

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.

Background

3. The complainant made an earlier, related request, on 14 November 2019. That case resulted in a complaint which the Commissioner has considered alongside this complaint, under reference IC-40048-BOD1. In that case, a decision notice has been issued at the same time as this decision notice; the Commissioner upheld the MPS's reliance on section 30(3) to NCND holding any information.

Request and response

4. On 4 January 2020, the complainant wrote to the MPS and requested information in the following terms:

"On August 11 2014 four met police sniffer dogs were sent to the [location redacted], following reports from the company of a cannabis smell.

Under the Freedom of Information Act please provide me with the names and/or identification numbers (or however they are identified within the Met).

Please also provide details of where the dogs were sent from - ie which dog support unit if they were sent from one.

Please also provide details of the time when the search was carried out.

Please be reminded that animal identities would not fall under data protection laws as they only apply to living humans".

5. On 18 January 2020, the MPS responded. It refused to confirm or deny that it held the requested information citing the exemptions at sections 30(3) (investigations and proceedings), 31(3) (law enforcement) and 40(5) (personal information) of the FOIA.
6. On 18 January 2020, the complainant requested an internal review. The MPS sent the outcome of its internal review on 11 February 2020. It maintained its original position.

Scope of the case

7. The complainant contacted the Commissioner on 10 May 2020 to complain about the way his request for information had been handled. His grounds of complaint were as follows:

"The Met Police has used the neither confirm nor deny exemption wrongly in this request - and in the way that the ICO advises against. I have asked for very basic information - the names or identity numbers of four sniffer dogs said to have been sent to do a drug search at a specified location, the date and time they were sent and where from.

The details about the alleged search have already been put on public record during the 2014 prosecution of [name removed] for

drug offences at [location removed] Crown Court. It was part of the prosecution case that the investigation began when the police received a call from [name removed] about a smell of cannabis - the court was told that police were sent and in response sent four sniffer dogs.

So it is already on public record that this search allegedly took place. To confirm or deny that the force held the names or identification numbers of these dogs, where they were sent from and when would not disclose any sensitive police information into the public domain. No covert policing tactics or details of people under investigation would be released.

Yet the Met has argued that confirming or denying it holds this information would do so which is impossible to justify.

The ICO says "a public authority can only refuse to confirm or deny whether it holds the information, if this would in itself reveal information that falls under an exemption" and that a public authority must be certain that an exemption in the Act applies in respect of the confirmation/denial."

It is not possible to put forward a credible argument that confirming or denying the requested information is held would, in itself, release any exempt information and I invite the internal reviewer to consider that in their response.

The ICO has been clear - https://ico.org.uk/media/for-organisations/documents/1166/when_to_refuse_to_confirm_or_deny_section_1_foia.pdf - that "in most cases, confirming that information is held will not reveal anything prejudicial or sensitive."

There has to be a real and genuine risk of the confirmation or denial releasing exempt information for this to be applied and it should not just be used as a blanket reason to refuse to confirm or deny if the requested information is held. please, therefore, as part of the internal review confirm or deny if the information is held.

So the Met should have confirmed or denied if it holds the information.

It should then release it as the exemptions it has based its refusals on would not apply - there is no section 40 personal information as these are dogs.

That information could not be used in conjunction with any other available information to identify an individual.

The section 30 and 31 exemptions are also misapplied here as. For section 31 the investigation is complete so it no longer applies and it is the most basic information requested about information already on public records so there is no risk of any prejudice. Section 30 would only apply if it were pre-prosecution, or if specific information, not already in the public domain that was used to determine someone's guilt or not was being requested. The basic fact of the search taking place or when it happened or what the dogs were called or where they were sent from would not fall under this - it would have to be details of what was found or not at the search that would have to be requested for it to fall under section 30 - which is not the case here - and it would have to have not been disclosed in the prosecution, what it was anyway.

The Met also failed to consider redacting any genuine information from the remainder of the information and sending the rest. Like many public authorities it has tried to use a number of general exemptions as a blanket reason for refusing all the information requested.

The request I have made is very important. There is evidence that could suggest that the police dog search in question may not have actually taken place, and that the CPS, court and whole criminal justice system may have been misled by the police in this case. the police should not be able to use the FOIA, by misapplying exemptions, to prevent the release of data that could help ascertain if the criminal justice system has been abused or not".

8. The Commissioner initially notes that there is no 'formal' information readily available in the public domain in respect of the alleged incident / investigation. Whilst there may have been a trial, no formal details are publicly available. Disclosure of information at a trial is necessary for the course of justice. This is not the same as a disclosure being made by way of a formal public statement or a disclosure under the FOIA. The MPS has made no public statement about the alleged incident.
9. The Commissioner will consider 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 PA 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 advised the Commissioner:

"If the information requested were held, it would be held solely for the purpose of investigating crime. This exemption covers information that may be held at any time for the purpose of any police investigation, whether a case is ongoing, closed or abandoned.

Under the Act, we would not wish to confirm or deny to the public at large specific elements of a police investigation or what information may or may not be held. It should be recognised that to divulge answers to any part of the request, even by confirming or denying its existence that, in itself, supplies information to the world at large. The MPS have not officially disclosed details regarding the investigation.

However, were the MPS to confirm or deny whether the information relating to this request is or is not held, would be

publicly confirming whether or not certain actions took place as part of an investigation and provide information about the investigation leading to inferences being drawn”.

23. It further added that the request:

“... indirectly asks for confirmation or otherwise of a specific police investigation.

This may at first glance appear relatively innocuous in its nature especially as it would only be names of police dogs, location dispatched from and times of the search. However, the MPS have to look at the wider picture and potentially the overall harm. Confirmation or denial would likely to have the potential to provide an “intelligence picture” and insight regarding the investigation. At first glance providing the information would appear harmless on its own, pieced together would give a fuller picture with other information for example information already in the public domain, information known to the applicant and/or information provided later may be of increased significance. The outcome could potentially identify/link the investigations and as a result identify /or misidentify individual(s) such as victims, witnesses, suspects and third parties.

If the MPS were to confirm or deny whether information is held on this occasion and then received the same request regarding a different investigation we would also be required to confirm or deny whether information is held regarding that investigation and so on. This demonstrates how gradually through a series of requests under the FOIA the ability of the MPS to protect information relating to investigations would be eroded.

By confirming or denying whether a specific a [sic] named police dog had been involved in a search on a specified date/time and at a specified location would set a precedent for future requests of a similar nature made under the FOIA. In this case, the request focuses on a particular investigation rather than investigations in general. By confirming whether it holds, or ever held, the requested information, the MPS would be revealing whether or not it has been – or indeed continues to be - involved in a criminal investigation.

The principle of consistency has to be applied, as inconsistent applications of NCND across responses would allow inferences to be draw. Most importantly, a lack of consistency would potentially allow exempt information/intelligence to enter the public domain over a period of time. Responses, which do not maintain the consistent approach, form a pattern, which would

also potentially allow the identification of individuals. The importance of the present response does not just relate to what a straightforward confirm or deny response may reveal about the specific investigation; 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. Harm of this nature would have an incremental effect and may need to be factored into any future disclosures.

The MPS must ensure a careful and considered approach when confirming or denying information relating to investigations. It is pertinent to note that the public interest is not what interest the public but what would be of greater good to the community if disclosed as a whole.

The public interest would be minimal for knowing the name of a dog and details related in comparison to the harm that could be caused by prejudicing current or future investigations. This could also in turn detrimentally affect the public's confidence in the ability of the MPS to handle investigations (whether unrelated to this matter or not) appropriately, professionally and sensitively.

It is not in the public interest to disclose details of any possible investigation as this could hinder any investigative process. By confirming or denying whether or not the specific information requested for each question is held, we would disclose information that may be harmful to any current or future investigations. Therefore, under the Act we would not wish to confirm or deny to the public at large specific elements of any possible police investigation, or what information may or may not be held".

24. 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.
25. The Commissioner is therefore satisfied that the exemption provided by section 30(3) of the FOIA is engaged.

Public interest test

26. 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.
27. 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.
28. 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

29. The MPS has argued:

"It is in the public interest to confirm or deny information is held in the interests of furthering public debate, transparency and openness regarding drugs related offences ...".

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

30. The MPS has argued:

"The public interest would be minimal for knowing the name of a dog and details related in comparison to the harm that could be caused by prejudicing current or future investigations. This could also in turn detrimentally affect the public's confidence in the ability of the MPS to handle investigations (whether unrelated to this matter or not) appropriately, professionally and sensitively.

It is not in the public interest to disclose details of any possible investigation as this could hinder any investigative process. By confirming or denying whether or not the specific information requested for each question is held, we would disclose information that may be harmful to any current or future investigations. Therefore, under the Act we would not wish to confirm or deny to the public at large specific elements of any

possible police investigation, or what information may or may not be held".

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. 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.
33. 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.
34. As a counter to this, she recognises the inherent need to protect police investigations.
35. 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.
36. The Commissioner has therefore not gone on to consider the other exemptions cited.

Right of appeal

37. 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

38. 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.
39. 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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