

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 29 May 2014

**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 requested the results of investigations that the Metropolitan Police Service (the MPS) has undertaken in respect of its use of Schedule 7 of the Terrorism Act 2000, information which was also sought by the Independent Police Complaints Commission (the IPCC). Having previously cited different exemptions, the MPS finally refused to provide the information citing exemptions at sections 30 (investigations and proceedings), 23 (information supplied by, or relating to, bodies dealing with security matters) and, in the alternative, 24 (national security) of the FOIA. The Commissioner's decision is that the MPS is entitled to rely on section 23, and section 24 in the alternative, as a basis for withholding the requested information and he requires no steps. He does however note breaches of sections 10(1) and 17(3).

## Background

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2. The request can be followed on the "What do they know" website<sup>1</sup>. It makes reference to a newspaper article which can be found online<sup>2</sup>, and includes the following statement:

*"The IPCC said it ordered the Met in February to 'investigate the rationale for stopping and questioning people under Schedule 7'. The force agreed to investigate two months later, following the threat of legal action, but then refused to hand over the resulting investigation documents to the watchdog, an IPCC spokesman said".*

3. The request makes reference to "Schedule 7". This refers to Schedule 7 of the Terrorism Act 2000<sup>3</sup>, which gives the police powers to stop, question and detain a person.
4. The MPS has further explained:

*"Schedule 7 Terrorism Act 2000 (as amended by the Anti-Terrorism Crime and Security Act 2001), sets out the basis for conducting port and border controls and defines an examining officer as a police, immigration or designated customs officer. It enables an examining officer to examine and/or detain a person who is 'at a port or in the border area, and [where] the examining officer believes that the person's presence at the port or in the area is connected with his entering or leaving Great Britain or Northern Ireland or travelling by air within Great Britain (GB) or within Northern Ireland (NI), to determine whether they are or have been, concerned in the commission, preparation or instigation of acts of terrorism".*

5. The request makes reference to the IPCC. Although this quote postdates the complainant's request, according to its website<sup>4</sup>:

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<sup>1</sup>[https://www.whatdotheyknow.com/request/results\\_of\\_investigation\\_into\\_se](https://www.whatdotheyknow.com/request/results_of_investigation_into_se)

<sup>2</sup> <http://www.theguardian.com/world/2013/aug/24/david-miranda-detention-greenwald-press-editors>

<sup>3</sup> <http://www.legislation.gov.uk/ukpga/2000/11/schedule/7>

<sup>4</sup> <http://www.ipcc.gov.uk/news/ipcc-granted-permission-challenge-mps-relation-schedule-7-terrorism-act-2000>

*"Mar 27, 2014*

*The IPCC has been granted permission at the High Court to proceed with its claim for judicial review of the Metropolitan Police Service's handling of complaints about its use of Schedule 7 of the Terrorism Act 2000 and its failure to provide the IPCC with investigation reports and background papers. Schedule 7 is the power to stop, question and detain people at ports of entry and departure.*

*IPCC Chief Executive, Amanda Kelly said:*

*"We welcome the court's decision to grant us permission to bring this case. We consider that the Metropolitan Police Service has a legal obligation to provide us with investigation reports and background papers. Stop and search powers are a matter of great public interest and we look forward to the court considering this important issue."*

*The IPCC has been supervising complaints made in relation to Schedule 7 powers since June 2011 in direct response to concerns, in particular raised by Muslim community groups, on misuse of these powers. As part of that supervision the IPCC imposed terms of reference for investigating the complaints. As a result the MPS has to provide the IPCC with a draft final investigation report for each complaint so that the IPCC can satisfy itself the terms of reference have been met".*

## **Request and response**

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6. On 24 August 2013 , the complainant wrote to the MPS and requested information in the following terms:

*"Please reveal the results of investigation you were instructed to perform by IPCC: 'investigate the rationale for stopping and questioning people under Schedule 7'.*

*As per article in Guardian you have so far refused to do so - please see link below.*

*I believe there is a strong public interest in the Police accountability for it's [sic] actions. Also, public has right to monitor potential abuse of power by MPS officers.*

*Please see link to the article:*

*<http://www.theguardian.com/world/2013/au...>"*

7. Having previously received an acknowledgement, on 24 September 2013 the complainant chased a response, advising the MPS that it was outside the 20 working day limit for responding to his request. On the same day the MPS advised that it needed further time to consider the public interest.
8. The MPS responded on 29 October 2013. It stated that the requested information was exempt by virtue of sections 31(1)(g) and 31(2)(b) (prejudice to law enforcement).
9. Following an internal review the MPS wrote to the complainant on 4 February 2014. It stated that it was now relying on sections 40(2) (personal information), 30(1)(a)(i)(b), 30(2)(a)(i) and 24(1) to withhold the information. It also refused to confirm or deny holding further information by virtue of section 23(5).
10. During the course of the Commissioner's investigation the complainant advised that he was happy to have any 'personal data' removed from the scope of the request so the Commissioner advised the MPS that he would no longer consider the application of section 40.
11. Following further consideration of the request, the MPS again revised its position to rely on sections 30(1)(a)(i)(b), 30(2)(a)(i), 23(1) and, in the alternative, 24(1) to justify the refusal.

### **Scope of the case**

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12. The complainant first contacted the Commissioner prior to the receipt of his internal review, which took over three months to be completed. After receipt of this he confirmed that his grounds of complaint were the delays and the citing of exemptions.
13. The Commissioner has confirmed with both parties that the requested information actually consists of the findings of investigations into complaints made by parties in connection with schedule 7 stops. There is no over-arching report, just findings for each complaint.

### **Reasons for decision**

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#### **Section 10 – time for compliance**

14. Section 10 of FOIA states that: "*Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of*

*receipt.*" The public authority should therefore have issued a full refusal notice, issued a notice under section 17(3) or disclosed the requested information within 20 working days.

15. The public authority did not respond to the complainant within 20 working days thereby breaching section 10.

### **Section 17 – refusal of request**

16. Having already breached the statutory time limit the public authority issued a notice under section 17(3) of the FOIA. This allows a public authority to provide its public interest determination in a separate notice *"within such time as is reasonable in the circumstances"*.

17. The Commissioner has issued guidance on this point<sup>5</sup> which includes the following:

*"...our view is that an authority should take no more than an additional 20 working days to consider the public interest, meaning that the total time spent dealing with the request should not exceed 40 working days."*

18. In this case the Commissioner notes that the public authority has exceeded the 40 working days to consider the public interest test. No reasons were given for the delay. He believes this to be unacceptable.
19. The Commissioner therefore finds that the public authority breached section 17(3) of the FOIA because it did not provide the complainant with its public interest determination within such time as was reasonable.

### **Section 23(1) and section 24(1) in the alternative**

20. 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)."*

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<sup>5</sup>[http://ico.org.uk/for\\_organisations/guidance\\_index/~/\\_media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/time-for-compliance-foia-guidance.pdf](http://ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/time-for-compliance-foia-guidance.pdf)

21. Section 24(1) states;

*"Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security."*

22. This means that section 23(1) and section 24(1) are mutually exclusive. However, the fact that section 24(1) can only be applied to information that is not protected by section 23(1) can present a problem, if a public authority does not want to reveal whether a section 23 security body is or has been involved in an issue. If it could only cite section 24(1) in its refusal notice, this would disclose that no section 23 body was involved. Conversely, if only section 23(1) was cited, this would clearly reveal the involvement of a security body. To overcome this problem the Commissioner will allow public authorities to cite both exemptions 'in the alternative' when necessary. This means that although only one of the two exemptions can actually be engaged, the public authority may refer to both exemptions in its refusal notice. The Commissioner is prepared to accept such an argument where it is correctly made.
23. The MPS has confirmed holding the requested information so this issue is not in dispute. The MPS has therefore submitted arguments in support of its view that it can rely on section 23(1), and section 24(1) in the alternative, for withholding the information requested.
24. Insofar as he is able to do so on the face of this decision notice, the Commissioner will now set out his decision as to whether the MPS can rely on section 23(1), and section 24(1) in the alternative.

**Could the MPS rely on section 23(1) in relation to the requested information?**

25. The exemption at section 23 captures information supplied directly or indirectly by a security body and information which relates to a security body. In this way, the exemption can protect information as it is disseminated through different channels. It is a class based absolute exemption. This means that if the requested information falls within the class described in the request it is absolutely exempt from disclosure under the FOIA. This exemption is not subject to a public interest test.
26. Section 23(3) contains a list of bodies dealing with national security matters. 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 by, or relates to, any of the bodies listed at section 23(3).

27. There is clearly a close relationship between the MPS and security bodies in that the MPS plays a key role in protecting the UK from the threat of organised criminals including terrorists. It is inevitable that it works closely with security bodies in carrying out its role. Therefore, in respect of the MPS role and the subject matter being requested, the Commissioner finds that, on the balance of probabilities, any information about the rationale for stopping and questioning people under Schedule 7 of the Terrorism Act 2000 that is held is likely to be related to, or have been supplied by, one or more bodies identified in section 23(3) of the FOIA. The Commissioner's conclusion is, therefore, that the exemption provided by section 23(1) of the FOIA is engaged.
28. Needless to say, in cases where section 23(1) has been relied upon, the public authority considers the relevant information highly sensitive. Therefore, the Commissioner has to be careful that in providing reasons for his decision, he does not inadvertently reveal any information considered to be sensitive, not least the withheld information. The Commissioner therefore appreciates that the brevity of his reasoning in this case may prove frustrating to the complainant. It is however an unavoidable consequence of the required approach to section 23 cases.

#### **Can the MPS rely on section 24(1) in the alternative?**

29. Section 24(1) can only be applied to information that does not fall within section 23(1). This means it cannot be applied *in addition to* section 23(1), but, for reasons explained above, it can be cited *in the alternative*.
30. As noted above, information is exempt under section 24(1) if it is required for the purpose of safeguarding national security. There is no definition of national security in the Act. However, in *Norman Baker v the Information Commissioner and the Cabinet Office* (EA/2006/0045 4 April 2007) the Information Tribunal was guided by a House of Lords case, *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, which concerned whether the risk posed by a foreign national provided grounds for his deportation. The Information Tribunal summarised their Lordships' observations as follows:

*"- 'national security' means the security of the United Kingdom and its people;*  
*- the interests of national security are not limited to actions by an individual which are targeted at the UK, its system of government or its people;*  
*- the protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence;*



- *action against a foreign state may be capable indirectly of affecting the security of the UK ; and*
- *reciprocal co-operation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom's national security".*

31. The exemption applies where withholding the information is "*required for the purposes of safeguarding national security*". Required is taken to mean that the use of the exemption is reasonably necessary. It is defined by the Oxford English Dictionary as '*to need something for a purpose*' which could suggest the exemption can only be applied if it is absolutely necessary to do so to protect national security. However, the Commissioner's interpretation is informed by the approach taken in the European Court of Human Rights where interference with human rights can be justified where it is 'necessary' in a democratic society for safeguarding national security. 'Necessary' in this context is taken to mean something less than absolutely essential but more than simply being useful or desirable, so the Commissioner interprets 'required', in this context, as meaning 'reasonably necessary'.
32. In correspondence with the Commissioner, the MPS has drawn attention to the Commissioner's own guidance on the national security exemption which states the following: "*The exemption is based on the effect that disclosure would have, not on the content or source of the information.*"

And also:

*"The interests of national security are not limited directly to preventing military and terrorist attacks on the UK but include the safety of UK citizens abroad, the protection of our democratic constitution, the effective operation of national security bodies and co-operation with other countries in fighting international terrorism."*

33. The MPS further explained:

*"Schedule 7 is used exclusively in respect of counter terrorism, which itself is clearly relevant to national security... This is because the police ability to prevent and detect crime (which would be impaired by the disclosure of information which would provide useful intelligence to potential offenders, enabling them to identify ways in which they may be able to create a greater likelihood that they would be able to avoid detection by taking certain actions) is clearly also required to safeguard national security as the purpose of this legislation is to prevent terrorist activity".*



34. The information requested clearly relates to work that the MPS has done under the remit of Schedule 7 of the Terrorism Act. It therefore follows that the investigation material requested necessarily relates to terrorism-related matters and the execution of police powers. Release of the individual reports is likely to reveal police tactics and rationale for exercising their powers and disclosure is therefore highly likely to be of benefit to those wishing to evade detection by the police. It is evident that terrorism-related matters are of grave concern when considering national security, and any detail that could reveal how and when the police operate in exercising their powers will therefore have direct relevance upon national security.
35. In light of the above the Commissioner is satisfied that if section 23(1) does not apply to some or all of the withheld information, section 24(1) is engaged in the alternative.

### **Public interest test**

36. Section 24(1) is a qualified exemption which requires a public interest test. This means that even if the exemption is engaged, the MPS can only rely on it in the alternative to section 23(1) if the public interest in doing so outweighs the public interest in disclosure.

### **Public interest arguments favouring disclosure**

37. The MPS has advised the Commissioner:

*"There is clear public interest argument based on accountability in the operation of Schedule 7 legislation, coupled with the more general argument of increased transparency of the MPS."*

38. The Commissioner also notes the high profile of the subject matter that is central to this request. Disclosure of the requested information would both better inform the public and assure it that complaints about the operation of Schedule 7 of the Terrorism Act are dealt with fairly and appropriately.

### **Public interest arguments against disclosure**

39. The MPS advised the complainant:

*"Disclosure of the level of detail you have requested (along with any other mosaic requests) would render security measures to protect the public as less effective..."*

*[Disclosure] would be likely to compromise ongoing or future operations to protect the security and infrastructure of the UK, as it*

*may enable individuals to try and ascertain how they can evade detection in respect of any plans to undermine national security”.*

40. The MPS advised the Commissioner:

*“The key factor favouring maintaining the exemption is the public interest in preventing acts of terrorism that threaten national security, and it is this factor to which the MPS has accorded the greatest weight ... this is not only due to the significant prejudice that has been identified in respect of preventing and detecting terrorist activity, but it is also the view of the MPS that the proactive steps taken by the MPS to increase community engagement reduce the weight of those public interest factors favouring disclosure in this respect.*

*It should be considered that future requests made across a period of time would also potentially allow analysis of the levels of police activity that are identified and enable any differences to be possibly highlighted.*

*As outlined previously, recognition of such intelligence led police activity would have a detrimental impact on the effectiveness and efficiency of ports police officers in response to ever changing patterns of ongoing terrorist activity, increasing the advantage to the potential terrorist and creating a corresponding increase in the risk posed to the security of the UK.”*

### **Balance of public interest**

41. The Commissioner is of the view that where section 24(1) is engaged, there will always be a compelling argument in favour of maintaining the exemption given the vital importance of maintaining national security. Whilst the public interest inherent in this exemption will not always be a determinative factor, in practice, for the public interest to favour disclosure where section 24(1) has been found to be engaged in a particular case there must be specific and clearly decisive factors in favour of disclosure. Although section 24(1) is a qualified exemption, clearly it would not be appropriate for the Commissioner to recognise anything less than the most weighty public interest in favour of maintenance of this exemption.
42. The newspaper article referred to in the information request states that, in view of a number of complaints it had received, the IPCC required the MPS to *“investigate the rationale for stopping and questioning people under Schedule 7”*. The Commissioner accepts that the public will have a valid interest in the way that the police service exercises its powers in these circumstances, and that it is fair and proportionate, and he

recognises that there is a valid public interest in the disclosure of this information on the basis of this subject matter.

43. However, his view is that this public interest is outweighed by the public interest in avoiding disclosure that could harm the safeguarding of national security. The conclusion of the Commissioner is, therefore, that the public interest in the maintenance of the exemption outweighs the public interest in disclosure. The Commissioner is therefore satisfied that the MPS can rely on section 24(1) as a basis for withholding the requested information if section 23(1) does not apply.
44. Given the Commissioner's conclusions regarding section 23(1) and section 24(1) in the alternative, he has not gone on to consider section 30.

### **Other matters**

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

#### *Internal review*

46. Part VI of the section 45 Code of Practice states that it is 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 considers 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.
47. Although he notes that there are sensitivities around this case because of the subject matter and the exemptions relied on, he is nevertheless concerned that it took over three months for an internal review to be completed.

## Right of appeal

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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: 0116 249 4253

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)

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 .....**

**Graham Smith**  
**Deputy Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**