

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 March 2018

**Public Authority:** Commissioner of the Metropolitan Police Service

**Address:** New Scotland Yard  
Broadway  
London  
SW1H 0BG

#### Decision (including any steps ordered)

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1. The complainant has requested information about three named parties from the Metropolitan Police Service (the "MPS"). The MPS would neither confirm nor deny holding any related information, citing the exemption at section 40(5) (personal information) of the FOIA. The Commissioner's decision is that it was entitled to do so. No steps are required.

#### Request and response

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2. On 29 May 2017 the complainant wrote to the MPS and requested information in the following terms:

*"I am emailing to file a new FOI request to access and obtain copy of any document the Met Police may have on:*

1. *[Name removed]*
2. *[Name removed]*
3. *[Name removed]*

*As widely reported, [names removed] have been targeted by a subpoena issued by the US Justice Department which required Google to hand over all their emails ...*

*It is therefore in the public interest to investigate any new development in their cases".*

3. On 8 June 2017 the MPS responded. It advised that to ascertain whether or not it may hold any related information would exceed the cost limit at section 12 of the FOIA.
4. On 29 June 2017 the complainant submitted an alternative request asking for the following:

*"a copy of the correspondence between the US DoJ [Department of Justice] and the Met Police on [three names removed] from June 2013 to June 2017".*
5. On 11 August 2017 the MPS responded. It would neither confirm nor deny ("NCND") holding any information, citing section 40(5) of the FOIA as its basis for doing so.
6. On 14 September 2017 the complainant requested an internal review. When doing so she advised she had contacted the named parties and that they had:

*"... agreed to send me an affidavit in which they consent to the release of this information. Attached you can find their statements".*
7. Following an internal review the MPS wrote to the complainant on 19 September 2017. It maintained its position.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 21 December 2017 to complain about the way her request for information had been handled. It is her contention that she has received consent from the named parties to have disclosure made to her personally. It is her view that it is possible for her to have the information provided to her personally under the FOIA without it being disclosed into the public domain.
9. The Commissioner will consider the application of section 40 below.

### **Reasons for decision**

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#### **Section 40 – personal information**

10. The MPS has cited section 40(5) of the FOIA. This section provides an exemption from the section 1(1)(a) duty to confirm or deny whether requested information is held where to do so would involve the disclosure of personal data and that disclosure would be in breach of any of the data protection principles. Consideration of this exemption involves two stages; first confirmation or denial as to whether the

requested information is held must involve the disclosure of personal data. Secondly, that disclosure must be in breach of at least one of the data protection principles.

11. Covering first whether confirmation or denial would involve the disclosure of personal data, the definition of personal data is given in section 1(1) of the Data Protection Act 1998 (DPA):

*"personal data' means data which relate to a living individual who can be identified-*  
*(a) from those data, or*  
*(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller".*

12. Because the parties are named, the view of the Commissioner is that confirmation or denial of whether information falling within the scope of the complainant's request is held would involve the disclosure of their personal data.
13. Having accepted that the requested information constitutes the personal data of living individuals other than the applicant, the Commissioner will go on to consider whether disclosure would breach one of the data protection principles. The Commissioner considers the first data protection principle to be relevant here, which states that personal data shall be processed fairly and lawfully.

*Would disclosure contravene the first data protection principle?*

14. The first data protection principle states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 of the DPA is met. Furthermore, in the case of 'sensitive' personal data at least one of the conditions in Schedule 3 must also be met.

*Is the requested information 'sensitive' personal data?*

15. Section 2 of the DPA sets out what categories of personal data are classed as *sensitive* for the purposes of that Act. These include:

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

16. The Commissioner is therefore satisfied that the requested information, should it be held, would be sensitive personal data.

*Is there a Schedule 3 condition?*

17. A particular requirement in relation to processing sensitive personal data (which includes the confirmation or denial in this particular case) is that at least one of the conditions in Schedule 3 of the DPA is met.
18. In this case the complainant, who is an investigative journalist, argues that it is in the public interest to investigate whether there were any new developments in relation to the cases her request concerns. She has also made representations, via a solicitor acting on her behalf, who raised the following points:

*"The MPS's main reason for refusing to provide the information is that its disclosure under FOIA is not just to [the complainant] and so "is not a private transaction", because any information is released "effectively to the world".*

*While this is a convenient short hand for describing the fact that an individual to whom information has been released can do with that information what she pleases, including disseminating that information, it has led the MPS into an incorrect analysis. The question is whether the processing would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 (DPA). Under section 1(1) DPA, the relevant "processing" by the MPS of the four individuals' personal data [there is a further request for similar information] would not be publication of that data "to the world". The processing would be disclosure to [the complainant] under FOIA.*

*Each data subject gave explicit written consent to that disclosure being made – ie disclosure under FOIA to [the complainant]. The MPS has incorrectly ignored that consent and failed to apply Principle 1 of the Data Protection Act correctly. The individuals have explicitly consented to the processing. The disclosure under FOIA to [the complainant] would therefore not contravene Principle 1.*

*The MPS has also inexplicably concluded, in the review response on [this] request, that the data subjects would not have a reasonable expectation that their information would be placed "into the public domain" by the MPS, and so Principle 1 would be contravened by disclosing the requested information. There are two errors with this. First, release of the information to [the complainant] under FOIA would not be release "into the public domain", so the MPS has asked itself about the wrong expectation on the part of the data subjects.*

*Second, and in any event, each data subject explicitly consented to the release of their personal information "to the Italian investigative*

*journalist [name removed]". The individuals therefore have a reasonable expectation that the MPS would release their information to an investigative journalist, which must include a reasonable expectation of what that individual would do with the information – which may be wider dissemination. Under the DPA, when considering the data subject's expectation, the MPS should have taken into account that the explicit consent has been given to release the information to a particular data controller, whose profession it is to publish information.*

*It would be incorrect to apply the "applicant blind" approach of FOIA to the DPA analysis, when considering the data subjects' reasonable expectations.*

*It is also relevant to the data subjects' expectations that:*

- a. Those data subjects all work for a media organisation which publishes and comments on censored or restricted official materials;*
  - b. Those data subjects have worked with [name removed] in her capacity as a journalist;*
  - c. Those data subjects have commented publicly about the release of their e-mails to the US authorities and clearly support journalistic work aimed at throwing light on any investigation into WikiLeaks' staff (ie any investigation concerning them).*
- None of this was considered by the MPS.*

*On a proper analysis, the MPS should have concluded that the reasonable expectation of each of the data subjects was the release of their data to [the complainant] and that she, as the data controller obtaining their information, may disseminate that information more widely.*

*If the MPS was confused about the data subjects' reasonable expectations, then it should have contacted those individuals in order to clarify the position.*

*Given that there was explicit consent for the disclosure, so the processing would comply with Schedule 2 paragraph 1 and Schedule 3 paragraph 1 of the DPA, the MPS did not need to consider compliance with the legitimate interests processing condition under Schedule 2 paragraph 6. However, had the MPS properly assessed this condition, they would have found it was also complied with".*

19. Summarising the above, the complainant's arguments focus on the view that the MPS is able to make a disclosure to her personally under the FOIA as the DPA allows for this. This is on the grounds that she has

consent from the parties concerned and their reasonable expectation is that the MPS will provide the information to her.

20. The Commissioner's general view is that the two conditions in Schedule 3 that might apply in relation to disclosures made under the FOIA are the first condition, which is that the data subject has consented to disclosure, and the fifth condition, which is that the data subject has already deliberately made the personal data public.
21. Even if the Commissioner found that disclosure would be generally fair, this would not impact on the outcome of the complaint if she found that no Schedule 3 condition could be satisfied. Therefore, taking into account the main focus of the complainant's arguments, she has initially gone on to consider whether there is a relevant Schedule 3 DPA condition to allow confirmation or denial to be given in this case.

*Have the data subjects provided consent?*

22. The complainant has provided three signed affidavits that she says are from the parties concerned. It is noted that they all state that the disclosure is to be made to her personally and there is no reference to the FOIA. A personal disclosure to the complainant is not something which can be provided for under the terms of the FOIA. Disclosure is applicant and purpose blind and any information disclosed under the FOIA must be suitable for disclosure to the public at large. Therefore these affidavits have no bearing on disclosure in this case.
23. It is further noted that, even were the affidavits differently worded, the validity of the documents would need to be ascertained prior to any such disclosure being considered. This would include confirming the identities of the parties which is not something which the Commissioner would generally expect a public authority to have to undertake in order to comply with a request made under the FOIA.

*Have the data subjects already deliberately made their personal data public?*

24. The Commissioner has seen no evidence to show that the data subjects have deliberately made the requested data public. In light of the wording of the request, and the current NCND position about whether or not any information is held, this would seem to corroborate that conclusion.
25. Some of the arguments advanced relate to the complainant's position as a journalist and touch on the Data Protection (Processing of Sensitive Personal Data) Order 2000 and the processing of personal data for the 'special purposes' set out in section 3 of the DPA, one of which is the purpose of journalism. However, this Order relates specifically to the DPA rather than the FOIA and concerns accessing personal data via that legislation. The view of the Commissioner is that the processing of

personal data in question here would be for the purpose of complying with section 1(1)(a) of the FOIA. It is not the case that journalists have additional privileges under the FOIA to any other requester.

### *Conclusion*

26. In conclusion, the Commissioner does not accept the complainant's assertion that the third condition in DPA Schedule 3 is satisfied. She maintains that none of the Schedule 3 conditions apply in relation to this request. Therefore, confirmation or denial as to whether this sensitive personal data is held would be in breach of the first data protection principle. The finding of the Commissioner is that the exemption provided by section 40(5) is engaged and the MPS was not obliged to confirm or deny whether it held the information requested by the complainant.

### **Other matters**

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27. If the named parties wish to access any information which the MPS may hold themselves they are entitled to make personal applications under the subject access provisions of the Data Protection Act 1998. Details of how to do so can be found on the MPS's website<sup>1</sup>. However, it must be borne in mind that there may be an applicable exemption to disclosure under the provisions of that legislation.

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<sup>1</sup> <https://www.met.police.uk/request/request-information-about-yourself-or-others/>

## Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

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

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

29. 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.

30. 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**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**