judicial and prosecution processes and (c) the preservation of the criminal court as the sole forum for determining guilt. In assessing where the public interest balance lies in a section 30(1) case relevant matters are therefore likely to include (a) the stage a particular investigation or prosecution has reached (b) whether and to what extent the information is already in the public domain (c) the significance or sensitivity of the information requested and (d) whether there is any evidence that an investigation or prosecution has not been carried out properly which may be disclosed by the information..."*

62. The MPS also relied on the Commissioner's guidance saying: "there is a general recognition that it is in the public interest to safeguard the investigatory process. The right of access should not undermine the investigation and prosecution of criminal matters nor dissuade individuals from coming forward to report wrongdoing."

63. In its internal review the MPS added:

*"It remains the case that to release any details of the investigation (not already publicly disclosed in the interim report) at the present time would jeopardize the current investigative process.*

*To disclose information pertinent to the investigation which may interfere and undermine the investigation at this early stage would detrimentally affect the ability of the MPS to conduct its role in the interests of preventing and detecting crime.*

*Maintaining confidential sources is of great importance in respect of this specific ongoing investigation, as well as to policing in general. Disclosure of the information you have requested could damage the maintaining of confidential sources in a number of direct and indirect ways. For example, disclosure of the information you have requested may pose a direct risk to individuals who may previously have assumed an undercover identity of a deceased child, if that information is used to try and identify those officers.*

*Additionally, disclosure of the information would not be in the public interest as it could deter the progress of the current investigation and the co-operation of individuals assisting with it. This would be particularly harmful if disclosure leads to fear that the MPS will release information relating to confidential sources and covert identities under FOIA. Whilst the investigation is ongoing, Operation*



*Herne requires a safe space in which to operate and premature disclosures create intense media pressure which presents possible blockages for the investigative process. This is not in the public interest and diverts resources away from handling the investigation, particularly considering the interim report was published and addresses the public interest on this matter.*

*In respect of unconnected future investigations and procedures, untimely disclosure of the information you have requested could damage the ability of the MPS to maintain confidential sources. Disclosure of information relating to CHIS identities threatens to make the public fearful about co-operating or providing information to the police in the future, especially considering this investigation is not even complete. Individuals may fear their identities may be exposed during an ongoing investigation (or closed) which could severely impact on an investigation.*

*It remains the case that a vital element of many investigations and proceedings is the intelligence supplied by confidential sources. It is important that Section 30 serves to protect these sources so that they are not deterred from co-operating and engaging fully with the MPS.*

*There is a significant public interest in protecting the supply of information from confidential sources. Informants will not provide information where they fear being identified as the source and fear suffering acts of retribution as a consequence. The form of retribution feared will depend on the circumstances, the most obvious example in this case would be fear of physical assault where a confidential source has provided information about a criminal during their undercover duties on the SDS”.*

### **Balance of the public interest**

64. The Commissioner accepts that on-going investigations need to be protected and it is unlikely that he will find that information should be disclosed where there is any possible impact on the investigative processes. He also accepts the importance of the MPS to be able to attract officers and civilians to act in undercover roles in order to fulfil vital police work, and their need to feel reassured that their identities will not be made public for fear of reprisals. However, the Commissioner also notes that this is a qualified rather than absolute exemption so there was an obvious intention when drafting the legislation that there may be occasions when information caught by this exemption can be disclosed.

65. Whilst the Commissioner recognises the sensitivities around protecting ongoing investigations, and the MPS's concerns in maintaining the ability to recruit to undercover roles, he also notes the complainant's submissions about releasing this information and the associated strong public interest arguments in favour of disclosure.

66. The MPS has stated to the Commissioner that it:

*"... believes that given the age is intrinsically linked to the creation of a legend, it is held as a result of an ongoing criminal investigation disclosure of the information should not take place at this, or indeed, because of the links to CHIS, at anytime".*

67. It has also made reference to the Operation Herne Report and the further related Report (referred to above) which was published after the request was made, advising that:

*"These reports were compiled with the intention of placing into the public domain information deemed of significant public interest, given the gravity of the allegations being made. Such information was deemed sufficient to inform, but not too detailed so as to impede or compromise the ongoing investigation. It is the MPS's belief that such disclosure outside of the Freedom of Information Act 2000 satisfies the ongoing public interest in this case".*

68. However, the Commissioner also notes the detailed submissions made by the complainant. Within his correspondence he explains:

*"There is also a clear public interest with regards to the hundreds of thousands of families who lost a child during the relevant period. Any of these families may fear that their relative's details were used by police officers without consent. The question of whether the 42 families should be told is complex. By confirming which ages were used, the MPS would also be confirming which ages were not used. This information could help answer the questions of tens of thousands of families for each any [sic] age that is identified as not having been used".*

69. The Commissioner finds this argument to be particularly compelling. Whilst he agrees it is in the public interest not to undermine an ongoing investigation, he does not accept that the requested information is sufficiently significant to have any impact on the ongoing work in this case. The information that has already been put into the public domain in the released Herne Report suggests that the ages in isolation would

be very unlikely to have much impact on the investigation as a whole. The age parameters and numbers of identities used have been divulged, so the Commissioner is of the opinion that disclosing a further summary of the actual ages is unlikely to be intrusive. As the 42 identities have already been confirmed it is assumed that information recording their ages is readily available to the MPS and that to disclose this information would therefore be very unlikely to pose any resourcing impact on the staff undertaking the investigation.

70. It may transpire that the 42 identities concerned have actually used all of the ages within the range of 0 to 17 years, in which case none of the families concerned will gain from any relief from disclosure. However, even if it is only one particular age that no officer selected, the potential relief for a large group of surviving relatives is significant.
71. Taking into account the arguments put forward by both parties and the significant public interest in this particular subject matter, on this occasion the Commissioner finds that the public interest in disclosure outweighs that in maintaining the exemption.

### **Other matters**

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72. The Commissioner has recorded the delays in this case for on-going monitoring purposes.

## Right of appeal

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73. 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: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

74. 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.
75. 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 .....**

**Graham Smith**  
**Deputy Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**