

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 30 November 2017

**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 the loss of 13 murder files from the Metropolitan Police Service (the "MPS"). The MPS refused to provide the information citing sections 30(1)(a) (investigations and proceedings), 38(1)(a) (health and safety) and 40(2) (personal information) of the FOIA. The Commissioner's decision is that the MPS was entitled to rely on section 38(1)(a) of the FOIA to withhold the requested information. No steps are required.

### Background

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2. The request centres on a newspaper article<sup>1</sup> concerning the loss of 13 unsolved murder files.
3. The MPS has further advised the Commissioner as follows:

*"In 2014 Mark Ellison QC was commissioned to "The Stephen Lawrence Independent Review: Possible corruption and the role of undercover policing in the Stephen Lawrence case". One of the concerns raised in the enquiry was the way in which the*

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<sup>1</sup> <http://www.mirror.co.uk/news/uk-news/scotland-yard-launches-bent-cop-8894444>

*Metropolitan Police Service managed its records as a consequence, the MPS implemented Operation Filesafe to address the issues of records management within the MPS. It was put into effect to review the document handling and record management which included a complete and thorough assessment of all physical records held across the MPS estate. Part of Operation Filesafe involves the searching of all police buildings and recovering files /papers and identifying what they relate too.*

*Not connected to Operation Filesafe, the MPS had an ongoing police operation (Operation Yetna) which was reviewing historical unsolved homicide cases from 1980-1989. Op Yetna enquiries identified that 14 of the relevant case files were missing from the MPS Records Management Branch. Op Yetna concluded in 2014.*

*As a consequence, a strategic oversight group was formed by the MPS. This strategic group established Operation Mastrick, as an oversight operation to identify how many unsolved murder case files were missing from the MPS corporate Records Management Branch.*

*This internal search operation extended beyond the original Operation Yetna parameters, and ascertained there were 21 historical unsolved homicide case files that were missing from the MPS Records Management Branch. Extensive searches were subsequently undertaken, which recovered relevant documentation. As of 1<sup>st</sup> November 2017, there are now 11 missing unsolved homicide case files”.*

## **Request and response**

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4. On 25 January 2017 the complainant wrote to the MPS and requested information in the following terms:

*"I would like to ask for the names of the 13 murder victims mentioned in the article below. Their files were lost at the time the below was written. I would also like to ask when each murder was committed and where.*

*As the Met has conducted a full review of all unsolved murders I would also like to ask for the full list of names. Please also provide the date of the murder and location.*

*<http://www.mirror.co.uk/news/uk-news/scotland-yard-launches-bent-cop-8894444>".*

5. On 21 March 2017 the MPS responded. It provided some information within the scope of the request, ie the year of each murder and the postal area where it occurred, but it refused to provide the remainder. It cited the exemptions at sections 38(1) and 40(2) of the FOIA as its basis for doing so.
6. The complainant requested an internal review specifying that he required a full list of the names as well as the actual date and location of the murder. Following an internal review the MPS wrote to the complainant on 22 May 2017. It revised its position, maintaining reliance on the exemptions previously stated but adding section 30(1)(a) of the FOIA.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 26 May 2017 to complain about the way his request for information had been handled. He asked the Commissioner to consider the application of exemptions to the request.
8. The Commissioner has viewed the withheld information.

### **Reasons for decision**

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#### **Section 38 – health and safety**

9. The MPS has confirmed reliance on section 38(1)(a) of the FOIA. This states that information is exempt information if its disclosure under the legislation would, or would be likely to, endanger the physical or mental health of any individual.
10. For the exemption to be engaged it must be at least likely that the endangerment identified would occur. Even if the exemption is engaged, the information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
11. The Commissioner considers that the term 'endanger' in section 38(1) should be interpreted in the same way as the term 'prejudice' in other FOIA exemptions. In order to accept that the exemption is engaged, the Commissioner must be persuaded that the nature of the endangerment and the likelihood of it occurring as a result of disclosure of the information in question is "*real, actual and of substance*", rather than trivial or insignificant. As part of this she must be satisfied that some causal relationship exists between the potential disclosure and the stated endangerment.

12. This means that three conditions must be satisfied for the exemption to be engaged. First, the harm that is envisaged would, or would be likely to occur relates to the applicable interests described in the exemption. Secondly, there is a causal relationship between the potential disclosure of the withheld information and the prejudice that the exemption is designed to protect against. Third, there is a real risk of the prejudice, or more precisely the endangerment, arising through disclosure. In this regard, a public authority is required to demonstrate that either disclosure "*would be likely*" to result in endangerment or disclosure "*would*" result in endangerment - "*would*" imposing a stronger evidential burden than the lower threshold of "*would be likely*" .
13. The MPS initially advised the complainant that contact had been made with SCO1 (Homicide and Major Crime Command) regarding release of the information requested. It told him that SCO1 had advised that the MPS had an ongoing duty of care to the families involved and that release of the names could lead to families being the subject of unsolicited approaches by the media. It added that as a potential result of such disclosure: "*the MPS has identified a tangible risk to the mental well-being of the families of those victims of homicide*".
14. The MPS subsequently explained to the Commissioner that it believed that disclosing the names of the individuals concerned *would be likely* to result in a significant amount of distress to surviving family members, particularly if the information was to be re-used or published in a manner that was not sensitive to the individual needs of those concerned. It added that it had a very real concern that the names of the victims could be used by the media to try to contact living family members and / or friends and that they may prefer to retain their anonymity. It was concerned that disclosure of the names could provide journalists with an opportunity to force family members to re-live their loss in the public eye.
15. The MPS also provided the following detailed explanation regarding its position:

*"When a member of the public dies the family of the deceased may be distressed for a considerable period of time. When that death is not due to natural causes the distress can be greater and when it is the result of a homicide the distress can be even more severe. In homicide cases it is common that close family members never get over the loss of their loved one. This can extend to the wider family and to close friends. An undetected homicide is an extreme occurrence. Where a family has been unable to seek any form of conclusion through the justice system, the MPS have an obligation to treat requests for information under the Act with extreme caution.*

*Disclosure of the names of the missing files relating to undetected homicide cases would personally identify a family that have suffered terrible loss. Those families are likely to remain anonymous from contact (if it is not via the police) and press coverage. The only contact family members would expect to have in connection with the death of a loved one is through police contact. The MPS does not close unsolved murder investigations, but they may be suspended pending any new information coming to light and are subject to regular review. As part of this process, a family liaison or exit strategy is agreed and it is often the case that families only request subsequent police contact if there is material new evidence that is likely to lead to the investigation being solved.*

*The MPS have a duty of care (including psychologically) to the families of homicide victims and must assess where its actions would likely to cause further distress to the family. When police need to contact families of undetected homicides, we do so with the full support and services of trained Family Liaison Officers (FLO) who can also call upon the Homicide Victim Support Service. These support services work to try and minimise the distress of families at the time an incident occurs. The MPS are concerned that further disclosure in relation to the homicides (which may then appear in newspapers and online) would be detrimental if the families are no longer supported on a daily basis by the services initially available. Additional support which may be required due to the effect of an adverse FoIA disclosure is prejudicial to the families.*

*There is no reasonable expectation that the MPS would release the information being requested without the consent/involvement of the living families.*

*The MPS is required to continue to take into account the expectations of the families connected to homicide cases when considering any related disclosure. It remains the case that bereaved families will often instinctively resist the continued disclosure of information relating to a homicide in the family. Family members are likely to be distressed if disclosure is made without their consent. The disclosure of any details regarding the deceased must therefore be handled sensitively by the MPS. Unexpected disclosure of this sort would be likely to remind a family of a time they received unexpectedly life-changing and devastating information about their family member. The MPS therefore believes disclosing a list of the names of the undetected homicide victims whose files are missing could very easily be used to re-contact relatives or create media coverage which would be distressing to a family trying to rebuild their lives. The MPS have a genuine concern that journalists would try to locate and then contact the families*

*direct which would cause them shock and distress to learn via the Act or from the media of the missing files linked to their loved ones.*

*The MPS is aware it is hard enough for families to come to terms with reminders of their loved ones tragic and untimely deaths on a daily basis as well as through possible media appeals and police contact. To disclose a list of loved ones names (which as explained will in many cases provide a direct public link to living individuals) would be inappropriate and insensitive to the needs of the families and would detrimentally impact on the general public's trust and confidence in the MPS.*

*This list is also likely to include names of children whose parents may still be alive. A child's death is devastating for a family. The impact of a child's death when the crime is undetected cannot be underestimated. To risk disclosing a list of names, when committed and where (which is likely to include children) into the public domain is likely to be extremely traumatic for families involved.*

*It is appreciated there may be instances where the names of deceased individuals have been previously disclosed by the police, for example for the purpose of a media appeal to assist with the apprehension of an offender. However, such disclosure would have taken place in an appropriate and controlled manner by police, for a policing purpose many years ago, at a time when the family were likely to be engaged with the specialist support services available. To disclose the victim's names in historical undetected homicide cases outside of a controlled appeal is likely to be viewed as improper and insensitive to families. It would be detrimental and harmful to living family members to find out through the internet or friends/families and colleagues that the MPS will continue to publish the names of their loved ones under the Act.*

*The MPS is required to act with caution as disclosure could very easily cause extreme distress to families that have suffered a loss. For the MPS to publish information under FoIA alone would be upsetting enough for families itself – let alone in considering how that information could be used once published under FoIA”.*

16. In this case the MPS has relied on the second limb of the exemption: that mental endangerment (the likelihood of causing significant upset or distress) "would be likely" to occur. Having considered the arguments put forward by the MPS the Commissioner is satisfied that section 38(1)(a) is engaged on the basis that the risk of endangerment is substantially more than remote and that it is real, actual and of substance.

17. As section 38 is a qualified exemption consideration must next be given to the balance of the public interest in disclosure.

*Public interest in favour of disclosure*

18. The complainant's view is that the information should be disclosed because:

*"The Met have a duty of care to the families in these cases to inform them that they have lost the files relating to the murders. This will be a matter of great embarrassment to the Met but this cannot be allowed to prevent these families being told the truth... The Met have a duty to inform them".*

19. The MPS acknowledge that disclosure would ensure that:

*"The public can have informed discussions based on the challenges faced by the MPS regarding record management, as well as the work being carried out to ensure the MPS are legally compliant with regards to the area of record management".*

20. It also advised that disclosure would reassure the public that it was committed to being as open and accountable as possible regarding the missing files.

*Public interest in favour of maintaining the exemption*

21. The MPS explained to the complainant that:

*"Disclosure of the deceased victim's names could jeopardise the mental state and safety of the deceased persons family, especially as we have not informed the family that the file of their deceased family member cannot be located. The MPS has a continuing duty of care to the deceased victim's family. To cause undue distress to the living family members cannot be in the public interest".*

22. It advised that the main reason favouring non-disclosure is the overwhelming distress to the families and friends, which it believed would be likely to occur were it to release the identities of their loved ones directly into the public domain. It believed that additional distress would be caused if they were to discover that the files were lost as a result of a disclosure under the FOIA and explained that family members would reasonably expect the MPS to seek their permission prior to releasing the names – and the act of seeking permission to disclose this information would in itself be likely to cause distress.

23. The MPS also advised the Commissioner that, to date, the names of these murder victims are not in the public domain and that an open source search of their names had resulted in no trace (the

Commissioner has also searched for the names and can confirm that they are not readily available). It concluded that:

*"To publicly disclose the names via the Act would be insensitive and result in a loss of confidence in the MPS to protect the well-being of the families".*

*Balance of the public interest test*

24. The Commissioner will invariably place significant weight on protecting individuals from risk to their physical and mental well-being. The natural consequence of this is that disclosure will only be justified where a compelling reason can be provided to support the decision.
25. The Commissioner recognises the complainant's view that the families / friends concerned should be told the truth about the situation. However, she agrees with the MPS that any such decision to do so, and the methodology used for handling the matter, must be done in an extremely careful and sensitively managed way. She does not consider that an unfettered disclosure to the world at large via the FOIA would be an appropriate action to take. Whilst there is merit in arguing that the parties concerned have a right to know, this is clearly not something which is a matter for the Commissioner to determine in this notice. The MPS itself has the expertise and the Family Liaison Officers concerned will have a detailed knowledge of the individuals concerned and will know the best way for dealing with each party as it is likely that they will each have very different personal requirements depending on their own particular circumstances.
26. There is also the matter that searches for the files remain ongoing, and, as is evidenced above by the locating of two of these since this request was made, they are still being recovered. As such the MPS again has to consider at what point no more information is likely to come to light and then decide how to manage that situation in respect of informing the parties concerned if this is deemed appropriate.
27. On this occasion the Commissioner considers that the strength of the arguments for disclosure is clearly outweighed by the public interest in maintaining the exemption in order to safeguard the mental health of surviving relatives and friends. Therefore, in all the circumstances, the Commissioner has decided that the balance of the public interest favours maintaining the exemption at section 38(1)(a).
28. As this exemption applies to all of the withheld information it has not been necessary for the Commissioner to consider the other exemptions cited.



## **Right of appeal**

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29. 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)

30. 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.

31. 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**