

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 May 2016

Public Authority: Chief Constable of West Yorkshire Police
Address: West Yorkshire Police HQ
P O Box 9
Laburnum Road
Wakefield
WF1 3QP

Decision (including any steps ordered)

1. The complainant has requested information about an alleged informant. West Yorkshire Police neither confirmed nor denied holding the information, citing the exemptions at section 23(5) (security bodies) and section 24(2) (national security) in the alternative as its basis for doing so. It also cited 30(3) (investigations) and 40(5) (personal information) of the FOIA.
2. The Commissioner's decision is that West Yorkshire Police has applied sections 23(5) and 24(2) in the alternative, appropriately to the requested information.
3. The Commissioner does not require West Yorkshire Police to take any further steps as a result of this decision.

Request and response

4. On 24 September 2014, the complainant wrote to West Yorkshire Police (WYP) and requested information in the following terms:

"Under the act. I would like to request complete copies of all the documents held by West Yorkshire Police on Gary Shopland and his work as an informant. I assume that this would include, but not limited, to the following:

- *complete records of the paperwork relating to his work as an informant between 1997 and 2003 for the West Yorkshire Police, including – for instance*
- *reports of information gathered by Mr Shopland, his recruitment in 1996, and payments he received;*
- *reports compiled by the West Yorkshire police officers responsible for running him as an informant, including [name redacted];*
- *paperwork relating to meetings in 2006 and 2007 in Solihull between Mr Shopland and his representatives and [name redacted] , of the force's professional standards intelligence unit (to assist your search for records, Mr Shopland met [name redacted] on [information redacted]);*
- *records relating to Mr Shopland's complaint against West Yorkshire Police in 2008 (recorded by the force's professional standards department as [redacted]);*
- *paperwork relating to the letter by [name redacted] , the force solicitor, to Mr Shopland on [redacted] in which [name redacted] stated that: "The West Yorkshire police are aware of historic media reports suggesting that your client [Mr Shopland] is a racist and/or Nazi. These reports were totally inaccurate and without proper foundation.";*
- *paperwork relating to the inquiry by the Guardian in May 2014 regarding Mr Shopland, including full copies of press lines and communications with other departments within the police.*

I am aware that the West Yorkshire Police may respond to this request by saying that the information request is exempt under the data protection provisions. I believe that these provisions relating to Mr Shopland do not apply as Mr Shopland is content for any information relating to himself to be disclosed. I have attached a letter from Mr Shopland to this effect. To assist your search for relevant records, I would like to add that your force recently wrote to Mr Shopland (on August 21) and your reference was [redacted])."

5. WYP responded on 24 November 2014. It stated that it was neither confirming nor denying whether it held the requested information and cited:

40(5) – personal information

30(3) – investigations by virtue of section 30(2)

23(5) – information supplied by or concerning certain security bodies

24(2) – national security

6. Following an internal review WYP wrote to the complainant on 17 April 2015 upholding its original decision.

Scope of the case

7. The complainant contacted the Commissioner 8 June 2015 to complain about the way his request for information had been handled. He explained that there were court rulings which had ruled in favour of informants being named, as the informants themselves had waived anonymity and provided some examples.
8. The Commissioner will consider the application of the exemptions and the length of time taken to deal with the request.

Reasons for decision

Section 23(5) (Information supplied by, or relating to, bodies dealing with security matters) and 24(2) (National security)

9. Information supplied by or relating to security bodies specified in section 23(3) is exempt information by virtue of section 23(1). Information which does not fall under 23(1) is exempt from disclosure under section 24(1) if the exemption is required for the purpose of safeguarding national security.
10. Sections 23(5) and 24(2) exclude the duty of a public authority to confirm or deny whether it holds information which, if held, would be exempt under section 23(1) or where confirmation or denial as to whether requested information is held is required for the purpose of safeguarding national security.
11. WYP explained that both sections 23(5) and 24(2) were engaged. The Commissioner does not consider the exemptions at sections 23(5) and 24(2) to be mutually exclusive and he accepts that they can be relied on independently or jointly in order to conceal whether or not one or more of the security bodies has been involved in an issue which might impact on national security. However, each exemption must be applied separately on its own merits. As section 23 is an absolute exemption it is not subject to the public interest test.
12. The test as to whether a disclosure would relate to a security body is decided on the civil standard of proof, that is, on the balance of probabilities. In other words, if it is more likely than not that the disclosure would relate to a security body then the section 23 exemption would be engaged.

13. From the above it can be seen that section 23(5) has a very wide application. If the requested information is within what could be described as the ambit of security bodies' operations, section 23(5) is likely to apply. This is consistent with the FOIA access regime as security bodies themselves are not subject to its provisions.
14. Factors indicating whether a request is of this nature will include the functions of the public authority receiving the request, the subject area to which the request relates and the actual wording of the request.
15. It is the Commissioner's opinion that the section 23(5) exemption should be interpreted so that it is only necessary for a public authority to show that either confirmation or denial as to whether the requested information is held, would involve the disclosure of information relating to a security body. Whether or not the security body is interested or involved in a particular issue is in itself information relating to a security body.
16. WYP explained that the requested information relates to whether Mr Shopland was or was not an informant. The Commissioner considers that the nature of the information would likely involve one or more of the security bodies identified in section 23(3). Confirming or denying whether WYP held the information specified in the request would therefore constitute a disclosure of information about one or more of the security bodies listed in section 23(3).
17. The Commissioner is satisfied that there is a close working relationship between WYP and the security bodies listed in section 23(3).
18. In light of WYP's relationship with the security bodies and the wording of the request, the Commissioner finds that, on the balance of probabilities the requested information, if held by WYP, would relate to or have been supplied by, one of or more bodies identified in section 23(3).
19. The Commissioner is therefore satisfied that complying with the requirements of section 1(1)(a) would constitute a disclosure of information about one or more of the security bodies listed in section 23(3). The need to adopt a consistent position is of vital importance in considering the application of an NCND exemption.
20. With regard to section 24(2), the Commissioner considers that this exemption should be interpreted so that it is only necessary for a public authority to show either a confirmation or denial of whether requested information is held, would be likely to harm national security. The Commissioner interprets the phrase 'required' to mean 'reasonably necessary'. In effect this means that there has to be a risk of harm to national security for the exemption to be relied upon, but there is no

need for a public authority to prove that there is a specific, direct or imminent threat. WYP explained that if held, it considered that disclosure of the information in question would undermine national security.

21. In relation to the application of section 24(2), the Commissioner notes that the First Tier Tribunal (Information Rights) has indicated that only a consistent use of a NCND response on matters of national security can secure its proper purpose. Therefore, in considering whether the exemption is engaged and the balance of the public interest test, regard has to be given to the need to adopt a consistent NCND position and not simply to the consequences of confirming whether the specific requested information in this case is held or not.
22. As a general approach the Commissioner accepts that withholding information in order to ensure the protection of national security can extend, in some circumstances, to ensuring that matters which are of interest to the security bodies are not revealed. In the present case, the Commissioner is satisfied that complying with the requirements of section 1(1)(a) would be likely to reveal whether the security bodies were interested in the subject matter of the request.
23. The Commissioner is satisfied that WYP is entitled to rely on both sections 23(5) and 24(2) in the circumstances of this case. He accepts that revealing whether or not information is held within the scope of the request which relates to security bodies would reveal information relating to the role of the security bodies. It would also undermine national security and for that reason, section 24(2) also applies because neither confirming nor denying if information is held, is required for the purpose of safeguarding national security.
24. As section 24 is a qualified exemption, it is subject to the public interest test.

Public interest test

25. The Commissioner is required to consider whether the public interest in neither confirming nor denying whether WYP holds information which would be exempt under section 24, outweighs the public interest in confirming or denying whether such information is held.
26. In submissions to the Commissioner, WYP recognised that there is a general public interest in openness with regards to the police because this increases public trust in and engagement with them.

27. WYP also acknowledged that there was a public interest in transparency with regards to policing operations and investigations. It also recognised that the public had a right to know how public monies were being spent.
28. However, WYP maintained that such public interest has to be weighed against a very strong public interest in safeguarding national security, which could only be overridden in exceptional circumstances. It explained that other organisations outside of the police service are also widely engaged in rewarding informants in a number of ways and by either confirming or denying whether the requested information is held, would harm the close relationship that exists with such organisations where trust and confidence in this specific, sensitive area has been built up in the exchange of information and financial assistance during the criminal justice process.
29. WYP also argued that confirming or denying whether it held the requested information would allow inferences to be made about the nature and extent of national security related activities which may or may not take place in a given area. It also explained that this could enable terrorist groups to take steps to avoid detection and therefore, confirmation or denial would be damaging to national security.
30. Furthermore, WYP argued that confirming or denying any policing arrangements of this nature would render national security measures less effective; this would lead to the compromise of ongoing or future operations to protect the security of infra-structure of the UK and increase the risk of harm to the public.
31. WYP also pointed out that the role of the police service is to enforce the law, prevent and detect crime and protect the communities it serves. WYP explained that the security of the country is of paramount importance and it does not divulge whether information is or is not held, if to do so would place the safety of an individual at risk, or undermine national security.
32. In addition, WYP pointed to the Information Tribunal (IT) decision in *ICO v Metropolitan Police* EA/2010/2006, which dealt with a request for informant spend at borough level. WYP explained that it considered the following applied in the present case:

'CHIS (Covert Human Intelligence Source) are given strong guarantees that their identities will be protected. In some instances, a prosecution may be stopped rather than risk the identity, or in some cases even the existence of a CHIS being revealed. We accept the evidence of DI D as to the "paranoia" of those acting, or contemplating acting, as a CHIS and accept that they would review the disclosure of the disputed

information a breach of confidence that would significantly undermine their confidence in having their identifies protected.

33. The complainant argued that it was in the public interest for the requested information to be disclosed. He pointed out that just because WYP always neither confirmed nor denied whether it held information regarding informants, it was not immutable.
34. The complainant pointed to various court cases which supported this principle, in particular *David James Savage v Hoddinot (Chief Constable of Hampshire)* [1997] EWCA Civ 943 (6th February, 1997). This Court of Appeal case dealt with an informant recovering money owed to him by the police. It was held that: "*if a police informant wishes personally to sacrifice his own anonymity, he is not precluded from doing so by the automatic application of the principle of public immunity at the behest of the relevant police authority.*" The complainant argued that this showed that as Mr Shopland had decided to relinquish his anonymity, WYP cannot argue that his identity should be protected.
35. The complainant also argued that police had in the past, disclosed informant names. He explained that in the prosecution of two Irish terrorists in 1993, the key to the prosecution was the evidence of a police informer that was put forward by prosecutors. The informant testified that he had been an informer for police and security service, supplying information about the IRA and other republican organisations. The complainant argued that this showed that the police had consented to the disclosure of the identity of this informant, in apparent breach of "neither confirming nor denying" the identity of informants.
36. The Commissioner considers that there is some public interest in confirmation or denial in response to the complainant's request.
37. He notes that, in this case, there is information already in the public domain regarding Mr Shopland. He also notes the complainant's argument that in the past, the police have disclosed the names of informants. However, the Commissioner notes that in the present case, there appears to be no evidence that WYP has done this.
38. The Commissioner also notes that complainant's reference in his request for information, that WYP has stated that Mr Shopland is not a racist and/or a Nazi. The Commissioner notes this was in relation to an application for a judicial review, however, he does not consider this adds much, if any, weight to the public interest in favour of confirmation or denial under the FOIA.

39. The Commissioner accepts that the public interest in protecting information for the purposes of safeguarding national security is a very strong one.
40. The Commissioner finds that in the circumstances of this case the public interest in protecting information for the purpose of safeguarding national security outweighs the public interest in favour of confirmation or denial.
41. As the Commissioner is satisfied that sections 23(5) and 24(2) in the alternative apply to all of the requested information, he will not go on to consider the application of sections 30(3) and 40(5).

Section 17 – refusal of a request

42. Section 17(1) provides that a public authority must respond to request for information within the time scale for compliance with section 1(1), which is 20 working days, starting the date after receipt. The complainant requested information on 24 September 2014 and WYP did not respond until 24 November 2014. The Commissioner considers that WYP has breached section 17(1).

Other matters

43. The complainant requested an internal review on 5 January 2015 and WYP responded on 17 April 2015. Part VI of the section 45 Code of Practice makes it good practice for a public authority to have a procedure in place for dealing with complaints about its handling of requests for information. He considers that the procedure should encourage a prompt determination of the complaint.
44. As he has made clear in his guidance¹ the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
45. The Commissioner is concerned that it took over 40 working days for the internal review to be completed.

¹ <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/>

Right of appeal

46. 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

47. 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.
48. 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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