

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 August 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 a person convicted of murder from the Metropolitan Police Service (the "MPS"). The MPS refused to provide some information citing sections 40(2) (personal information) and 30(1)(a)(i) (investigations) of the FOIA. It would neither confirm nor denying holding the remainder by virtue of sections 30(3), 40(5) and 31(3)(law enforcement). The Commissioner's decision is that section 40(2) is properly engaged. He also finds that 30(3) is engaged and that the public interest against confirmation or denial that information is held outweighs that in favour of confirmation or denial. He requires no steps.

Request and response

2. On 3 March 2015, the complainant wrote to the MPS and requested information in the following terms:

"Please provide me with the following documents and correspondence from the completed investigation into the murder of [name and place redacted], on [date redacted] 2005.

- 1) *the witness statement and interview transcript of [name removed]*
- 2) *the witness statement and interview transcript of [name removed]*
- 3) *any files and correspondence relating to [name removed]'s*

*suspected involvement in three sexual assaults in [location redacted], Spain, [date redacted]
4) any files and correspondence relating to [name removed]'s suspected involvement in the [place redacted] murders in [place redacted] Australia in [years redacted] (the victims were [names redacted]).*

Thanks very much for your help."

3. The MPS responded on 12 March 2015. It stated that the information was held but that it was fully exempt by virtue of sections 30(1)(a) (investigations and proceedings) and 40(2) (personal information) of the FOIA.
4. Following an internal review the MPS wrote to the complainant on 9 April 2015. It maintained its position in respect of part (2) of the request but, in respect of the remainder, refused to confirm or deny holding any information by virtue of sections 30(3) (investigations and proceedings), 31(3)(law enforcement) and 40(5) (personal information).
5. During the course of the Commissioner's investigation the MPS revised its position in respect of part (1), removing the neither confirm nor deny exclusion but instead relying on sections 30(1)(a)(i) and 40(2).

Scope of the case

6. The complainant contacted the Commissioner on 10 April 2015 to complain about the way his request for information had been handled. In respect of part (2) he argued that the named party would have no reasonable expectation of privacy as his statement was read in open court. In respect of the remaining parts of the request the complainant raised arguments about what he believes to have been a miscarriage of justice.
7. The Commissioner will consider these matters below.

Reasons for decision

Parts (1) and (2) of the request

8. The witness statements / interview transcripts have both been withheld by virtue of sections 30(1)(a)(i) and 40(2). The Commissioner will firstly consider the application of section 40(2).

Section 40 – personal data

9. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.

Is the requested information personal data?

10. The first step for the Commissioner to determine is whether the requested information constitutes personal data, as defined by the Data Protection Act 1998 (DPA). If it is not personal data, then section 40 cannot apply.
11. The two main elements of personal data, as defined in section 1(1) of the DPA, are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way. The information can be in any form, including electronic data, images and paper files or documents.
12. In this case, the complainant has requested specific witness statements/ interview transcripts in relation to two named individuals. Having considered the nature of the withheld information, the Commissioner is satisfied it constitutes information that falls within the definition of 'personal data' as set out in section 1(1) of the Data Protection Act 1998. He has reached this conclusion on the basis that the information comprises personal data relating to an individual and their involvement in an offence, as well as to the personal data of another individual involved in the investigation and proceedings.
13. The Commissioner is therefore satisfied that section 40(2) is engaged.

Is the information sensitive personal data?

14. Sensitive personal data is defined in section 2 of the DPA. It is personal data which falls into one of the categories set out in section 2 of the DPA. In this case, the Commissioner considers the relevant categories are:
 - (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.*

15. The Commissioner is satisfied that the withheld information in its entirety can be considered to be the sensitive personal data. This is because it relates either to the individual who committed an offence which led to their conviction or a witness who provided a statement for the proceedings in that offence.
16. Having accepted that the information requested constitutes the sensitive personal data of living individuals other than the applicant the Commissioner must next consider whether disclosure would breach one of the data protection principles.

Would disclosure breach one of the Data Protection principles?

17. The Commissioner has considered whether disclosure of the requested information would breach any of the data protection principles as set out in schedule 1 of the Data Protection Act (DPA). He considers the most relevant principle in this case is the first principle, which states that:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

- (a) at least one of the conditions in Schedule 2 is met, and*
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met".*

Would it be fair to disclose the requested information?

18. In answering the question of fairness, the Commissioner recognises the importance of considering whether the data subject has consented to the disclosure and/or whether the data subject has actively put some or all of the requested information into the public domain. The Commissioner also considers it appropriate to consider the consequences of any disclosure and the reasonable expectations of the data subject.

19. The MPS has argued:

"As with any criminal investigation, especially those looking at crimes of a sexual nature, there is an inherent sensitivity in any information that is collated for the purpose. This is particularly the case when we consider the personal information that forms part of it. This interview contains sensitive information, in both the legal and non-legal sense, about the alleged crime. With this in mind, I believe that disclosure of the information would be significantly unfair, especially in regard to the witness statement of [name removed]".

Has the data subject consented to the disclosure?

20. With respect to the matter of consent, the Commissioner is not aware of anything to suggest that consent has been given for disclosure of the requested information by either party concerned.

Has the data subject actively put some or all of the requested information into the public domain?

21. Where the data subject themselves has put some or all of the requested information into the public domain, the Commissioner considers that this weakens the argument that disclosure would be unfair.
22. In this case the Commissioner has not seen any evidence that either data subject has actively put some or all of the requested information into the public domain. Whilst it is of note that there was a trial where the evidence in the case would have been read out in court and therefore it would have been in the public domain, this does not mean that the parties concerned have actively disclosed the information themselves. This is a necessary part of the administration of justice and the Commissioner does not consider that disclosure of sensitive information as part of the court process indicates that the parties concerned have given consent for further disclosure in the future. The disclosure of personal data may still breach the data protection principles even after it has been disclosed in open court.

Reasonable expectations

23. In explaining its reasoning for refusing to disclose the requested information, the MPS has advised the Commissioner:

"The MPS is of the opinion that any witness who provides information to the police in order for them to investigate crime would expect that statement to be held in confidence. There would be an expectation that such information to be treated confidentially and only shared with those that needed to know professionally, not the MPS would contend, to disclose, even in a redacted form under Freedom of Information Legislation. Accordingly, the MPS contends that disclosure of the statements and or interview tapes would be at variance with these expectations and thus unfair.

Unless these individuals were to make this information public themselves, this information would be held by the MPS in the strictest confidence. The MPS would not routinely disclose the information provided to us by victims, witnesses or suspects, and would not look to do so in response to FOIA requests unless there was a significant reason to override the data protection

principles. In this case the MPS does not believe such a reason exists”.

24. The Commissioner recognises that individuals who necessarily provide frank and honest witness statements to the police would not expect the police to then release them to the general public. Although they would expect them to form part of the 'public' trial for which they were taken, this is a specific purpose and a necessary part of the court process. The Commissioner considers this to be an entirely different situation to the release of sensitive personal information into the public domain via the FOIA after the court case has ended.
25. The Commissioner also notes the complainant's arguments that the MPS, and other forces, do on occasion release video footage of interviews with criminals who have already been convicted, and he provided some examples. However, the Commissioner has discussed this with the MPS and he understands that there are only very limited circumstances when it would consider that there is a particular public interest in disclosure and such disclosure is not done under the terms of the FOIA. Furthermore, the information will not be released in its entirety, it will be edited and full consideration will be given to any consequences of disclosure. As already cited above, the MPS does not consider there to be such an over-riding interest in this particular case.

Consequences of disclosure

26. In looking at the consequences of disclosure on the data subject, the Commissioner has considered what those consequences might be. In doing so, he has considered the nature of the information itself and the climate in which the information would be disclosed.
27. The MPS has argued:

"Personal data should not be processed in a way that would have an unjustified adverse effect on the individual. In my opinion, the negative and distressing impact that the release of either statement or tapes would have on either the witness and or relatives of the victim, [name removed].

This opinion has been informed by an ICO Decision Notice in support of Surrey Police, whereby it was argued that to release the actual tapes of Saville's interviews would be highly distressing to his victims, even though in that rare case the transcripts had been released (see FS5052675). Albeit in this case it is recognised that the victim, [name removed] is deceased. However, her family are not”.

28. Mindful of the fact that disclosure under the Act is disclosure to the world at large, the Commissioner considers that, in this case, the murdered woman's friends and family are amongst the general public to whom any disclosure would be made, as too are those of the witness concerned. The circumstances of the murder are particularly distressing and the Commissioner considers it is highly likely that disclosure of this type of information is likely to have a detrimental or distressing effect on those parties. Whilst he accepts that the complainant wishes to have sight of the information as he believes it may well assist with other crimes which he thinks may have been perpetrated by the same person, this does not negate from the impact on those parties directly concerned.
29. If the requested information were able to shed any light on the other crimes, which were not committed in the UK so the MPS would have no jurisdiction, then it is for the relevant prosecuting authorities, or other victims, to request the information from the MPS via the appropriate channels.

Conclusion

30. The view of the Commissioner is that there is some legitimate public interest in the disclosure of this information owing to its subject matter and the complainant's belief that the murderer is responsible for other crimes which may be evidenced further in the content of the information he has requested. However, if there is any possible connection to the other crimes, the Commissioner does not consider that placing the information requested into the public domain will go any way toward resolving these matters. Indeed an unfettered disclosure of this type may have the detrimental impact of compromising any enquiries which could be ongoing in the countries where the crimes occurred.
31. The Commissioner notes that the information in this case falls is considered to be 'sensitive' personal data. As such, by its very nature, this has been deemed to be information that individuals regard as the most private information about themselves. Further, as disclosure of this type of information is likely to have a detrimental or distressing effect on the subjects concerned, the Commissioner considers that it would be unfair to disclose the requested information.
32. As the Commissioner has concluded that it would be unfair to the individuals concerned to disclose the withheld information and to do so would contravene the first principle of the DPA, he has not gone on to consider whether disclosure is lawful or whether one of the Schedule 2 DPA conditions is met. However, his initial view is that no Schedule 2 condition would be met, nor indeed a schedule 3 condition. The

exemption provided by section 40(2) is, therefore, engaged and the Commissioner will not consider the other exemption cited.

Parts (3) and (4) of the request

33. These parts of the request relate to what would be an 'open' investigation were any information held. As such, the Commissioner has firstly considered the citing of section 30(3).

Section 30(3) – criminal investigations and proceedings

34. This section provides an exemption from the duty to confirm or deny whether information is held in relation to any information that, if it were held, would fall within any of the classes described in sections 30(1) and 30(2). Consideration of section 30(3) involves two stages; first, the exemption must be engaged as any information within the scope of the request would be in the relevant class. Secondly, this exemption is qualified by the public interest. This means that if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information must be disclosed.
35. The first step here is to address whether, if the MPS did hold information falling within the scope of parts (3) and (4) of the complainant's request, this would fall within the class specified in section 30(1)(a)(i). The wording of the requests are specifically for information relating to a police investigation. Given this, the Commissioner considers it clear that any information held by the MPS falling within the scope of the requests would be within the class described in section 30(1)(a)(i); that is, it would be held for the purposes of an investigation into whether a person should be charged with an offence. The exemption provided by section 30(3) is, therefore, engaged.

The public interest test

36. The next step is to consider the balance of the public interest. In reaching a conclusion on the balance of the public interest in this case, the Commissioner has considered two key factors. First, he has considered whether disclosure of the confirmation or denial would be likely to harm an investigation being carried out by the MPS, which would be counter to the public interest, and what weight to give to this public interest factor. Secondly, he has considered what public interest there is in confirmation or denial.
37. As section 30 is a qualified exemption the Commissioner has gone on to consider 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 disclosing whether the MPS holds any information falling within the scope of the request.

Public interest arguments in favour of confirming or denying that information is held

38. The Commissioner has taken into consideration the fact that the MPS is charged with enforcing the law, preventing and detecting crime and protecting the communities it serves. There is a public interest in the transparency of policing such investigations and the MPS acknowledges that confirming or denying whether the information is held would ensure transparency.
39. The Commissioner has also taken into account that there is a general public interest in promoting transparency and accountability in relation to the MPS's activities. To confirm or deny whether there is information held which may have relevance to an alleged miscarriage of justice, would provide the world at large with some information about how it deals with such matters and would confirm to the public that the MPS has investigated, or is investigating, the same.

Public interest test arguments against confirmation or denial that information is held

40. In respect of 30(3) the MPS advised the complainant:

"Whilst there is a public interest in the transparency of policing operations and providing assurance that the MPS is appropriately and effectively dealing with such matters, there is also a strong public interest in safeguarding the integrity of police investigations and operations and in maintaining confidence in the MPS".

41. The Commissioner has also taken into account that confirmation or denial of the existence of any information concerning an allegation made by a member of the public concerning a crime which is believed to have been committed could undermine any subsequent investigation which would impinge on an alleged offender's right to a fair trial under Article 6 of the Human Rights Act 1998. This is particularly relevant where (as in this case) a request for information relates to named individuals.
42. To confirm or deny under the FOIA whether an individual has been or is under investigation could alert that individual to that fact and as a consequence it could impede any ongoing investigation process; conversely it could confirm to that individual that they are no longer of interest to the police. There is a possibility that the requested information relates to an ongoing investigation, and there is always the potential, should any new evidence come to light, for a closed

investigation to be reopened. Confirming or denying whether information is held about a particular investigation could therefore potentially have a negative impact on any future re-opened investigation.

Balance of the public interest arguments

43. In cases involving the application of section 30(3), the Commissioner believes that the wording of the request is key to determining whether the balance of the public interest favours maintaining the exemption. This is because the more specific a request, the more likely it is that confirmation as to whether or not information is held would result in the prejudicial effects described above, and thus the more likely that the public interest favours maintaining the exemption.

44. The MPS has advised the Commissioner:

"It should be noted that the two remaining parts relate to speculation about [name removed]'s movements and potential involvement in regard other offences [sic] in other countries. Such matters pertain to who the investigators may have questioned, who they may have consulted or cooperated with, what evidence may have been obtained and or what other locations may or may not have been identified as being linked to potential investigations".

And:

"... were the MPS to confirm or deny whether the information relating to the potential scope of the investigation, is or is not held, this alone would publicly confirm whether or not certain actions took place as part of the investigation and provide information about potential suspects, leading to inferences being drawn as to whether or not someone was charged and or prosecuted. It should be recognised that to divulge answers to the parts above, even by confirming or denying its existence that, in itself, supplies information to the world at large.

In this instance whilst it would be of interest to the public to have it confirmed, or otherwise, about specific issues relating to the investigation, I believe that public interest in confirming or denying whether the information is held does not outweigh the benefits of neither confirming nor denying that the requested information is held".

45. On the issue of whether disclosure would be likely to harm an investigation, an important consideration is whether and to what extent the information in question is in the public domain. In the situation in

this case this means considering whether there is any information in the public domain that suggests that the MPS did carry out, or is in the process of carrying out, an investigation relating to the circumstances described in the requests.

46. The Commissioner has located information in the public domain which refers to an alleged confession by the murderer who is the main subject of this request which may in turn question the conviction of another party. However, this is not an 'official statement' so cannot be fully relied on and the Commissioner has been unable to locate information in the public domain that relates to any relevant investigation by the MPS itself.
47. The information in the public domain is a relevant factor in this case but should not be determinative. The MPS submitted to the Commissioner that they had not publicly confirmed or denied an investigation. The Commissioner accepts that there is difference between the information he has found online and formal, official confirmation or denial by a police force.
48. The section 30 exemption exists to ensure the effective investigation and prosecution of offences. Given the complexity of the types of allegations the requests relate to the Commissioner accepts that it is likely that either confirmation or denial could be disruptive. The Commissioner accepts that MPS has a legitimate requirement for a safe space in which to operate and premature confirmation or denial could hamper their considerations of how to proceed or investigate. It could also have a considerable impact on the parties concerned. Strong weight should therefore be accorded to maintaining the exclusion.
49. In this case the request focuses on a particular investigation rather than investigations in general and specifically asks for information about investigations in relation to a named individual. By confirming whether or not 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 into the individual named by the complainant.
50. The Commissioner recognises that the complainant has genuine reasons for making the request as he believes someone is wrongfully imprisoned and he is attempting to prove to the contrary. However, the FOIA is motive blind which means that the Commissioner can only decide whether confirmation or denial that the information is held should be put into the public domain, rather than disclosed to the complainant specifically.

51. In considering the balance of the public interest in relation to the application of the neither confirm nor deny provisions of section 30 in this case, the Commissioner's view is that significant weight has to be given to the need to protect the MPS's ability to adopt a consistent approach when responding to similar requests about investigations into named individuals in the future. That is to say, if the MPS routinely confirmed that it was not conducting investigations into a particular individual – because this was in fact the case – but then adopted a 'neither confirm nor deny' approach when it actually was investigating a particular individual organisation, then its decision to do so could be reasonably assumed to be taken as an indication that it was in fact conducting an investigation into the named party cited in the request. This would of course undermine the rationale for adopting the 'neither confirm nor deny' response in the first place.
52. Having considered the arguments in this particular case, the Commissioner's view is that the public interest arguments in favour of maintaining the refusal to either confirm or deny whether information is held outweigh those in favour of the MPS issuing such a confirmation or denial. Therefore, the Commissioner finds that the MPS was entitled to rely on the refusal to confirm or deny provided by section 30(3) of the FOIA.
53. Given this conclusion, it has not been necessary to go on to consider the other exemption cited by the MPS.

Right of appeal

54. 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

55. 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.
56. 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

Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF