

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 July 2014

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 about the National Public Order Intelligence Unit (the "NPOIU") and the Special Demonstration Squad (the "SDS") which fall under the remit of the Metropolitan Police Service (the MPS). The MPS provided some information but withheld the remainder citing the exemptions at sections 23(1)(security bodies) and, in the alternative, 24(1)(national security), 30(2)(investigations & proceedings) and 40(2) (personal information) of the FOIA; it also refused to confirm or deny holding further information by virtue of section 23(5)(security bodies). The Commissioner has decided that section 30(2) has been properly cited in relation to all of the requested information and that the public interest is best served by maintaining the exemption. No steps are required but the Commissioner does note procedural breaches in respect of timeliness.

Background

2. The Commissioner is considering three related complaints from this complainant. As they were considered together by the MPS at internal review stage, the Commissioner has included all three cases in this one decision notice.
3. A total of 17 documents have been identified as falling within the scope of the three requests. These have been numbered by the public authority for convenience and are listed below:
 1. National Public Order Intelligence Unit - Minute Sheet (dated 13/9/2001)
 2. Welfare - File note (dated 12/12/01)
 3. Letter - to HR Directorate (dated 04/02/02)
 4. Psychological Recruitment Assessment - Memorandum (dated 28/02/02)
 5. RE OH Memo dated 28th February 2002 (no date)
 6. Policy Paper - Welfare - Policy paper (date stamp 25/03/02)
 7. Welfare - Policy (date stamp 25/03/02)
 8. Special Branch Policy Paper - memorandum (dated 15/05/02)
 9. Development of current procedures for SDS welfare (dated 22/03/05)
 10. 1995 SDS manual
 11. NPOIU Welfare Policy (dated 14/04/00)
 12. SDS Health & Safety (30/06/00)
 13. Welfare meeting - Tuesday 12 September 2000 (14/09/00)
 14. Memo - Draft letter (10/08/01)
 15. Letter (25/09/01)
 16. File note (undated)
 17. Welfare meeting re Special Duty Section (SDS) (05/05/00)
4. Reference is made to "Operation Herne". The first report relating to this operation is available online¹ and a recent update placed on the MPS's website shows that it remains, at the time of writing this notice, an ongoing inquiry².

¹http://www.met.police.uk/foi/pdfs/priorities_and_how_we_are_doing/corporate/operation_herne.v1.pdf

² <http://content.met.police.uk/News/Operation-Herne-report/1400022946786/1257246741786>

Requests and responses

5. The Commissioner has itemised each of the three requests under consideration below.

FS50499316

6. On 24 January 2012, the complainant wrote to the public authority and requested information in the following terms:

"My request relates to the National Public Order Intelligence Unit (NPOIU) which is under the command of the Metropolitan Police. It relates to the arrangements put in place by the management of the NPOIU to ensure the mental welfare of undercover officers deployed by the NPOIU.

Under the act , I would like to know:

1) What policies have been initiated by the NPIOU since January 1 2000 to implement arrangements to ensure the psychological and psychiatric well-being of undercover officers working for the NPIOU

2) What policies have been initiated by the NPIOU since January 1 2000 to ensure that undercover officers working for the NPIOU received regular psychological counselling and assessment.

Under the act, I would also like to request:

1) Complete copies of documents which outline these policies since January 1 2000;

2) Complete copies of any policy or discussion papers held by the National Public Order Intelligence Unit which discusses this subject since January 1 2009.

... I would also like to ask your department, on answering this request, to provide a schedule of the documents which are relevant to this request. I believe that there should be a brief description of each relevant document including the nature of the document, the date of the document, and whether the document is being released or not. I believe that providing such a schedule would clarify what documents are being released and what is being withheld, and would also represent best practice in open government".

7. On 5 April 2012, the MPS confirmed that it held information within the scope of the request but refused to provide this citing sections 30(1)

(investigations and proceedings) and 31(2) (law enforcement) of the FOIA.

FS50507017

8. On 2 February 2012, the complainant wrote to the public authority and requested information in the following terms:

"My request relates to the Special Demonstration Squad (SDS) which was run by the Metropolitan Police between 1968 and 2008. The Squad was formed following the 1968 anti-Vietnam war riots in Grosvenor Square to gather information about public order problems and to build knowledge of extremist organisations and individuals. Its work is described on page 37 of this HMIC report published on February 2 2012:

<http://www.hmic.gov.uk/media/review-of-national-police-units-which-provide-intelligence-on-criminality-associated-with-protest-20120202.pdf>

The SDS deployed undercover officers to gather information.

Under the act , I would like to know:

3) What policies were put in place by the SDS between January 1 2000 and its closure in 2008 to implement arrangements to ensure the psychological and psychiatric well-being of undercover officers working for the NPOIU

4) What policies were put in place by the SDS between January 1 2000 and its closure in 2008 to ensure that undercover officers working for the NPIOU received regular psychological counselling and assessment.

Under the act, I would also like to request:

3) Complete copies of documents which outline these policies between January 1 2000 and its closure in 2008

4) Complete copies of any policy or discussion papers held by the SDS which discussed this subject between January 1 2000 and its closure in 2008.

... I would also like to ask your department, on answering this request, to provide a schedule of the documents which are relevant to this request. I believe that there should be a brief description of each relevant document including the nature of the document, the date of the document, and whether the document is being released

or not. I believe that providing such a schedule would clarify what documents are being released and what is being withheld, and would also represent best practice in open government”.

9. On 5 April 2012, the MPS confirmed that it held information within the scope of the request but refused to provide this citing sections 30(1) (investigations and proceedings) and 31(2) (law enforcement) of the FOIA.

FS50507019

10. On 27 February 2012, the complainant wrote to the public authority and requested information in the following terms:

“My request relates to a document produced by a Metropolitan Police unit known as the Special Demonstration Squad (SDS) which existed between 1968 and 2008. The work of the SDS is described on pages 14, and 37-39 of a report into national police units which provide intelligence on criminality associated with protest published in February 2012 by Her Majesty’s Inspectorate of Constabulary (HMIC).

A copy of the report can be found here:

<http://www.hmic.gov.uk/media/review-of-national-police-units-which-provide-intelligence-on-criminality-associated-with-protest-20120202.pdf>

On page 38 of this report, it states that a manual produced in 1995 by the SDS “describes how their undercover field officers should operate”.

Under the act, I would like a complete copy of this 1995 manual...

I would also like to ask your department, on answering this request, to provide a schedule of the documents which are relevant to this request. I believe that there should be a brief description of each relevant document including the nature of the document, the date of the document, and whether the document is being released or not. I believe that providing such a schedule would clarify what documents are being released and what is being withheld, and would also represent best practice in open government”.

11. On 5 and 26 April 2012, the MPS confirmed that it held information within the scope of each request, but refused to provide this citing sections 30(1) (investigations and proceedings) and 31(2) (law enforcement) of the FOIA.

12. Following an internal review the public authority wrote to the complainant on 30 April 2013. Its response considered all three requests and it disclosed some information. The remaining information was withheld citing different exemptions for each request. These included the exemptions at sections 23(5), 24(1), 30(2)(a)(i) and (ii), 31(1)(a) and (b), 38(1) and 40(2).
13. During the Commissioner's investigation the MPS made the following revisions to the exemptions being cited.
 - It clarified that it wished to rely on section 30(2) in respect of the entire withheld information, ie covering all three requests.
 - It advised that it was no longer relying on section 31(1)(a).
 - It advised that section 23(1) and, 'in the alternative', section 24(1) were now being cited.
 - It clarified that section 23(5) was also being cited as it was not required to confirm or deny whether any additional information is held relating to security bodies.
14. Following two visits by the Commissioner's staff to the MPS to view the withheld information, further information was disclosed.

Scope of the case

15. The complainant contacted the Commissioner 28 May 2013 to complain about the way his request for information had been handled. He specifically referred to timeliness and the application of exemptions.
16. The complainant also drew the Commissioner's attention to matters that had occurred since the date of his request which he believed increased the public interest in disclosure of the requested information. However, the Commissioner must consider the situation at the time a request is made and he is therefore unable to take these later matters into account.

Reasons for decision

Section 10 – time for compliance

17. Section 10(1) of the FOIA provides that a public authority should comply with section 1(1) within 20 working days. Section 1(1)(a) initially requires a public authority in receipt of a request to confirm whether it holds the requested information.

18. None of these three requests were responded to within this time limit. The Commissioner therefore finds that the public authority breached section 10(1) by failing to comply with section 1(1)(a) within the statutory time period.

Section 30 - investigations and proceedings

19. This exemption has been considered first as it has been cited in respect of all of the withheld information.

20. Subsection (2) of this exemption has been cited which states:

*"Information held by a public authority is exempt information if –
(a) it was obtained or recorded by the authority for the purposes of its functions relating to-
(i) investigations falling within subsection (1)(a) or (b)
(b) it relates to the obtaining of information from confidential sources".*

21. The investigations falling within subsection (1)(a) and (b) are:

*"(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,
(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct".*

22. Consequently, for information to be exempt from disclosure under section 30(2), it must have been obtained for the purposes of the public authority's investigations or proceedings **and** relate to the obtaining of information from confidential sources.

23. Confidential sources contribute information which is often vital to the investigations, proceedings and law enforcement activities of public authorities. A confidential source is a person who provides information on the basis that they will not be identified as the source of that information. As a rule, confidential sources will be third parties. In most circumstances an authority's own officers are unlikely to be considered confidential sources. However, undercover police officers and others working undercover for law enforcement bodies are an exception. The concealment of their true identity is an essential feature of their work.

24. It is also important to remember that section 30(2) is a class-based exemption; if information meets both of the criteria referred to in

paragraph 22 above, it is exempt from disclosure. There is no need to demonstrate any prejudice to a particular investigation or proceeding in order for the exemption to be engaged. However, the exemption is subject to the public interest test and the likelihood of any harm occurring as a consequence of disclosure is directly relevant to that test.

25. The MPS has provided a lengthy submission to the Commissioner to state its position. This was supplemented by confidential discussions with the Commissioner's staff, including the signatory to this decision notice, while the information was being reviewed by them at MPS premises.
26. In the particular circumstances of this case the relevant purposes in section 30(2) - thus the relevant investigations or proceedings - are connected to those being undertaken in relation to Operation Herne. The MPS has confirmed to the Commissioner that "*all of the information identified in relation to the requests was held by the Operation Herne team*". It confirmed that part of the scope of the Operation Herne inquiry is to identify any potentially criminal behaviour or conduct which may need to be considered under conduct regulations. It went on to clarify: "*Therefore, Operation Herne may in the circumstances lead to a decision as to whether a person should be charged with an offence and or a determination as to whether an individual charged with an offence is guilty of it*".
27. The police officers whose conduct is under consideration as part of Operation Herne are all undercover officers. The Commissioner is therefore satisfied that Operation Herne is caught by section 30(2) and that the exemption is therefore engaged in respect of all the withheld information.
28. However, section 30 is a qualified exemption and therefore the Commissioner must consider whether the public interest in maintaining this exemption outweighs the public interest in disclosing the information.
29. In considering where the public interest lies in this case, the Commissioner has been guided by the Information Tribunal in the case of *Toms v Information Commissioner & Royal Mail* where it stated:

"... in striking the balance of interest, regard should be had, inter alia to such matters as the stage or stages reached in any particular investigation or criminal proceedings, whether and to what extent the information has already been released into the public domain, and the significance or sensitivity of the information requested".

Public interest in disclosing the information

30. The MPS has recognised the public interest in disclosure of the requested information. It confirmed that it has tried to satisfy this where possible by disclosing information; this is something which it has revisited during this investigation by continuing to disclose as much as it can without causing any undue prejudice to the investigation as it continues. This is demonstrated by the following statement:

"At the time of writing, the inquiry has progressed to the point where the first report in relation to Operation Herne has been published. This has enabled the MPS to review the information requested in light of what has been added to the public domain and disclose additional information."

31. The MPS also advised the Commissioner:

"Against the background of public debate, media coverage and public scrutiny of a range of issues relating to undercover policing, there is also a legitimate public interest to the extent that the redacted information could inform public debate and enhance transparency in relation to these wider issues. However, this information is also relevant in relation to understanding the context in which various historic actions and decisions took place."

Public interest in maintaining the exemption

32. The MPS has drawn attention to an earlier Information Tribunal finding as follows:

"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 HMRC³ 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

³<http://www.informationtribunal.gov.uk/DBFiles/Decision/i260/David%20Armstrong%20v%20ICO%20%28EA-2008-0026%29%20Decision%2014-10-08.pdf>

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.”

33. It drew further attention to the fact that Operation Herne remains a 'live' inquiry, focused upon a 40-year period dating from 1968, and that the requested information is therefore relevant to an ongoing investigation that is being conducted with a view to identifying conduct matters that may lead to criminal proceedings. Disclosure prior to the completion of the inquiry could, in the MPS's view, be detrimental to the investigation which would clearly not be in the public interest.
34. The MPS also argued that the drafting of section 30(2) recognises the particular public interest in ensuring that information about confidential sources is not generally disclosed. It drew particular reference to there being no historical record status for information exempt under section 30(2)⁴ (unlike 30(1)), which it viewed as reflecting the importance of giving long-term protection to information relating to confidential sources.
35. It mentioned that the continued retention of these documents indicates that they still have relevance to the MPS and that the information is relevant to the *'selection, recruitment, training, tradecraft guidance and support provided to SDS officers'* which is part of the Operation Herne terms of reference.
36. It added:

“The ICO guidance in relation to section 30⁵ refers to an Information Tribunal decision in the case of Mr A Digby-Cameron v the Information Commissioner (EA/2008/0023 & 0025; 26 January 2009) that stated that the general public interest served by section 30 was:

'the effective investigation and prosecution of crime, which itself requires in particular

⁴ Section 63(1) of the FOIA provides that historical records, ie those older than 30 years, cannot be exempt by virtue of section 30(1).

⁵http://www.ico.org.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/s30_exemption_for_investigations_and_proceedings_v3.pdf

- (a) *the protection of witnesses and informers to ensure that people are not deterred from making statements or reports by the fear that they may be publicised,*
- (b) *the maintenance of the independence of the judicial and prosecution processes and*
- (c) *the preservation of the criminal court as the sole forum for determining guilt.”*

37. The MPS also relied on a statement in the government White Paper⁶ outlining the Government's proposals for a Freedom of Information Act' under the heading 'What is FOI not intended to do?' which states that:

"...FOI should not undermine the investigation, prosecution or prevention of crime, or the bringing of civil or criminal proceedings by public bodies." (paragraph 2.21)

38. The Commissioner's attention was drawn to the fact that the Independent Police Complaints Commission (the "IPCC") is currently supervising four investigations involving undercover officers following referrals from the MPS related to Operation Herne. The MPS advised that:

"A premature disclosure of information pertinent to an IPCC supervised investigation that may lead to further issues suitable for IPCC referral or investigation would undermine these enquiries and the role and effectiveness of the IPCC. This would also have a negative impact upon public confidence in the police complaints system.

... It is possible that the IPCC supervised investigation could lead to one of more individuals being charged and prosecuted for one or more offences".

39. Reference was made to the large volume of information that is currently being looked at by the Operation Herne team and the harm that could be caused were information released before due consideration of that information has been given. It summed its position up by saying:

"Due to the volume of information to be considered, covering a time period of 40 years in addition to the resources that have been allocated to Operation Herne and the relatively short period of time

⁶ <http://www.archive.official-documents.co.uk/document/caboff/foi/chap2a.htm>

(in the context of investigations and the harm recognised by the time periods relating to the application of FoIA exemptions) the public interest would be served by enabling the existing enquiry to go where the evidence takes it, determine the full context and harm in relation to the disclosure of the information requested and determine priorities in relation to the focus of enquiries. This would be achieved by maintaining the exemption”.

Balance of the public interest

40. It is important to note that the Commissioner must consider the situation at the time that a request is made. Therefore, although he notes the considerable time between the making of the requests and this notice, he must necessarily consider things as they were at that time. However, in this regard he would also note that Operation Herne remains ongoing and therefore any inherent harm associated with compromising that investigation remains today. He further notes that the MPS has advised that:

“Even in the absence of Operation Herne, section 30(2) would apply to the information in its entirety as section 30(2) is not limited to specific investigations and would apply to administrative procedures etc. relating to confidential sources.”

41. The Commissioner recognises the public interest in disclosure in this case, particularly given the high profile of the issues which are being considered by both the MPS and the IPCC. However, the Commissioner also recognises the vital importance of the MPS being able to investigate fully, and without any hindrance to the process, when considering its position in relation to potential criminal conduct.
42. Having had full access to the information in its entirety and considered in detail the potential consequences of disclosure of each withheld item, the Commissioner is satisfied that the MPS has disclosed the maximum amount of information without causing any possible detriment. He further notes that it has done so taking into account the current situation, rather than that at the time of the request, which he considers shows a positive approach to transparency on behalf of the MPS as it has endeavoured to maximise disclosure as the investigation has progressed.
43. Although he notes that there is a significant public interest in disclosure, the Commissioner finds the public interest arguments in favour of maintaining the exemption to be more compelling. He therefore concludes that the public interest in maintaining section 30(2) outweighs that in disclosure.

Section 23(5) - information held by, or relating to, security bodies

44. The public authority has explained to the Commissioner that:

"... section 23(5) has been cited in relation to any additional information / documents that may be held by the MPS in addition to the actual content of the documents that the MPS have confirmed are held".

45. Information relating to security bodies specified in section 23(3) is exempt information by virtue of section 23(1).
46. Section 23(5) excludes the duty of a public authority to confirm or deny whether it holds information which, if held, would be exempt under sections 23(1).
47. By virtue of section 23(5) the duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in section 23(3).
48. In the Commissioner's opinion the exemption contained at section 23(5) 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 a security body is interested or involved in a particular issue is in itself information relating to a security body.
49. Furthermore, the Commissioner believes that the phrase 'relates to' should be interpreted broadly. Such an interpretation has been accepted by the First-tier Tribunal (Information Rights) in a number of decisions.
50. The test as to whether a disclosure would relate to a security body is decided on the normal civil standard of proof, that is, 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 exemption would be engaged.
51. From the above it can be seen that section 23(5) has a very wide application. If the information requested 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 scheme of FOIA because the security bodies themselves are not subject to its provisions. 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.

52. There is clearly a close relationship between the MPS and the security bodies. In respect of its role, and the subject matter of the requested information, the Commissioner is satisfied that, on the balance of probabilities, any information, if held, could well relate to one or more of the bodies identified in section 23(3) of the FOIA. He is therefore satisfied that the section 23 exemption is appropriately engaged in respect of any relevant information (if held) beyond that which the MPS has acknowledged it holds.
53. Section 23 affords an absolute exemption and no public interest test is required once it is found to be engaged.

Conclusion

54. As he has determined that the exemptions at section 30(2) and 23(5) are properly relied on the Commissioner has not found it necessary to consider the other exemptions cited.

Other matters

55. The complainant has asked the Commissioner to investigate why it took so long for this and his other related requests to be responded to by the public authority. The Commissioner has noted the procedural breach in his findings above and he will also draw attention to the length of time taken to undertake an internal review here, although this necessarily falls outside of the main body of his decision notice.
56. Any formal determination about the causes of these delays falls outside the Commissioner's jurisdiction. However he remains in regular dialogue with the MPS with a view to securing significant improvement in its information request handling practice.

Internal review

57. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his 'Good Practice Guidance No 5', 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.

58. The Commissioner accepts the sensitivity of the subject matter in this case. However, he is very concerned that it took over a year for two of the internal reviews to be completed, and over 11 months for the other. He further notes that this public authority is currently subject to ongoing monitoring in respect of the timeliness of its internal reviews and these requests will be considered as part of that monitoring.

Right of appeal

59. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

60. 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.
61. 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

Graham Smith
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