

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

### **Decision notice**

**Date:** 26 November 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 about a relationship between an undercover officer and a woman from the Metropolitan Police Service (the "MPS"). The MPS would neither confirm nor deny holding the requested information citing sections 30(3)(investigations and proceedings), 40(5)(personal data) and 42(2)(legal professional privilege). During the Commissioner's investigation, the MPS amended its position to advise that some parts of the request were not valid as they were questions rather than requests for recorded information.
2. The Commissioner's decision is that two parts of the request were not valid as per section 8 of the FOIA. He also agrees that the MPS was entitled to rely on section 40(5)(b)(i) to neither confirm nor deny holding the requested information. No steps are required.

#### **Background**

---

3. The request can be followed on the 'What do they know?' website<sup>1</sup>.
- 

<sup>1</sup>[https://www.whatdotheyknow.com/request/actions\\_of\\_bob\\_lambert\\_concernin?post\\_redirect=1#describe\\_state\\_form\\_1](https://www.whatdotheyknow.com/request/actions_of_bob_lambert_concernin?post_redirect=1#describe_state_form_1)

4. A related article was published by the BBC on the same day that the request was made<sup>2</sup>.
5. The MPS made the following public statement following the civil action referred to in the request:

*"The MPS unreservedly apologises for any pain and suffering that the relationship with Bob Lambert, an undercover officer, has had on this woman. We recognise the impact that the revelation that he was an undercover police officer must have had both on her and her son.*

*From the outset we have dealt with this lengthy case with professionalism and sensitivity, completely understanding the gravity of the circumstances. We regret if this necessarily complex process has added to her distress.*

*We want to be, and have tried hard to be, as open as we possibly can. Arguing the need to maintain the policy of neither confirm nor deny in relation to undercover operations has never been a refusal to accept wrong doing, but has been done solely to protect a vital policing tactic.*

*Whilst Lambert has himself confirmed that he was an undercover officer that does nothing to dilute our duty to protect our staff currently working undercover. The passage of time does not lessen that responsibility or reduce the very real risks posed to our officers who have done, and currently do, this difficult and dangerous work. This must include not confirming pieces of information that when put together can identify undercover officers, tactics, or sources of information.*

*Our staff must uphold the highest possible standards, no matter what role they hold. Those standards are robustly enforced. Consequently we are giving Operation Herne our fullest support as they continue to investigate a range of criminal and misconduct allegations relating to officers from the former Special Demonstration Squad.*

*It is important to stress that the MPS has never had a policy that officers can use sexual relations for the purposes of policing".*

---

<sup>2</sup> <http://www.bbc.co.uk/news/magazine-29743857>

6. The allegations being considered by Operation Herne<sup>3</sup> (or the subset enquiry Operation Aubusson<sup>4</sup>) specifically relate to the Special Demonstration Squad ('SDS') and latterly the National Public Order Intelligence Unit ('NPOIU').

## Request and response

---

7. On 24 October 2014, the complainant wrote to the MPS and requested information in the following terms:

*"These questions are made with reference to the recent payment by the Metropolitan Police to 'Jacqui' for her impregnation, by Bob Lambert, a Metropolitan Police Officer at the time, and for other acts.*

*1 Was 'Jacqui' in a position to give informed consent for her impregnation under contemporary rape legislation?*

*2 Had she been made aware that Lambert had a wife and children?*

*3 What guidance or instruction did the Metropolitan Police give to Lambert regarding informed consent?*

*4 Did Lambert comply with that guidance or instruction?*

*5 Did Lambert's reports to the Metropolitan Police cover his sexual relationship with 'Jacqui'?*

*6 Would Lambert's reports to the Metropolitan Police have allowed the Metropolitan Police to assess Lambert's compliance with any instructions or guidance regarding informed consent.*

*7 At that time, was the Metropolitan Police satisfied that the level of informed consent in this case clearly met the requirements of contemporary rape legislation?*

---

<sup>3</sup>[http://www.met.police.uk/foi/pdfs/priorities\\_and\\_how\\_we\\_are\\_doing/corporate/operation\\_herne\\_terms\\_of\\_reference.pdf](http://www.met.police.uk/foi/pdfs/priorities_and_how_we_are_doing/corporate/operation_herne_terms_of_reference.pdf)

<sup>4</sup> <http://blog.cps.gov.uk/2014/08/charging-decision-concerning-mps-special-demonstration-squad.html>

*8 What consideration has been given to a prosecution for rape?*

*9 Did Lambert's reports to the Metropolitan Police cover the registration of the birth of Jacqui's child, and the registration of a false name for the father?*

*10 What consideration has been given to a prosecution for giving or allowing false information on the birth certificate?*

*11 What actions have been taken to secure all relevant reports and records?"*

8. Outside of the 20 working day deadline for providing a response, the MPS wrote to the complainant on 24 November 2014 and extended the time to respond to the request whilst considering the public interest; it sent its response on 29 December 2014. In respect of parts 1 - 10 it would neither confirm nor deny whether information was held and cited sections 30(3)(investigations and proceedings), 40(5)(personal data) and 42(2)(legal professional privilege). It provided links to information to evidence what actions had been taken to secure all relevant information as per part 11 of the request. It further added:

*"Some aspects of your request appear to be asking for opinions, analysis or assessments in relation to a number of scenarios. The MPS are not required to provide opinions unless this information is held in recorded form".*

9. Following an internal review the MPS wrote to the complainant on 22 January 2015. It maintained its position.

## **Scope of the case**

---

10. The complainant contacted the Commissioner on 23 March 2015 to complain about the way his request for information had been handled. He referred to the citing of sections 30(3), 40(5)(b)(i) and 42(2) so the Commissioner will consider whether the MPS is entitled to neither confirm nor deny whether it holds information in respect of parts (1) to (10) of the request. He has not considered the response to part 11.
11. The MPS has clarified to the Commissioner that the "neither confirm nor deny" stance relates to any information that may be held rather than to the event itself.
12. The MPS has also confirmed that, if held, all information connected to this request would fall within the remit of Operation Herne (or the subset enquiry Operation Aubusson).

13. During the investigation the MPS contended that parts 1 and 7 of the request are not valid requests as they are questions requiring an explanation rather than requests for recorded information.

## Reasons for decision

---

### Section 8 - validity of request

14. This is being considered in respect of parts 1 and 7 of the request only.
15. Section 8(1) defines a valid "request for information" under the Freedom of Information Act 2000 (FOIA) as a request which:
  - (a) *is in writing,*
  - (b) *states the name of the applicant and an address for correspondence, and*
  - (c) *describes the information requested.*
16. The request in question is clearly in writing and has an address for correspondence. The only issue remaining for the Commissioner to consider is its validity in respect of whether it describes the information requested.
17. In the Commissioner's view a request will meet the requirements of section 8(1)(c) as long as it contains a sufficient description of the information required. Details as to date, author, purpose or type of document, physical location, subject matter or area concerned with, may all help to identify the nature of the information sought. Each request has to be judged on its individual merits as to whether there were sufficient indicators provided to enable the information requested to be adequately described for the purposes of section 8. As long as a request attempts to describe the information it is likely to meet the requirements of section 8(1)(c) as it is always open to the public authority to seek further clarification to identify the information.
18. The MPS advised the Commissioner:

*"... the MPS in their initial response suggested that some parts [of the request] were questions rather than information requests: Having examined this issue again the MPS would contend that each element of [the complainant]'s request was phrased as a question. However, being mindful that information may or may not be held that relates to that question the MPS has placed a liberal interpretation on the request as a whole.*

*However, for the purpose of this response the MPS would consider that parts 1 and 7 are not valid requests under Section 8(1)(c):*

- 1. Was 'Jacqui' in a position to give informed consent for her impregnation under contemporary rape legislation?*
- 7. At that time, was the Metropolitan Police satisfied that the level of informed consent in this case clearly met the requirements of contemporary rape legislation?*

*Section 8(1)(c) is only concerned with the validity of the description, it cannot be used to refuse requests that are unclear. The MPS is content however that the conditions of Section 8(1)(a) and (b) are met.*

*The Commissioner's view, as highlighted in DN FS50558958: Salford City Council <sup>5</sup> is that the requests are legible and clear in intent, but that they do not describe the information requested. Section 84 of The Act defines information as "information **recorded** in any form" (Information Commissioner's emphasis).*

*The MPS contends that items 1 and 7 do not ask for recorded information, instead they are phrased as questions designed, the MPS believes, to obtain an explanation".*

19. The Commissioner considers that the wording of section 8(1)(c) is clear and should bear its plain meaning. This provision simply requires the request to "*describe the information requested*". In both instances, the request clearly seeks an opinion or explanation from the MPS. It does not seek any actual information that may be recorded.
20. It is therefore the Commissioner's view that parts 1 and 7 are not requests for information as per section 8 of the Act, rather they are questions seeking an opinion. As they are not requests for information the Commissioner cannot include them in his decision. Instead he will go on to consider the remaining elements of the request.

---

<sup>5</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1431986/fs\\_50558958.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1431986/fs_50558958.pdf)

## **Section 40 – personal information**

21. The MPS has cited section 40(5)(b)(i) in respect of all the remaining parts of the request.
22. Section 40(5)(b)(i) of the FOIA states that the duty to confirm or deny does not arise in relation to other information if or to the extent that:

*"(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded".*

23. Consideration of section 40(5) involves two steps: firstly, whether providing the confirmation or denial would involve the disclosure of personal data, and secondly, whether that confirmation or denial would be in breach of any of the data protection principles.

### ***Is the information personal data?***

24. On the issue of whether confirmation or denial in response to the complainant's request would involve the disclosure of personal data, the definition of personal data is given in section 1(1) of the DPA:

*"personal data' means data which relate to a living individual who can be identified:*

*(a) from those data, or*

*(b) from those data and any other information which is in the possession of, or is likely to come into the possession of, the data controller".*

25. The Commissioner accepts that confirmation or denial as to whether the requested information is held would relate to the named parties within the request. He therefore accepts that any information held would relate to them.
26. The Commissioner is satisfied that complying with section 1(1)(a) in this case would effectively confirm or deny whether the requested information is held in connection with the parties named in the request. Clearly this information would therefore relate to both individuals and so would be their 'personal data'.

### ***Is the information sensitive personal data?***

27. The MPS further advised that the information, if held, would be the 'sensitive personal data' of the parties concerned.



28. Section 2 of the DPA sets out categories of personal data that are classed as 'sensitive' for the purposes of that Act. The MPS has argued that the following categories of 'sensitive' personal data all apply in this case:

*(e) his physical or mental health or condition,*

*(f) his sexual life,*

*(g) the commission or alleged commission by him of any offence, or*

*(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.*

29. In this case, the sensitive personal data comprises information about a named undercover officer and a woman with whom he had a relationship. It therefore relates to the possible mental or physical health of the parties concerned, their sexual life, potential criminal allegations as well as potential criminal proceedings. The Commissioner also here notes that the investigations into the SDS, which will necessarily involve this officer, remain ongoing.

30. Based on the wording of the request, the Commissioner is satisfied that, if it were held, the personal data in question would constitute sensitive personal data as defined by section 2(e), (f), (g) and (h) of the DPA.

31. Having accepted that the request is for the sensitive personal data of living individuals other than the applicant, the Commissioner must go on to consider whether confirming or denying if the information is held would contravene any of the data protection principles. The MPS considers, and the Commissioner accepts, that the first data protection principle is relevant in the circumstances of this case.

***Would confirmation or denial breach the first data protection principle?***

32. When determining whether sensitive personal data may be disclosed it is necessary to consider whether the disclosure would be fair, before considering whether schedule 2 (processing of any personal data) and schedule 3 (processing of sensitive personal data) conditions also exist which would permit the disclosure.

33. In assessing fairness, it is necessary to consider the likely consequences of disclosure in each particular case. Personal data must be processed fairly and not used in ways that have unjustified adverse effects on the individuals concerned.

34. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. In this case, the processing



concerns the confirmation or denial as to whether the requested information is held as this action will reveal something about the parties.

35. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
  - the individual's reasonable expectations of what would happen to their information;
  - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned);
  - any legitimate interests in the public having access to the information; and,
  - and the balance between these and the rights and freedoms of the individuals who are the data subjects.
36. The MPS has advised that it would only hold any information connected to this request to support a policing purpose and that it would therefore be reasonable for individuals to expect that any information that the MPS holds in relation to them to only be used to support that purpose and that it would not be disclosed to third parties. The Commissioner recognises that people have an instinctive expectation that a police force, in its role as a responsible data controller, will not disclose certain information about them and that it will respect their confidentiality in the sensitive matters that it handles.
37. Furthermore, sensitive personal data has, by its very nature, been deemed by the DPA to be the most private information about identifiable individuals and in most cases the very nature of sensitive personal data means it is highly likely that disclosing it will be unfair.
38. In light of the above, the Commissioner considers that information relating to the subject matter of this request will carry a strong general expectation of privacy for those parties concerned.
39. As to the consequences of disclosure upon a data subject, the question – in respect of fairness - is whether disclosure would be likely to result in unwarranted damage or distress to that individual. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the withheld information. He will also take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public at large, without conditions.
40. Given the nature of the request, and that disclosure in this case could lead to an intrusion into the private lives of the individuals concerned, the Commissioner is satisfied that confirmation or denial as to the existence of the requested sensitive personal data could be both detrimental and distressing to the parties concerned.

41. Any details related to the civil action are not in the public domain and the woman concerned would have no expectation that details concerning her would be revealed by the MPS. In the Commissioner's view, she is highly likely to find any related disclosure by the MPS to be highly distressing in the circumstances.
42. In addition, the ongoing police investigations into the SDS (referred to above) will necessarily cover the issues raised by the request. It is therefore the Commissioner's opinion that the Officer concerned will have no expectation that any details will be made public in advance of their conclusions. Indeed, such action may be detrimental to the investigations themselves.
43. The Commissioner is therefore satisfied that the confirmation or denial as to the existence of the requested information would involve the processing of sensitive personal data which would be unfair and in breach of the first data protection principle of the DPA.
44. Notwithstanding a data subject's reasonable expectations or any damage or distress caused, it may still be fair to disclose information, or in this case confirm or deny if information is held, if there is a more compelling public interest in doing so. Therefore the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in confirming or denying if the information is held.
45. The Commissioner would stress that this is a different balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Given the importance of protecting an individual's personal data the Commissioner's 'default position' is in favour of protecting the privacy of the individual. The public interest in confirming if information is held must outweigh the public interest in protecting the rights and freedoms of the data subject if providing confirmation or denial is to be considered fair.
46. The interest in disclosure must be a public interest, not the private interest of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.
47. The Commissioner recognises that there is a wider public interest in the subject matter of this request and that public concerns that have been raised about the actions of the MPS and the SDS in this regard. However, he also recognises that a civil settlement has been reached and that the MPS has publically commented about this matter as far as it is able to do so. Furthermore, the matters raised are still being considered by way of investigations which the MPS will report on in due course. The public has therefore already been kept informed to some

degree and this will continue to be the case as the investigations progress.

48. The Commissioner accepts that the MPS still has wider issues around the actions of the SDS which it needs to investigate and resolve. However, in the Commissioner's view, the legitimate interest in the public being informed regarding these matters continues to be addressed.

### **Conclusion**

49. In light of the nature of the information and the reasonable expectations of the individuals concerned, the Commissioner is satisfied that confirming or denying if the requested information is held would not only be an intrusion into their privacy but could potentially cause unnecessary and unjustified distress to the data subjects. He considers these arguments to outweigh any legitimate interest in disclosure. He has therefore concluded that confirmation or denial in this case would breach the first data protection principle. He therefore finds the exemption at section 40(5) engaged and the duty to confirm or deny did not arise.
50. Because the Commissioner is satisfied that the confirmation or denial would be unfair, it has not been necessary to go on to determine whether schedule 2 or 3 of the DPA provides a basis for processing the sensitive personal data. Nevertheless, even without resorting to a detailed analysis, he considers it highly unlikely that a condition for processing personal data of this kind would be available.
51. As he has found section 40(5)(b)(i) to be engaged, the Commissioner has not found it necessary to consider the other exemptions cited.

### **Other matters**

---

52. In his covering complaint the complainant raised various matters regarding the interpretation of the FOIA. The Commissioner notes that, as the MPS did not cite sections 40(5)(a) or 40(5)(b)(ii), the complainant's comments about these were not relevant to this decision. He would also point out that section 40(5)(b)(i) was not repealed in 2000.

## Right of appeal

---

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

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

54. 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.
55. 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 .....**

**Gerrard Tracey**  
**Principal Adviser**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**