Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 January 2016

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 a copy of the information which the Metropolitan Police Service (the "MPS") submitted to the Interception of Communications Commissioner's Office ("IOCCO") for a review it conducted into the police service's use of the Regulation of Investigatory Powers Act 2000 ("RIPA") to identify journalistic sources. The MPS initially found the request to be vexatious under section 14(1) of the FOIA, however, during the course of the Commissioner's investigation, it changed its position and instead relied on sections 21(1)(information accessible by other means) and 31(1)(a)(b) & (g)(law enforcement). The MPS subsequently went on to disclose some information, maintaining reliance on 31(1)(a)(b) and (g) for the remainder. The Commissioner's decision is that it was entitled to do so and no steps are required.

Background

2. The request makes reference to a Report published by the IOCCO. This can be found online[1].

3. Regarding its findings the Report states:

> *"Statistical Information*
>
> *7.1 In the 3 year period covered by the inquiry 19 police forces reported undertaking 34 investigations which sought communications data in relation to suspected illicit relationships between public officials (sources) and journalists. The 34 investigations concerned relationships between 105 journalists and 242 sources.*
>
> *7.2 608 applications under Chapter 2 of Part 1 of the Act were authorised to seek this communications data. This represents an extremely small percentage (0.1%) of the total applications that were authorised by the police in that 3 year period.*
>
> *7.3 Commonly the investigations were internal Police Professional Standards enquiries concerned with the disclosure of information to journalists by police officers and police staff which was considered sensitive and therefore deemed to be a criminal act - typically misconduct in public office, a breach of data protection or an offence under the computer misuse act. Exceptionally they related to contempt of court and the offence of conspiracy to pervert the course of justice".*

4. The only force which is specifically mentioned in the Report is the MPS.

Request and response

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

[1] http://www.iocco-uk.info/docs/IOCCO%20Communications%20Data%20Journalist%20Inquiry%20Report%204Feb15.pdf

> *"I am writing to you under the Freedom of Information Act 2000 to request the following information.*
>
> *Following the publication of the report: "IOCCO inquiry into the use of Regulation of Investigatory Powers Act (RIPA) to identify journalistic sources" - by the Interception Commissioner please may you provide me with all materials which were sent to the Commissioner's office for the purpose of the report".*

6. The MPS responded on 26 February 2015. It stated that it considered the request to be vexatious under section 14(1) of the FOIA.

7. Following an internal review the MPS maintained its position.

Scope of the case

8. Following previous correspondence, the complainant contacted the Commissioner on 27 September 2015 to provide his grounds of complaint. He disputed that the requested information related to law enforcement and did not agree that the MPS's responses specifically addressed the requested information, rather that they were generic in nature. He also provided detailed reasons as to why he believed that the information should be released; it should be noted that these arguments were provided prior to any disclosure being made by the MPS. The complainant also confirmed he was happy for names to be redacted from the requested information prior to disclosure.

9. During the Commissioner's investigation, two decision notices were issued concluding that requests similar to this were not vexatious[2,3]. On this basis the MPS reconsidered its position and revised it. It withdrew reliance on section 14(1) and instead cited section 21(1) in respect of information already contained in the published IOCCO Report and sections 31(1)(a)(b) and (g) in respect of the remaining information.

10. The MPS subsequently went on to disclose some information and removed reliance on section 21(1). It withheld the remaining information under sections 31(1)(a),(b) and (g).

[2] https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432033/fs_50578306.pdf
[3] https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432034/fs_50582792.pdf

11. Having disclosed some information from its submission to the IOCCO the MPS is no longer relying on section 21(1) of the FOIA. The Commissioner has considered the citing of section 31 in respect of the remaining withheld information.

Reasons for decision

Section 31 – law enforcement

12. The MPS is relying on section 31(1)(a)(b) and (g). These state that:

> *Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—*
>
> *(a) the prevention or detection of crime,*
> *(b) the apprehension or prosecution of offenders,*
> *(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)…*

13. Section 31 is a prejudice based exemption and is subject to the public interest test. This means that not only does the information have to prejudice one of the purposes listed but, before the information can be withheld, the public interest in maintenance of the exemption must outweigh the public interest in disclosure.

14. In order to be engaged, the following criteria must be met:

- the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;

- the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and

- it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

15. Prejudice to different functions is described in each of the three subsections cited. Therefore, the Commissioner will firstly consider the

citing of 31(1)(a) and (b), which has been applied to the withheld information in its entirety.

Section 31(1)(a) and (b)

16. The relevant applicable interests cited in this exemption are the prevention or detection of crime and the apprehension or prosecution of offenders.

17. In engaging this exemption the MPS initially stated:

> *"To disclose additional information to that contained within IOCCO's report may be likely to compromise potential ongoing or future operations and or prosecutions, the consequence of which would hinder the prevention and/or detection of crime. It therefore remains the case that any information identifying the focus of policing activity could be used to the advantage of criminal organisations. Likewise, the disclosure of additional information may be likely to provide intelligence that could be used by criminals to undermine the operational integrity of policing that would be likely to adversely affect public safety and have a negative impact on the ability of the MPS to protect the public and uphold the law".*

18. The withheld information comprises parts of the written submission which the MPS provided to the IOCCO for its Report. The Commissioner has had full sight of this and can confirm that the content specifically relates to a number of police operations, and that the relevant details are not currently in the public domain; some of these remain 'live'.

19. The MPS has advised the Commissioner that the covering letter it provided with its actual submission to the IOCCO described the contents of that submission as :

> "*… operations that were / are being held to determine if a member of a police service or other party have been in contact with a journalist or employee of a newspaper or television company".*

20. It further explained that:

> *"Accordingly, the material that has been withheld outlines in some detail the type and nature of the investigation being undertaken by the MPS and on occasion the number of authorisations under RIPA or PACE that were authorised. The information also includes investigations that are ongoing and not, as yet, in the public domain.*

Clearly, it would not be in the public interest for the MPS to name those operations or to detail the circumstances or their nature as to do so may be likely to alert those still sought as suspects".

21. With regard to the first criterion of the three limb prejudice test described above, the Commissioner accepts that potential prejudice to any ongoing police investigation clearly relates to the interests which the exemptions contained at sections 31(1)(a) and 31(1)(b) are designed to protect.

22. With regard to the second criterion, having considered the contents of the withheld information the Commissioner is satisfied that its disclosure clearly has the potential to harm the ongoing investigations being undertaken by revealing the use of RIPA authorisations in those enquiries. In respect of the one enquiry which is now closed, the MPS has argued that even to disclose the nature of that enquiry would harm law enforcement. This is because it relates to security issues around a specific MPS system and to reveal any details about this would be likely to be prejudicial to MPS law enforcement capability by opening up potential operational vulnerabilities for the system concerned.

23. Having viewed the information in full, the Commissioner accepts that there is a causal link between disclosure of the information and the interests which the exemptions contained at sections 31(1)(a) and (b) are designed to protect. Moreover, given the potential consequences of disclosure, the Commissioner is satisfied that the resultant prejudice which the MPS considers would be likely to occur is one that can be correctly categorised as real and of substance.

24. In relation to the third criterion, the Commissioner has been guided on the interpretation of the phrase "*would*" or "*would be likely to*" by a number of Tribunal decisions. He believes that for the lower level of likelihood, ie "*would be likely*", to be met the chance of prejudice occurring should be more than a hypothetical possibility; there must have been a real and significant risk. The Commissioner understands that the MPS is relying on the lower limb that prejudice would be likely to occur.

25. Having had the benefit of examining the withheld information the Commissioner notes that it contains details about investigations which are not currently in the public domain. The Commissioner is satisfied that disclosure of the withheld information would be likely to represent a real and significant risk to the MPS's enquiries by revealing whether or not RIPA was used as a law enforcement tool in that particular case.

26. Based on the contents of the withheld information, and the representations provided by the MPS, the Commissioner is satisfied that the exemptions contained at sections 31(1)(a) and (b) are engaged.

Public interest test

27. Section 31 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemptions contained at sections 31(1)(a) and (b) outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

28. The MPS has advised that it:

> *"… understands that there is a clear public interest in accountability and transparency through disclosure of information that enables members of the public to scrutinize how the police service operates in areas such as RIPA. It is plainly evident that the use of RIPA legislation has attracted significant debate at all levels and there continues to be significant debate about the privacy implications of the use of RIPA and the potential adequacy of the legislation at the moment".*

29. In his submission to the Commissioner the complainant included the following arguments to support his position that the MPS's response to the IOCCO should be disclosed:

> *"The interception of information relating to journalists' sources is a incredibly sensitive area that has implications on freedom of expression as well as privacy. In extreme circumstances the accessing of this information may conceivably put someone at danger (for example, if information has been accessed about a source and their identity has been passed onto someone who may wish to harm the journalist's source).*
>
> *The response from the Metropolitan Police (MPS) does not take into account the specific information that this request covers, it merely considers information of the nature that I have requested. There is little reference to the specific information, which has been requested in this instance.*
>
> *The MPS states that some information is accessible by other means - in the IOCCO report, which it quotes at length. This information has been summarised and aggregated by the IOCCO for the purposes of its report. It marks, what is presumably, a small*

amount of the information submitted by the MPS to IOCCO for the production of its report. The information that is included in the report is also not in its original format, which was implied by the request. As per the original request the word 'materials' can be reasonably interpreted as information that was submitted in its original form by the MPS.

The public interest test by the MPS does not take into account the inappropriateness of the monitoring in the initial case. The seriousness of the interceptions has led to the law being changed. The MPS and other police forces, in response to the inappropriate interceptions being made, showing their severity, require judicial oversight before similar interceptions can be made (http://www.theguardian.com/world/2015/feb/04/police-600-applications-trace-journalist-sources-snopping-watchdog).

Article 10 of the European Convention on Human Rights allows a right for 'freedom of expression'. This is particularly important for journalists, and their publishers. As the IOCCO report stated, these interceptions: "did not give due consideration to Article 10 of the Convention". The protection of humans rights and the potential breach of the ECHR in these interception cases cannot be fully considered unless information is published. A number of journalists may want to take legal action if their human rights have been contravened by the interception of communications that relate to their sources.

Journalistic source material is also give protection by the UK justice system under section 10 of the Contempt of Court Act 1981. This highlights the importance of the ability for a journalist's sources to be protected. Likewise the potential identification, and privacy matters, of the journalists' sources and any repercussions of identification have not been considered and weighed into the balancing of the public interest by the MPS.

There is also no other way to potentially access this information. The IOCCO is not covered by the FOIA, and thus there is no statutory mechanism that may allow the disclosure of information relating to a case that has serious implications as the one that is discussed.

Overall the potential breaches of the human rights of individuals - who may not be aware that this has occurred - outweighs the public interest in maintaining the exemptions".

30. The Commissioner notes that the above submission was made prior to the disclosure which was made by the MPS. The subsequent disclosure therefore evidences to the complainant that the response made by the MPS to the IOCCO was in fact succinct and only a relatively short letter. It does not name any journalists, only giving résumés of any investigations where RIPA has been used, and does not include any actual 'material'. Many of the complainant's arguments are therefore no longer relevant, although the Commissioner has reproduced them to show that they have been considered.

31. The Commissioner further notes the complainant's submission focuses on the protection of journalistic sources. However, as shown in the Background section above, the Commissioner would suggest that the focus of the IOCCO's enquires is different. The overriding purpose of the related RIPA applications concerns inappropriate disclosure to the media by police officers, police staff and others in public office, and an attempt by forces to identify the parties making these disclosures; these are not efforts by police forces to identify journalists, and the only sources sought are those in a 'public office' role. According to the IOCCO report quoted from above, disclosures by these parties would be deemed to be criminal acts. The police service clearly has a vested interest in ensuring the integrity of its staff and investigating whether inappropriate disclosures of material central to its law enforcement duties are being made.

32. The complainant also makes reference to the Human Rights Act and, in his view, the inappropriateness of the applications which were made. However, it is important to note that in the press release which it issued to accompany its Report the IOCCO[4] stated:

> *"Police forces have not circumvented other legislation by using their powers under Chapter 2 of Part 1 of the Act to acquire communications data in these cases. Police forces are not randomly trawling communications data relating to journalists in order to identify their sources.*
>
> *All of the communications data applications had been authorised by a designated person of the correct rank. The applications related to investigations where public officials were suspected of criminal conduct or where a media organisation had voluntarily disclosed information to the police".*

[4] http://iocco-uk.info/docs/Press%20Release%20IOCCO%20Journalist%20Inquiry.pdf

33. Therefore, although the rules for obtaining this type of data have been amended since the IOCCO's Report, it must be borne in mind that, at the time they were made, the IOCCO is satisfied that the applications were done to the appropriate standards and there was no suggestion of any wrong-doing by any force. Furthermore, any journalist who believes they may have been compromised in some way is also able to follow this up via the appropriate channel, which is unlikely to be via an unrestricted disclosure made under the FOIA which could very likely undermine any future investigation into such matters.

Public interest arguments in favour of maintaining the exemption

34. In arguing against disclosure the MPS has advised:

> *"Disclosure … would be likely to undermine, compromise or indeed disrupt the law enforcement capability of the MPS. As evidenced in the* [IOCCO] *Commissioners Report members of the public will be aware that the MPS uses its legitimate powers under RIPA. Apart from this limited information it is important that the MPS maintains a tactical advantage and that we are able to be proactive in operational policing and remain effective in operating in a confidential environment. There is a clear need to be able to protect either unknown and or ongoing police investigations, which may be taking place now or in the future. This extends to the protection of witnesses and victims who are likely to be identified either by the disclosure, or by small pieces of information which can be linked to other data available via the public domain either by those who wish to frustrate any such investigation or identify such individuals".*

35. The Commissioner has scrutinised the withheld information and is satisfied that, where possible, any information which is in the public domain has been disclosed to the complainant. The remaining information is not known. Disclosure of this could have the effect of 'tipping off' those who are under suspicion thereby enabling them to evade justice. It could also allow criminals to assess the types of cases where RIPA may be used and the related circumstances where the police service may successfully do so. Such disclosure could compromise current and future investigations thereby impacting on the MPS's law enforcement practices.

Balance of the public interest test

36. In its public interest test the MPS advised the complainant that:

> *"In February 2015 IOCCO report identified that the use of communications data in the circumstances of this request represented 0.1% of the total police applications within the relevant*

time period. IOCCO gave reassurance that all of the information they disclosed in the report was very carefully considered, giving weight to the argument for not disclosing any further information held by the MPS.

Whilst the factors of accountability and public debate carry weight, it is considered that these are far-outweighed by the potential negative effect on the law enforcement capabilities of the MPS, in particular, that ongoing or future investigations may be likely to suffer compromise and worse that individuals may be identified. As alluded to, the MPS is already subject to statutory monitoring from IOCCO on its use of RIPA and this function would not be enhanced through additional disclosure by the MPS at this time. Consequently the public interest favours non disclosure".

37. The Commissioner accepts that the IOCCO Report has resulted in a significant amount of media and press speculation. Disclosure of the withheld information would allow the public to know about further criminal investigations being undertaken by the MPS which have required the use of RIPA in assisting with those particular enquiries.

38. However, the Commissioner believes that there is stronger public interest in ensuring that the overall effectiveness of investigations being undertaken by the MPS is not undermined or compromised. Whilst there is a public interest in knowing that the MPS takes its law enforcement duties seriously and does not seek to circumvent or undermine the considerable powers it has to undertake those duties, it is of note that the powers it has are already under scrutiny by the IOCCO to ensure that its acts appropriately and proportionately. Such scrutiny has been reflected in the changes to the authorisations process that have been made since the IOCCO Report.

39. The Commissioner considers that there is a very strong public interest in ensuring that the apprehension and prosecution of individuals is not prejudiced as a result of inappropriate disclosure. The public is entitled to expect that those who have committed offences are successfully prosecuted, particularly when those under suspicion are themselves in a position of trust such as serving police officers. It would clearly not be in the public interest if the disclosure of information resulted in the inability of the prosecuting authorities to successfully apprehend or prosecute such offenders. In this case the Commissioner has had regard to the serious nature of the crimes which are being considered and the possibility of successful future prosecutions as a result of these investigations.

40. The Commissioner has concluded that in all of the circumstances of this case the public interest in maintaining the exemptions at sections

31(1)(a) and (b) outweighs the public interest in disclosing the withheld information.

41. As he has found that these exemptions fully cover the withheld information he has not found it necessary to consider the application of 31(1)(g).

Right of appeal

42. 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

43. 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.

44. 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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