

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 February 2020

Public Authority: Commissioner of the Metropolitan Police Service

Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant has requested a summary of a report from the Metropolitan Police Service (the "MPS"). The MPS refused to provide this, citing the exemptions at section 30(1) (investigations and proceedings) and 40(2) (personal information) of the FOIA. During the Commissioner's investigation it disclosed a small amount of information but continued to rely on the exemptions cited for the remainder.
2. The Commissioner's decision is that the MPS was entitled to rely on section 30(1) of the FOIA to withhold the remaining information. No steps are required.

Background

3. The Commissioner understands that the Inquiry and Review Support Command (IRSC) is a unit within the MPS that was established to support the MPS response to the Undercover Policing Inquiry and to review historic anti-corruption investigations. The Operation Kayu Summary was created as part of the anti-corruption review strand of the IRSC's work.
4. The complainant has made two earlier requests which were both refused on cost grounds by the MPS, under section 12 of the FOIA. However, by way of advice and assistance, it did explain to him, in responding to his first request, that:

"As part of the ongoing work of the IRSC, an internal briefing note dated 05/01/2015 was created and titled 'Summary of Operation Kayu'. This document referred to an Operation Kayu Misconduct Report. Consequently further searches were conducted that identified 4 Operation Kayu Misconduct reports. Therefore, you may wish to limit the scope of your request to these documents. However, please note that these are likely to be subject to one or more FoIA exemptions".

5. The MPS explained that Operation Kayu:

"... was a 2007 Directorate of Professional Standards operation regarding the integrity of a DCI within Newham crime squad. There is some information in the public domain concerning this matter".

6. The MPS also advised the complainant that:

"A review of historic anti-corruption operations and intelligence is currently being conducted by the MPS Inquiry and Review Support Command (IRSC), formerly known as the Public Inquiry Team. This review involves scanning, categorising, indexing and reviewing obsolete IT systems and approximately 3,000 crates containing hard copies of archived material, including material relating to your request and various other operations. The IRSC is also supporting the work of the Daniel Morgan Independent Panel and the Undercover Policing Inquiry into undercover policing".

7. Further information about the IRSC can be found online^{1,2}.

8. The MPS directed the complainant to a judgment which contains some information about the subject matter³. This judgment explains, at paragraph 72, that Operation Kayu was an expensive anti-corruption investigation and that the police officers who were investigated were all exonerated.

¹ https://www.london.gov.uk/sites/default/files/pcd_73_public_inquiry_team.pdf

² <https://www.ucpi.org.uk/wp-content/uploads/2016/07/160617-statement-of-Neil-Huchison-provisionally-redacted-PART-1.pdf>

³ <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/david-hunt-v-times-newspapers-ltd.pdf>

Request and response

9. Following the two earlier requests which were refused on cost grounds, on 30 April 2019, the complainant made the following request for information under the FOIA:

"I would therefore request, under the Freedom of Information Act, the document known as 'Summary of Operation Kayu' only. Please disregard the request for the 4 Operation Kayu misconduct reports for the purposes of cost adherence".

10. The MPS responded on 3 June 2019 and refused to provide the requested information. It cited the exemptions at sections 30(1) (investigations and proceedings) and 40(2) (personal information) of the FOIA as its basis for doing so.
11. Following an internal review, the MPS wrote to the complainant on 8 July 2019; it maintained its position.
12. On 27 January 2020, the MPS disclosed a small amount of information to the complainant.
13. The Commissioner has viewed the withheld information *in situ*.

Scope of the case

14. The complainant contacted the Commissioner on 16 July 2019 to complain about the way his revised request for information had been handled. He advised that he believed the public interest was such that the details of the anti-corruption investigation should be released.
15. The Commissioner will consider the citing of exemptions below.

Reasons for decision

Section 30 – investigations and proceedings

16. The MPS is relying on sections 30(1)(a)(i) & (ii) of the FOIA. These state that:

"Information held by a public authority is exempt information if it has at any time been held by the authority for the purpose of –

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained—

- (i) whether a person should be charged with an offence, or*
- (ii) whether a person charged with an offence is guilty of it ...”*

17. The Commissioner considers that the phrase “*at any time*” means that information can be exempt under section 30(1)(a) of the FOIA if it relates to a specific ongoing, closed or abandoned investigation.
18. Consideration of section 30(1)(a) of the FOIA is a two-stage process. First, the exemption must be shown to be engaged. Secondly, as section 30 is a qualified exemption, it is subject to the public interest test. This involves determining whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Is the exemption engaged?

19. The first step is to address whether the requested information falls within the class specified in section 30(1)(a) of the FOIA. The Commissioner has issued guidance on section 30⁴ which states that section 30(1)(a) can only be claimed by public authorities that have a duty to investigate whether someone should be charged with an offence.
20. The Commissioner’s guidance describes the circumstances in which the subsections of section 30(1) of the FOIA might apply. With respect to section 30(1)(a), the guidance says:

“The exemption applies to both investigations leading up to the decision whether to charge someone and investigations that take place after someone has been charged. Any investigation must be, or have been, conducted with a view to ascertaining whether a person should be charged with an offence, or if they have been charged, whether they are guilty of it. It is not necessary that the investigation leads to someone being charged with, or being convicted of, an offence....”

21. As a police force, the MPS has a duty to investigate allegations of criminal offences, including allegations relating to serving or former police officers, by virtue of its core function of law enforcement. The Commissioner is therefore satisfied that it has the power to carry out investigations of the type described in section 30(1)(a).
22. The requested information is a summary of an anti-corruption investigation and it necessarily includes details about that Operation and its investigation into the integrity of the officers concerned. The MPS explained:

⁴ <https://ico.org.uk/media/for-organisations/documents/1205/investigationsandproceedings-foi-section-30.pdf>

"Operation Kayu commenced on 01/10/2007 and concluded in 2009. No officers were charged with any offences and it is unlikely that the case would be re-opened.

The requested summary is a briefing document created as part of the work of the MPS Inquiry Review and Support Command or IRSC (formerly known as the Assistant Commissioner's Public Inquiry Team (AC-PIT) or Operation Beacon) with a view to providing senior decision makers with an overview of the anti-corruption investigation following a review of 3,000 crates containing files relating to historic anti-corruption investigations. Although a review of files relating to Operation Kayu has been completed, the anti-corruption strand of the IRSC's work is ongoing and is not anticipated to be complete until at least mid-2020. Furthermore, the Daniel Morgan Independent Panel is ongoing....

Due to the nature of anti-corruption investigations, related information may be relevant to future investigations and proceedings...."

23. The MPS has further explained that the summary relates not only to the anti-corruption investigation regarding the integrity of three officers, but also to investigations those officers had been involved with.

24. It advised the complainant:

"Operation Kayu was a 2007 DPS operation regarding integrity of a DCI within Newham Crime Squad. This same DCI led or was otherwise involved in Operations Houdini, Epsom and Blackjack.

Operation Houdini concerned the handling of stolen goods

Operation Epsom concerned witness intimidation".

25. The MPS also explained that the summary had been created for the IRSC review and that:

"The requested information was created with a view to providing an overall picture of historic anti-corruption investigations that had taken place since 1994. Consequently, this request should not be viewed in isolation as similar information is held in relation to other investigations that individually and collectively are sensitive in nature. Anti-corruption investigations are internally sensitive as they relate to internal officers and staff... The requested information carries a protective marking of 'Secret' and relates to allegations that relate to sensitive investigations that in part concerned the handling of confidential sources...".

26. It is therefore clear to the Commissioner that the requested information relates to an investigation into the possible misconduct of police officers, ie Operation Kayu, and that the content of the summary refers to other Operations which those officers were involved with, and to the wider ongoing investigative review which is currently underway.
27. Having considered the requested information, the Commissioner is satisfied that it relates to investigations that the MPS has the power, and a duty, to conduct with a view to ascertaining whether a person or persons should be charged with offences and whether any persons charged with offending are guilty of it. Furthermore, the current IRSC inquiry means its content remains of ongoing relevance. She has therefore decided that the exemption is properly engaged.

Public interest test

28. Section 30(1)(a) is subject to a public interest test. This means that even though the exemption is engaged, information may only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
29. In accordance with her guidance, when considering the public interest in maintaining exemptions, the Commissioner considers that it is necessary to be clear what they are designed to protect.
30. The purpose of section 30 of the FOIA is to protect the effective investigation of offences and related prosecutions. Clearly, it is not in the public interest to jeopardise the ability of the MPS to investigate crime effectively.
31. Set against this, the Commissioner recognises the importance of the public being able to have confidence in public authorities whose purpose it is to uphold the law. Public confidence is increased by enabling scrutiny of public authority performance which may sometimes involve examining the decisions taken in particular cases.

Public interest arguments in favour of disclosing the information

32. No specific arguments regarding disclosure have been provided by the complainant, who has stated:

"I believe the public interest is to publish the report, and undue balance is given in not publishing it".

33. The MPS has argued:

"The Metropolitan Police Service is charged with enforcing the law, preventing and detecting crime and protecting the communities we

serve. There is a public interest in the transparency of policing operations and providing assurance that the MPS is appropriately and effectively dealing with crime. This is particularly apparent in relation to this request to the extent that it relates to issues regarding police misconduct and public confidence in the police service. However, these factors also support the strong public interest in safeguarding the integrity of police investigations and operations that the MPS have a statutory duty to conduct”.

34. The Commissioner also recognises that there is a general public interest in public authorities being open and transparent with regard to the information they hold, and that disclosure would serve that particular interest.

Public interest arguments in favour of maintaining the exemption

35. As mentioned above, the MPS considers that there is a strong public interest in safeguarding the integrity of both police investigations and operations that it has a statutory duty to conduct. This in turn serves to reassure the general public.
36. The MPS has noted that some information has entered the public domain relating to Operation Kayu as a consequence of civil proceedings, and it has therefore issued press lines and confirmed limited information such as the Operation name and the existence of documents in response to FOIA requests. It also noted that: *“related information is also in the public domain via media reports and published books”*. However, it has stressed that such information is *“unofficial in nature”* and has not been formally disclosed or ratified by the MPS itself.
37. The MPS has argued:

“The timing of the request is the decisive factor in determining where the balance of the public interest lies. This is significant in relation to the age of any information that may be held and within the context of the ongoing work of the IRSC and related public inquiries that have been established with a view to satisfying the public interest. This includes a systematic review of historic anti-corruption operations and intelligence which involved scanning, categorising, indexing and systematically reviewing approximately 3,000 crates containing hard copies of archived material and obsolete IT systems containing further information. It is only as a consequence of this work that it has been possible to identify, summarise and retrieve information relating to Operation Kayu. It is in the public interest for the IRSC to complete its review of historic anti-corruption files and enable the MPS to obtain a complete overview of such information prior to disclosing incremental items of information in response to requests under FOIA.

The timing of the request has the potential to undermine or detract from such work and would not be in the public interest. This is reflected in the ICO's guidance in relation to section 31⁵ where it states:

'101. Investigators need private thinking space, or safe space, if they are going to fully explore all aspects of a case without fear that their half formed opinions would be reported in the press or enter the public domain. Such concerns would hinder the efficient running of an investigation. Investigators may expect their findings to be made public but at a later stage when they represent the fully considered conclusions of the investigation.'

38. The MPS further argued:

"To the extent that there is any public interest in relation to potentially criminal behaviour, I am mindful of the Information Tribunal judgement in the case of Armstrong v Information Commissioner and HRMC⁶ which stated:

'93. Criminal investigations are the responsibility and statutory duty of regulated bodies, such as the police or HMRC. We are not persuaded that there is public interest in disclosing material that may lead to the discovery of further offences or other matters requiring criminal investigation. We also consider that there is strong public interest in ensuring that the operations of authorities which are responsible for conducting criminal investigations are not jeopardised or thwarted through disclosures of information under FOIA.'

In the circumstances of the request it is unlikely that disclosure would satisfy concerns regarding the investigation as the underlying detail is sensitive in nature, such that the public interest would favour non-disclosure and/or require substantially more information to be disclosed. This is reflected in the limited information that has been provided by the MPS via press lines".

Conclusion

⁵ <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

⁶ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i260/David%20Armstrong%20v%20ICO%20%28EA-2008-0026%29%20Decision%2014-10-08.pdf>

39. The MPS concluded:

"After weighing up the competing interests, I have decided that the balance of the public interest favours withholding the requested information in full. This is because having taken into account the context in which the document was created (i.e. as part of a large scale review) and the context in which related information has entered the public domain (i.e. largely as a consequence of leaks and unofficial disclosures), the public interest at this moment in time favours protecting information acquired in the course of police investigations to enable space for the MPS to ascertain a complete picture of the anti-corruption investigation within the scope of the IRSC's review".

40. In reaching a conclusion on the balance of the public interest, the Commissioner has given due consideration to both parties. She has also considered whether disclosure would be likely to harm any investigation, which would be counter to the public interest, and what weight to give to these competing public interest factors.
41. Although it is recognised that Operation Kayu itself is 'closed', and the three officers were exonerated, the content of the requested summary refers to other Operations and therefore has wider sensitivities. Furthermore, the overarching IRSC review, which the summary was produced for, remains ongoing and it is therefore not possible to 'second guess' the impact of any premature disclosure of documents which are part of that extensive work. Such disclosure may have a significantly detrimental impact to that investigative review and affect what has been a very costly and onerous task to date.
42. Whilst the Commissioner recognises the importance of Operations such as Kayu in tackling possible police corruption, and the significant public interest in taking measures to ensure such action is identified and dealt with appropriately, it is noted that, on this occasion, the officers involved were exonerated. She therefore finds very limited public interest in disclosure of the summary on that basis. The other Operations referred to in the summary are not the focus of the request itself and the complainant has not indicated whether these are of any particular interest to him. Nevertheless, the Commissioner notes that they are all of value to the ongoing inquiry.
43. In the circumstances of this case, and with the lack of any arguments to the contrary, the Commissioner considers that any possible detriment to the ongoing inquiry considerably outweighs any public interest in disclosure of the summary.
44. Having given due consideration to all the arguments set out above, the Commissioner has decided that the public interest in maintaining the

exemption outweighs the public interest in disclosure, and therefore that section 30(1)(a) of the FOIA has been applied appropriately in this case.

Other matters

45. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

Information Notice

46. As the MPS failed to respond to the Commissioner's enquiries in a timely manner it was necessary for her to issue an Information Notice in this case, formally requiring a response. Furthermore, the MPS failed to comply with the Notice within the time specified in it.

47. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft Openness by Design strategy⁷ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our Regulatory Action Policy⁸.

⁷ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁸ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

48. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

49. 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.

50. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Carolyn Howes
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