

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 May 2015

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 connected to an incident involving a man who had been questioned over the alleged sexual assault of a 14 year old girl. The Metropolitan Police Service (the "MPS") provided some information, advised that some information is not held and cited the exemptions at sections 30(1)(a)(i)(investigations and proceedings) and 40(2)(personal information) for the remainder. The Commissioner's decision is that, where stated, the MPS does not hold the requested information. He also finds that section 30(1)(a)(i) is engaged and that the public interest lies in maintaining the exemption. No steps are required.

Background

2. The case refers to convicted murderer Arnis Zalkalns who is now deceased. Further related information can be found online¹.
3. This decision concerns disclosure of an MG3, which is a "Report to Crown Prosecutor" form. The MG3 is completed by the police and is used to provide the CPS with proposed charges and an outline of the circumstances of the case. On this occasion the form was only completed in 'draft' format and was not submitted to CPS.

Request and response

4. On 27 January 2015, the complainant wrote to the MPS and requested information in the following terms:

"My request is as follows:

- *Please provide of copy/copies of the transcript/s of police interview/s with Arnis Zalkans [sic] in 2009 after he was arrested over an alleged indecent assault on a 14-year-old girl, near the Grand Union Hotel in Boston Manor;*
- *Please provide a copy of the MG3 completed in relation to the case;*
- *Please disclose the start date for the investigation and the date it concluded.*
- *Please disclose the name of the SIO [Senior Investigating Officer]"*.

5. The MPS responded on 12 February 2015. It stated that, in respect of the first two parts, information was held but that it was exempt from disclosure under sections 30(1)(a) and 40(2) of the FOIA. It provided the dates at point 3. It advised that the name of the SIO at point 4 of the request was exempt from disclosure by virtue of section 40(2).
6. The complainant asked the MPS to review its response in respect of the first two parts of his request only; he advised he was happy for the MG3 to be 'anonymised' to prevent identification of the alleged victim.

¹ <http://www.bbc.co.uk/news/uk-england-london-29440882>

7. Following its internal review the MPS wrote to the complainant on 10 March 2015. It stated that it had since ascertained that there were no transcripts of the interviews so nothing was held in respect of point 1. In respect of point 2 it maintained that this was exempt under sections 30(1)(a) and 40(2).
8. During the Commissioner's investigation the MPS clarified that it wished to rely on 30(1)(a)(i).

Scope of the case

9. The complainant contacted the Commissioner on 10 March 2015 to complain about the way his request for information had been handled. He asked him to consider whether or not there were any transcripts and also whether or not the MG3 could be provided in an anonymised format.
10. The Commissioner can confirm that he has viewed the MG3, other than the name of the girl concerned as he did not consider this necessary for him to come to a decision in the case.

Reasons for decision

Section 1 – general right of access

11. Section 1(1) of FOIA states that:

"Any person making a request for information to a public authority is entitled:-

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him".*

12. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of information Tribunal decisions, applies the civil standard of the balance of probabilities.
13. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or whether it was held at the time of the request).

14. In its internal review response, the MPS explained to the complainant:

"Having conducted further enquiries, I have since been able to ascertain that there are no written transcripts of this interview held by the MPS. It appears that transcripts were never produced as the allegation was not substantiated".

15. In response to this, the complainant said to the Commissioner:

"As can be seen, the MPS response varies one element of the original response. The MPS now says it does not hold transcripts of the interview with Zalkalns, apparently because none were produced because the allegation was not substantiated.

I would request the ICO to examine this, as it is clear from other elements of the MPS' internal review response that "statements" made by Zalkalns are referred to in the MG3. It would seem highly likely that such "statements" were made during police interview. These statements must have either been taken from the interviewing officers' notes, the tape or the transcript - if one exists. I am planning to submit a separate FOI request for the tapes of interview, in case there aren't actually any written transcripts as I was initially led to believe by the initial MPS FOI response".

16. The Commissioner has investigated this part of the complaint by returning to the MPS and asking it a number of questions in order to determine whether it holds any transcripts.
17. By way of response, the MPS provided an email chain as evidence that, at the time of the request, transcripts of any interview/s with Mr Zalkalns were not held as they had not been transcribed.
18. In light of the explanation and email submission provided by the MPS the Commissioner is satisfied that, on the balance of probabilities, it did not hold any transcript/s of the incident logged in 2009.

Section 30 – investigations and proceedings

19. Section 30(1) provides 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".

20. 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.

21. 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).
22. 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). The requested information was also obtained with a view to undertaking a specific investigation. The Commissioner is therefore satisfied that the exemption is properly engaged.

The public interest test

23. Section 30(1) is a qualified exemption and is therefore subject to the public interest test under section 2(2)(b) of FOIA.

Public interest arguments in favour of disclosure

24. The MPS advised the complainant:

"This case has been publicly linked to that of the tragic murder of Alice Gross due to Mr Zalkalns' involvement. I understand from your complaint that you believe there is a strong public interest in disclosure due to the fact that it would address whether or not appropriate checks had been made on the individual in question in order to determine his background. The MPS appreciates this argument.

The MPS also believes that disclosure would demonstrate our openness and transparency in relation to this case, and the Alice Gross murder investigation".

25. The Commissioner recognises that there will always be a public interest in achieving transparency and accountability in police matters.

Public interest arguments in favour of maintaining the exemption

26. The MPS advised the complainant that it believed disclosure would: *"hinder our ability to interview suspects and investigate crimes of this nature in the future"* as it would allow those with ill-intent to gain an

advantage by knowing how to "prepare" themselves for future interviews. It also advised that disclosure could:

"... potentially enable individuals intent on committing a similar crime to change their actions or behaviours in a way which may enable them to evade prosecution, hindering our established investigative processes".

27. Having viewed the MG3, the Commissioner does not accept that, on this occasion, releasing its content would give any advantage to those with 'ill-intent' by divulging any methodology which would allow them to escape justice. Whilst some MG3s may be sufficiently detailed to allow this to be done, he does not agree that it would be the case on this occasion and he therefore does not give this argument any weight.

28. The MPS further argued that disclosure would be harmful because individuals would be:

"... less likely to come forward, or co-operate with the police when interviewed, if they believe that the information they provide will be disclosed in circumstances outside the criminal justice process. For this reason, I propose that disclosure of MG3 forms could restrict the flow of information to the MPS in future, as potential sources of information may be discouraged from coming forward if they anticipate that the information that they provide could later be disclosed in response to requests made under the Act. In particular this disclosure may dissuade victims of sexual offences to come forward, and this crime is already largely under-reported as it is".

29. The MPS drew the complainant's attention to a number of decision notices previously issued by the Commissioner. Whilst the Commissioner will consider complaints on a case-by-case basis, he will often be guided by decisions he has previously reached. For example, he has previously accepted that the public has a widespread perception that information provided to the police will not generally be disclosed in response to an FOIA request. As cited by the MPS, from decision reference FS50153447, the Commissioner has stated that he:

"... accepts the basic premise of the argument that some potential sources of information are more likely to be discouraged from coming forward if the public authority were to release the information identifying witnesses and the details they have provided in this case. The Commissioner also recognises that the restriction of the flow of information to the police would harm their ability to investigate future cases."

30. The MPS also cited the following arguments in support of non-disclosure:

"... in FS50124180, the Information Commissioner stated that "There is a substantial public interest in ensuring that the police have the space to carry out their work. This is so that they can determine the most effective way in which to run investigations so that offenders can be apprehended and brought to justice. It is obviously in the public interest to ensure that individuals committing crime are caught and are subject to an independent prosecution process." In this Decision Notice, the I.C.O. also drew attention to the increased public interest in giving the police this space when a request concerns the recent period. The public interest is therefore significantly increased in this case when one considers the investigation that your request focuses on is not very old and recently informed a much more recent criminal investigation".

Balance of the public interest

31. In summing up its reasoning to the complainant the MPS advised him:

"The MPS appreciates the public's frustration when it appears, rightly or wrongly, that more could have been done to prevent crime of any type. This is particularly the case in high profile cases such as that in which Mr Zalkalns was involved. However, as explained above, there are many mechanisms in place to deal with any cases where the police may have been believed to have failed in their public duty. Disclosing sensitive personal information about an investigation under the Act is not an appropriate way to deal with such concerns. Although disclosure would further demonstrate the MPS commitment to transparency, to do so in this instance would be at the cost of protecting victims, witnesses and the established investigative processes which serve to ensure successful prosecution and justice for those wronged".

32. It also directly responded to one of the complainant's arguments in support of disclosure stating:

"I note here your reference to the Jimmy Saville [sic] case, and the fact that Sussex Police did publish redacted copies of one of his police interviews from 2009. You do not seem to believe this case to be any different. However I would like to respectfully disagree. That interview was not conducted under caution, and was about historic crimes which centred on a number of potential victims. This case relates to a comparatively recent case, where there is only one victim who is still very young. In my opinion, this increases the

chance of identification, and also increases the risk to both her and our formal questioning process”.

33. When considering the application of any of the exemptions contained in s30(1), the Commissioner believes that consideration should only be given to protecting what is inherent in those exemptions – the effective investigation and prosecution of crime - which requires the following:
- the protection of witnesses and informers to ensure people are not deterred from making statements or reports by fear it might be publicised;
 - the maintenance of independence of the judicial and prosecution processes;
 - preservation of the criminal court as the sole forum for determining guilt;
 - allowing the investigating body space to determine the course of an investigation; and
 - information that deals with specialist techniques.
34. With the above underpinning the consideration of 30(1), when weighing up the public interest in relation to the exemption the following factors (amongst others) should be considered:
- 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;
 - the significance or sensitivity of the information; and
 - the age of the information.
35. The Commissioner has confirmed with the MPS that the MG3 is intrinsically linked with the subsequent murder investigation of Alice Gross, for which Mr Zalkalns was the most likely suspect². However, although the MPS has no ongoing enquiries in relation to the murder because Mr Zalkalns is now himself deceased, the case remains 'open'.
36. In addition, it is of note that there is to be a coroner's inquest into Miss Gross's death³. The inquest was announced in October 2014 and remains on-going. Although the terms of the inquest are not in the

² <http://www.channel4.com/news/alice-gross-murder-review-inquiry-river-brent-arnis-zalkalns>

³ <http://www.bbc.co.uk/news/uk-england-london-29568792>

public domain, they may well rely on evidence held by the MPS, such as the MG3, and it is likely that any shortfalls will be considered and commented on by the coroner if he considers it appropriate to do so.

37. The Commissioner also notes that some limited details about this incident have been made public as knowledge of it is in the public domain; the details available do however remain very limited although they serve the public interest to some extent.
38. As evidenced by the MPS in its submissions above, the Commissioner has previously determined that there is a strong public interest in protecting information acquired by the police during their investigations. To disclose important evidence under the FOIA (without a sufficiently strong public interest in doing so) would undermine the existing procedures governing the disclosure of information in relation to criminal investigations. Such disclosure could also act as a deterrent to those providing information to the police and as such act as a disincentive and consequent hindrance in other police investigations.
39. The MPS has advised that it considers the girl concerned to be:

"... a vulnerable victim who provided information to police at a time in her life when she was extremely vulnerable in respect of an event of an extremely intimate nature".

Adding:

"Disclosure of this information now will cause undoubted distress".

40. The Commissioner accepts that the information recorded on the MG3 is particularly sensitive as it relates to details given by a very young and vulnerable witness. He also accepts that she is very likely to be traumatised were details of the information she provided, and her dealings with the police, placed into the public domain. For example, were she, as a member of the public, to read the details about what she said in a newspaper, she would necessarily know that she is the subject. Not only could this be distressful to her personally, but it could cause considerable harm to wider policing if other vulnerable witnesses were deterred from coming forward for fear that information they provide could be placed indiscriminately into the public domain. Furthermore, knowing what Mr Zalkans himself said about the incident is also very likely to cause her distress.
41. The Commissioner notes that the complainant has concerns that inadequate checks may have been undertaken by the police in respect of Mr Zalkans and that, had he been properly checked then he may have been detained in 2009. The Commissioner accepts that this is obviously an important matter as disclosure of the MG3 may reveal poor processes

or a failure of duty by the officer concerned. However, regarding this point, the Commissioner accepts the response made by the MPS above where it comments that there are mechanisms in place to deal with cases where the police are suspected to have failed in their public duty. He agrees that such mechanisms exist outside the FOIA and that provision of the MG3 to the world at large is not an appropriate way to go about dealing with any such suspicions. Provision of the MG3 would only provide a very limited view as to what happened at the time and could be very misleading without a thorough review into events.

42. Taking the above matters into account, the Commissioner has decided that the balance of the public interest weighs in favour of maintaining the exemption at section 30(1)(a)(i).
43. In light of the Commissioner's findings in respect of section 30(1) he has not gone to consider the MPS' reliance on section 40(2). However, he would like to add that 40(2) is unlikely to be engaged as the complainant did accept that it could be 'anonymised' thereby allowing the MPS to redact any personal data prior to disclosure.

Right of appeal

44. 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@hmcts.gsi.gov.uk

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

45. 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.
46. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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