

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 December 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 connected with Stephen Ward, who was involved in the Profumo Affair of the early 1960s. The Metropolitan Police Service (the "MPS") initially provided a small amount of information but withheld the remainder citing section 40(2) (personal information); it also refused to confirm or deny that it held further information by virtue of sections 23(5) (information related to security bodies) and 24(2) (national security). This position was revised during the Commissioner's investigation and further information was disclosed. The MPS's final position is that the remaining information is exempt by virtue of sections 23(1) and 40(2). The Commissioner's decision is that the MPS is entitled to rely on these exemptions and he requires no steps.

Background

2. The Commissioner has previously issued decision notice FS50530711¹ in relation to this case. The notice covered earlier delays and procedural matters so these will not be reconsidered in this notice.
3. It is of note that on 27 March 2014 the MPS was contacted by the Criminal Cases Review Commission (the "CCRC"). The CCRC advised the MPS that it must retain and not dispose of "*all documents and other materials*" held relating to the prosecution of Stephen Ward pending its collection by the CCRC.
4. The CCRC has power under section 17 of the Criminal Appeal Act 1995. This means that it can require the MPS to provide information and that the MPS is under a legal duty to comply with that request. The obligations under section 17 are absolute and override public interest immunity, legal professional privilege and any other rule or obligation of confidentiality. Further details can be found online². The CCRC will examine the papers with a view to considering whether the case should be referred back to the Court of Appeal.

Request and response

5. On 1 October 2013, the complainant wrote to the MPS and requested information in the following terms:

"My request relates to the late Stephen Ward (19 October 1912 – 3 August 1963). You may recall that he was the osteopath and portrait artist who found himself at the centre of the Profumo Affair of 1963. Mr Ward was arrested by the police in June 1963 and subsequently appeared at Marylebone Police Station. He was charged with living off immoral earnings and procuring prostitutes. His trial began at the Old Baily [sic] on the 22 July 1963 and ended on 5 August 1963 – two days after he took his own life.

¹http://ico.org.uk/~media/documents/decisionnotices/2014/fs_50530711.aspx

² <http://www.justice.gov.uk/downloads/about/criminal-cases-review/policies-and-procedures/casework/section17-criminal-appeal-act-95.pdf>

I assume the information should be readily available. Dr Ward's death in 1963 means there are no data protection issues as far as the request is concerned. There are also no on-going investigations relating to this matter.

Please note that I am only interested in receiving material which relates to the period January 1 1962 to the January 1 1965.

Some of the information may have been generated prior to Dr Ward's arrest in 1962 and some of it may have been generated following his death in 1963.

1) Does the Metropolitan police hold information which relates to Mr Ward's arrest and or charges and or police interviews and or subsequent trial?

2) If the answer to the above question is yes can you please provide copies of all statements given by Stephen Ward and or his legal representative? Can you please provide copies of all transcripts of all police interviews with Mr Ward and or his legal team?

3) Could the Metropolitan Police force please provides [sic] copies of all documents it holds which in any way relates to the decision to arrest and or question and or charge Dr Ward. This information will include but will not be limited to case files, the note books of relevant police officers, other witness statements, interview transcripts, photographs and sketches.

4) Does the Metropolitan Police force hold a transcript of Dr Ward's trial at the Old Bailey. If the answer to the above question is yes can you please provide a copy.

5) Does the Metropolitan Police force hold copies of correspondence and communications (including faxes, telephone transcripts, memos and letters) with the Home Office and or the Home Secretary of the day (Henry Brooke) which relates in any way to the decision to arrest and or question and or charge Stephen Ward. If the answer to this question is yes can you please provide copies of this correspondence and communication. I am interested in receiving both sides of the correspondence and communication".

6. The MPS responded on 21 January 2014. It confirmed holding information in respect of part (1) and advised that no transcript was held in respect of part (4). It refused to provide the requested information citing section 40(2) (personal information). It also refused

to confirm or deny holding information by virtue of sections 23(5) (information related to security bodies) and 24(2) (national security).

7. Following an internal review the MPS wrote to the complainant on 2 April 2014. It disclosed a small amount of information but maintained its original position for the remainder of the request.
8. During the course of the Commissioner's investigation the MPS revised its position. It added section 31(1) (law enforcement) to its reasons for withholding the requested information and amended its reliance on sections 23(5) and 24(2) to 23(1), thereby confirming that it held relevant information supplied by or related to one of the security bodies.
9. This position was later amended again and further information was disclosed. The MPS's final position was to rely only on sections 23(1) for some of the withheld information and 40(2) for the balance.

Scope of the case

10. Following on from the earlier decision notice referred to above, the complainant contacted the Commissioner on 2 April 2014 to complain about the way his request for information had been handled.
11. Having previously issued a decision notice concerning delays in connection with servicing this request, the Commissioner will now consider the application of exemptions to the withheld information.
12. As an appropriate response was provided to parts (1) and (4) of the request these parts will not be further considered.

Reasons for decision

Section 23 – information supplied by, or relating to, bodies dealing with security matters

13. Section 23(1) states:

"Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)".

14. To successfully engage the exemption at section 23(1), a public authority must be able to demonstrate that the relevant information was *directly or indirectly* supplied to it by, or *relates to* any of the bodies listed at section 23(3). This means that if the requested information falls

within this class it is absolutely exempt from disclosure under the FOIA. This exemption is not subject to a balance of public interests test.

15. As cited by the MPS to the Commissioner, he has previously determined in his decision notice reference FS50258193³ that:

"...there will be very few instances where information held by Special Branch is not also held by a section 23(3) body, even if it was not directly or indirectly supplied by them, as the nature of the work of special branches involves very close working with security bodies and regular sharing of information and intelligence..."

16. As it is a class-based and absolute exemption, the only question for the Commissioner is whether the requested information falls within the description of information covered by section 23(1).
17. On this occasion, the Commissioner has not viewed the withheld information. Instead a senior official of the MPS has written to him and stated that the information to which this exemption had been applied does either relate to, or was supplied by, the Security Services which is one of the bodies specified in section 23(3). The Commissioner is prepared, in limited circumstances, to accept the assurance of a senior official that information withheld under section 23(1) has indeed been supplied by or is related to security bodies specified in section 23(3). He will only do so where the official occupies a position in relation to the security bodies which allows them genuinely to validate the provenance of the information, and where the official is independent of the public authority's process for dealing with freedom of information requests. The Commissioner is satisfied that the author of this letter occupies such a position within the MPS.
18. Accordingly, the Commissioner accepts that, in the circumstances of this case, the assurance he received from the senior official at the MPS regarding the nature of the withheld information, coupled with his own knowledge and experience gained from investigating previous complaints, is sufficient. In addition he has inspected some of the withheld information and has been able to form his own independent view as to security body interest in parts of that information. He accepts that the withheld information relates to a body listed in section 23(3) for

³http://www.ico.org.uk/~media/documents/decisionnotices/2011/fs_50258193.pdf

all of the reasons given by the public authority, supplemented by his own knowledge and judgement.

19. The Commissioner is therefore satisfied that section 23(1) is engaged in respect of the information to which it has been applied.

Section 40 – personal information

20. Section 40(2) of the FOIA provides an exemption in relation to information that constitutes the personal data of any individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles. Consideration of this exemption is a two-stage process: first, whether the information requested constitutes personal data, and secondly whether disclosure of that personal data would be in breach of any of the data protection principles.

21. Covering first whether the information requested constitutes personal data, section 1(1) of the Data Protection Act 1998 (DPA) defines personal data as follows:

"personal data' means data which relate to a living individual who can be identified:

- (a) from those data, or*
- (b) from those data and any other information which is in the possession of, or is likely to come into the possession of, the data controller".*

22. The MPS has described the withheld information as follows:

"Given that the information was collected in regard to alleged criminal offences by one named individual, albeit deceased, the information relates, in detail, to a great number of third party individuals. The information contained within the files consists of witness statements, both original and typed copies in which those providing the statement go into graphic detail about their and others private lives and because of the allegations being investigated much is discussed about theirs and others sexual habits and behaviour. It must be borne in mind that the statements are recollections of those providing them and may have been corroborated by others, or indeed, not as the case may be. The police reports contained therein also highlight, in detail, such behaviour and the connections between those named...

Therefore, in regard to 'personal information' the MPS is satisfied that the majority of information within the files is personal data

relevant to section 1 Data Protection Act 1998. However, it is also recognised that the majority is in fact relevant to Section 2 Data Protection Act 1998, (DPA) in that it is 'sensitive personal data'. This is because the statements obtained and various reports make reference, in detail, to the sexual health of individuals as well as their sexual behaviour, both matters considered relevant to Section 2(f) DPA 1998. Also contained within the file are references to a number of individuals and their recorded criminal history and if not criminal history reference to alleged criminal activity and this information is relevant to Section 2 (g) and or 2(h) DPA".

23. Having viewed the relevant information the Commissioner is satisfied that this is an accurate description of the information withheld under section 40(2). Clearly this information would both relate to and identify the parties concerned. This information is, therefore, personal data according to the definition given in section 1(1) of the DPA.
24. Section 2 of the DPA lists what is to be considered sensitive personal data for the purposes of that Act. Included in this list, as cited above, are (f) a person's sexual life, (g) the commission or alleged commission of any offence by a person and (h) any proceedings for any offence committed or alleged to have been committed by a party, the disposal of such proceedings or the sentence of any court in such proceedings.
25. The Commissioner is satisfied that, where cited, the withheld information is properly categorised as sensitive personal data, although he recognises that this does not cover the withheld information in its entirety.
26. Having concluded that the withheld information is either the personal data, or sensitive personal data, of the parties concerned, the Commissioner will next consider some points made by the complainant prior to going on to consider whether or not disclosure of the information would be in breach of the DPA.
27. The complainant suggests that, due to the passage of time, many of the parties will now be deceased. However, the Commissioner does not accept that this is necessarily so as several of the parties connected to the case were only very young at the time. In the absence of other officially verified information, a life expectancy of 100 years is a reasonable basis on which to proceed. Although some of the people referred to in the file may be deceased the Commissioner's position in this case is to agree with the MPS and be cautious and assume that the

information is personal data because he does not have the capability or resource to investigate this and nor, for the same reason, does he expect the MPS to do so. This position has been previously accepted by the First-Tier Tribunal⁴.

28. The complainant also suggests that the MPS could contact parties to gain consent for release of the information. However, the Commissioner would not expect a public authority to go to such lengths which, on this occasion, would be compounded by the length of time since the events, as it would be likely to take considerable resources to try and locate the people concerned.
29. Finally, the complainant also suggests that the requested information can be anonymised thereby removing any reliance on section 40. Whilst this can be a useful way forward in many cases, on this occasion the Commissioner does not consider it to be a viable option. The MPS advised him:

"It is noted that the complainant makes reference to relevant information being anonymised... The ICO have published a guide to the anonymisation of information allowing disclosure⁵.

In regard to [that guidance] I would draw the ICO's attention to page 18 where the guidance talks about information already in the public domain that could potentially lead to the identity of an individual being revealed no matter what the redaction. And as mentioned [previously] there is a huge amount of information already in the public domain that relates to the case of Stephen Ward, some of it in great detail. Therefore any anonymisation of held information would need to be thorough and certainly sufficient to prevent an individual being identified given the plethora of publicly available information. This is especially relevant when one considers the 'motivated intruder' test and this was highlighted in the

⁴ <http://www.hendersonchambers.co.uk/wp-content/uploads/pdf/ea-2012-0141-decision-2013-02-151.pdf>

⁵ https://ico.org.uk/for_organisations/data_protection/topic_guides/~/media/documents/library/Data_Protection/Practical_application/anonymisation-codev2.pdf

following Decision Notice and is the MPS believes pertinent to this case and any potential anonymisation⁶:

Therefore, given the above the MPS is of the opinion that anonymisation in this instance to ensure that identification is prevented, whilst not impracticable, it would leave information for disclosure purposes as potentially meaningless. The MPS would wish to stress that statements by individuals not only talk about themselves but also about third parties and the redaction of information contained within the statements would be likely to lead them remaining with extracts existing of.....I said.....he said”.

30. As stated above, the Commissioner has had full access to the statements covering this personal data. Having done so, he fully accepts the arguments put forward by the MPS with particular regard to the motivated intruder test and the large amount of information which is already available. As such he accepts that it would not be possible to fully anonymise the information and remove all possible identifiers from the documents. Even if it were possible in respect of parts of documents, the remaining words would make little sense and have no real value.

Would disclosure contravene the first data protection principle?

31. 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 is met.
32. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be fair, lawful and meet one of the DPA schedule 2 conditions. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.
33. The Commissioner has first considered whether disclosure would be fair. In doing so he takes into account the following factors:
- the individual’s reasonable expectations of what would happen to their information;

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[https://ico.org.uk/~media/documents/decisionnotices/2014/fs_50523095.p
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- the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned); and
 - the balance between the rights and freedoms of the data subject and the legitimate interests of the public.
34. In consideration of these factors, the MPS advised the Commissioner as follows:
- "The witnesses provided evidence for the purposes of criminal proceedings, thus the purpose or reason (the 'why') their information was collected is specific and clear to them (witnesses can be held in contempt of court if they refuse to testify). So while individuals may have been content to provide information to be used for this purpose they may not wish this to be used for any additional purpose. We are arguing that to release their information would be for another purpose for which the witnesses have not given their consent and have no expectation of"*
35. In relation to the reasonable expectation of the witnesses, the Commissioner considers that they would have had no reasonable expectation that this information would be placed in the public domain, even after this length of time. Witnesses, when providing information as part of an investigation, do so with a high expectation that their information will not then be more widely published. Furthermore, as already mentioned, the subject matter of many of the statements relates to particularly sensitive issues, such as prostitution. In the Commissioner's view, the parties concerned would be understandably distressed were details of their past to be made public as they may well now be living totally different lifestyles.
36. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the withheld information. He will also take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public at large, without conditions. Given the nature of the material, and the sensitivity of the subject matter, disclosure in this case could lead to an intrusion into the private lives of the individuals concerned and the consequences of any disclosure could be damaging or distressing to them.
37. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in its disclosure.
38. In considering these 'legitimate interests', such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.

39. The Commissioner acknowledges that the conviction of Stephen Ward has been considered by many to be 'unsound' for some considerable time. Indeed, so much so that it is now being reviewed by the CCRC with a view to the case being formally put before the Court of Appeal. As such the information which has been requested can be shown to be of some considerable public interest in that it relates to a suspected miscarriage of justice. However, the Commissioner also notes here that any such suspicions will now be properly addressed by appropriate legal experts who will decide whether or not there is any evidence to support these suspicions. In the Commissioner's view, such reconsideration is the correct way to deal with these matters. The actions of the CCRC will meet the legitimate interest of the public without infringing the rights of the parties connected to this sensitive matter.
40. In light of the nature of the information and the reasonable expectations of the individuals concerned, the Commissioner is satisfied that release of the withheld information would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the data subjects. He considers that these arguments outweigh any legitimate interest in disclosure. He has therefore concluded that it would be unfair to disclose the withheld information - in other words, disclosure would breach the first data protection principle. He therefore upholds the MPS's application of the exemption at section 40(2) in this case.
41. As disclosure would not be fair, the Commissioner has not gone on to consider in any detail whether disclosure is lawful or whether one of the schedule 2 DPA conditions is met (or schedule 3 in relation to any sensitive personal data). However, his initial view is that no such condition would be met.

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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