

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 January 2018

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

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

#### Decision (including any steps ordered)

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1. The complainant asked the Metropolitan Police Service (the "MPS") to confirm or deny whether it was conducting, or intending to conduct, a particular investigation. The MPS would neither confirm nor deny any such investigation citing the exemptions at section 30(3) (investigations and proceedings) and 40(5)(b)(i) (personal information) of the FOIA. The Commissioner's decision is that it was entitled to rely on section 40(5)(b)(i) to neither confirm nor deny the existence of any investigation; she did not therefore consider the citing of section 30(3). No steps are required.

#### Background

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2. The complainant has previously submitted a related request to the MPS. This request was dealt with by way of a decision notice in which the Commissioner found that the MPS was entitled to neither confirm nor deny holding information by virtue of section 40(5)(b)(i). That decision can be found on her website<sup>1</sup>.

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notice/2017/2013997/fs50669724.pdf>

3. The request refers to the offence of "misconduct in public office". The MPS has explained that this is a common law offence that is defined in case law and not by statute. It confirmed that the police have the power to investigate such offences.

## Request and response

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4. On 28 April 2017 the complainant made the following information request via the "What do they know?" website<sup>2</sup>:

*"Under the terms of the Freedom of Information Act 2000, I request confirmation or denial of any current or intended police investigation into the alleged common law offence of 'misconduct in public office' in relation to any aspect of government decision making leading to the 2003 invasion of Iraq. I seek to identify no government minister or Whitehall official as individual subjects of this request".*

5. On 16 May 2017 the MPS responded. It refused to confirm or deny holding the requested information, citing sections 30(3) and 40(5) of the FOIA.
6. Following an internal review the MPS wrote to the complainant on 19 June 2017. It maintained its position.

## Scope of the case

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7. The complainant contacted the Commissioner on 24 June 2017 to complain about the way his request for information had been handled. He asked her to consider whether or not the MPS was entitled to neither confirm nor deny holding any information. His grounds of complaint were as follows.

*"I have long held the concern that the conclusions of the Chilcot Report were reached from a consideration of evidence at a standard of rigour below that expected in a court of law. This caveat also applies to statements made by Sir John Chilcot to House of Commons Select Committees. For example, the opinion he gave to the House of Commons Liaison Select Committee absolving 'him*

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<sup>2</sup>[https://www.whatdotheyknow.com/request/confirmation\\_or\\_denial\\_of\\_any\\_in#incoming-993544](https://www.whatdotheyknow.com/request/confirmation_or_denial_of_any_in#incoming-993544)

*(Blair) from a personal and demonstrable decision to deceive Parliament or the public; to state falsehoods knowing them to be false'.*

*[http://www.huffingtonpost.co.uk/entry/sir-john-chilcot-tony-blair-iraq-public-trust-beyond-facts-psychological-dominance\\_uk\\_581a294ee4b08315783d68c6](http://www.huffingtonpost.co.uk/entry/sir-john-chilcot-tony-blair-iraq-public-trust-beyond-facts-psychological-dominance_uk_581a294ee4b08315783d68c6)*

*This is the personal opinion of a former civil servant. How it was formed does not meet the rigours and standards for treating evidence demanded by a court law [sic]. Nevertheless, and in keeping with a 'principal objective' given the Iraq Inquiry's terms of reference to circumvent all legal liability for decision makers (discussed in the e-mail complaint below), it has become a defining opinion on this question of alleged 'intent' to deceive or advocate a course of action on false grounds.*

*I think it is germane to ask the question whether the real motives of the MPS in refusing to confirm or deny a police investigation is to protect this putative investigation from external interferences which may be damaging to it: to prevent a potential criminal from getting wind of it; to honour data protection rights of a possible defendant (as claimed in the MPS internal review); or is it to construct a wall of secrecy and silence around a tacit Establishment understanding already in force that legal liabilities will not be flagged up over this controversial area of executive policy making and that official 'criticisms' and 'lessons to be learnt'- as drawn up by the civil service- will be the limit of any actions to be taken.*

*In any case, if the MPS were to mount an investigation, how hampered would it be in commencing such with a body of 'evidence' collected and interpreted by a Privy Counsel inquiry denied any kind of remit to investigate and make conclusions about legal liabilities and working below the rigours and standards in the treatment of evidence expected by a court of law?*

*In conclusion, I want to return to the question of consistency in NCND. The Times yesterday (24 June) bears a report 'Grenfell cladding firm never paid off massive debt'- on the criminal investigation launched by the police over legal liabilities for the Grenfell Tower fire. The detective leading the investigation, Detective Superintendent [sic] Fiona McCormack, is reported as giving substantial detail about the direction and questions the investigation will be seeking answers for. 'We are looking at every criminal offence from manslaughter onwards, we are looking at health and safety offences and we are reviewing every company at the moment involved in the building and refurbishment of Grenfell Tower'.*

*This information is publicised despite it being known that it affects a small group of identifiable individuals. What is to prevent these individuals from attempting to make an escape from justice. Where is the data protection rights for company directors whose guilt has not been established in a court of law as yet? In this light, how does the MPS defend arguments of consistency in NCND?"*

8. The Commissioner will consider the MPS's position below.

## **Reasons for decision**

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### **Section 40 – personal data**

9. The MPS considers section 40(5)(b)(i) of the FOIA to apply to the requested information. The consequence of section 40(5)(b)(i) is that if a public authority receives a request for information which, if it were held, would be the personal data of a third party (or parties), then it can rely on section 40(5)(b)(i), to refuse to confirm or deny whether or not it holds the requested information.
10. Consideration of section 40(5) involves two steps: first, whether providing the confirmation or denial would involve the disclosure of personal data, and secondly, whether disclosure of that personal data would be in breach of any of the data protection principles.

### ***Is the information personal data?***

11. The first step for the Commissioner to determine is whether the requested information, if held, constitutes personal data, as defined by the Data Protection Act 1998 (the "DPA"). If it is not personal data, then section 40 cannot apply.
12. The DPA defines personal data as:

*"...data which relate to a living individual who can be identified  
a) from those data, or  
b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."*

13. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them,

has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

14. In his grounds of complaint the complainant has advised the Commissioner that:

*"There is, I would argue, not a small cast of easily identifiable 'specific individuals' here, but rather quite a large and spread out cast potentially featuring ministers, civil servants and special advisers. It is inevitable that there would be some speculation about who might be involved, but as the request I have made seeks neither to identify particular decision making areas or individual subjects, it cannot result in establishing a certain relation to any specific individuals.*

*I argue that my request is sufficiently non-specific in wording to elicit a confirmation or denial and that the MPS is incorrect in its assessment of this matter".*

15. The MPS told the Commissioner that it considers that the requested information is personal data on the following basis:

*"Based on the wording of [the] request, a confirmation or denial statement would disclose or infer to the world at large whether an individual has been the subject of an investigation by police.*

*Through open source search all information relating to this subject matter in the public domain relates/links to a living individual, former Prime Minister Tony Blair. The MPS believe any confirmation or denial would disclose Mr Tony Blair's details.*

*Although [the complainant] has stated he does not seek to identify any government minister however [sic] if the MPS were to confirm or deny an investigation was/had taken place this would clearly relate to a named living individual therefore confirming or denying the requested information would breach the data protection rights of the individual as it would reveal under FoIA whether they had been the subject of an investigation".*

16. The Commissioner does not agree that the wording of the request would reveal whether or not anyone **had** been the subject of an investigation as it only seeks confirmation or denial of any **current** or **intended** police investigation. Nevertheless, she considers that confirmation or denial in this case would clearly have the potential to reveal something about a named party. Whilst confirmation that information is held - if this were indeed the case - would not exclusively mean that there is a current or intended police investigation into Tony Blair because, as suggested by the complainant, there may be other parties who could be

under investigation, denial would obviously say something about him as it would be apparent that no-one was being investigated, ie neither Tony Blair nor any other party is under investigation. Therefore, the Commissioner is satisfied that confirmation or denial in this case would have the potential to disclose something about a named individual. She is therefore satisfied that providing a confirmation or denial in this case would result in the disclosure of personal data.

***Is the information sensitive personal data***

17. Sensitive personal data is personal data which falls into one of the categories set out in section 2 of the DPA. The following categories are relevant in this instance:
  - (g) the commission or alleged commission by him of any offence; and
  - (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.
18. In this case, given that the request relates to information about the existence, or otherwise, of a criminal investigation the Commissioner is satisfied that any information held would fall under sub-sections 2(g) and (h) in relation to the named individual.
19. This means that the confirmation or denial can only be disclosed if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions and, because it is sensitive personal data, also one of the Schedule 3 conditions. If confirmation or denial would fail to satisfy any one of these criteria, then the MPS is not required to provide a response.
20. Therefore, even if the Commissioner found that confirmation or denial would be generally fair and that there was a suitable Schedule 2 condition to support it, these would not result in that action if no Schedule 3 condition could be satisfied. She has therefore gone on to firstly consider the applicability of the Schedule 3 DPA conditions. If there is no relevant Schedule 3 condition then a full consideration of any data protection principle or any Schedule 2 condition is unnecessary.

***Is there a relevant Schedule 3 condition?***

21. The Commissioner's view, as set out in her guidance on section 40<sup>3</sup>, is that the two conditions in Schedule 3 that might apply in relation to disclosures made under the FOIA are the first condition, which is that the data subject has consented to disclosure, and the fifth condition, which is that the data subject has already deliberately made the personal data public. This is because the other conditions concern disclosure for a stated purpose, and so cannot be relevant to the 'applicant blind' and 'purpose-blind' nature of disclosure under FOIA.
22. The Commissioner is aware of no evidence that the first or fifth condition is met and no arguments have been advanced to support either of these conditions.
23. In conclusion, the Commissioner does not find that any condition in DPA Schedule 3 is met. Therefore, confirmation or denial as to the existence or otherwise of this sensitive personal data would be in breach of the first data protection principle. The finding of the Commissioner is that the exemption provided by section 40(5)(b) is engaged and the MPS was not obliged to confirm or deny whether any information is held.
24. As section 40(5)(b) is properly engaged it is not necessary to go on to consider the applicability of section 30(3).

**Other matters**

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25. The Commissioner also notes the complainant's arguments about what matters the MPS chooses to make public. Whilst he may be frustrated by these selections, the Commissioner is unable to comment on such matters as the police, or indeed any other relevant public authority, will need to make their own decisions regarding what is suitable for reporting to the media. It is for the body concerned to manage the amount of information to be provided in order to keep the public informed - such disclosures are not made under the FOIA. Furthermore, if any individual believes their personal data has been unfairly placed in the public domain then it is their right to make a complaint to the Commissioner under the terms of the DPA for her consideration.

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<sup>3</sup> <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>

## Right of appeal

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26. 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)

27. 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.
28. 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**