

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 May 2018

Public Authority: Chief Constable of West Midlands Police
Address: PO Box 52
Colmore Circus
Queensway
Birmingham
B4 6NQ

Decision (including any steps ordered)

1. The complainant requested information about West Midland Police's ('WMP') use of agents provocateurs and similar techniques. After clarifying the request with the complainant, WMP stated that the use of agent provocateurs is illegal and is not used by the Police Service, but would neither confirm nor deny ('NCND') whether it held any further information, citing section 31(3), the NCND exemption for law enforcement. During the course of the Commissioner's investigation, WMP also sought to rely on section 38(2), the NCND exemption for health and safety. In both instances, WMP concluded that the public interest in maintaining the exemption outweighed that in disclosure of the requested information.
2. The Commissioner's decision is that WMP was entitled to NCND whether it held the requested information by virtue of section 31(3) of FOIA. However, by relying on section 38(2) which it had not mentioned at or before the internal review, WMP has also breached section 17(1) of FOIA.
3. The Commissioner does not require WMP to take any steps as a result of this notice.

Request and response

4. On 26 June 2017, the complainant wrote to WMP via the *WhatDoTheyKnow.com* website¹ and requested information in the following terms:

"Do you use Agent Provocateurs or similar techniques, if so, when and how?"

5. On 28 June 2017, WMP asked the complainant to clarify his request by providing a definition as to *"what you mean by the term agent provocateurs or similar techniques"*.
6. On 29 June 2017, the complainant provided the following clarification, making no reference to 'similar techniques',:

"A description from Wikipedia is as such.

An agent provocateur (French for "inciting agent") is a person who commits, or who acts to entice another person to commit an illegal or rash act or falsely implicate them in partaking in an illegal act. An agent provocateur may be acting out of their own sense of duty or may be employed by the police or other entity to discredit or harm another group (such as a peaceful protest or demonstration) by provoking them to commit a crime, thereby undermining the protest or demonstration as a whole.

In accordance with French grammar, the plural form of the term is, agents provocateurs; a female agent is an agente provocatrice."

7. On 20 July 2017, WMP responded. It told the complainant that:

"The activities associated with being an 'Agent Provocateur' according to the definition supplied ... would fall into an illegal category and therefore are not utilised by the Police Service.

The activity of an Agent Provocateur is subject to much case law and if an officer were to act in this way, it would render all evidence that may be used in a prosecution case against an individual

¹https://www.whatdotheyknow.com/request/the_use_of_agent_provocateurs

inadmissible. However, in light of your request also stating 'similar techniques', we have looked at your request and interpreted it in the broadest sense.

After reviewing the request in the way outlined above, West Midlands Police will neither confirm nor deny that we hold any of the requested information."

8. WMP refused to confirm or deny that it held the remaining requested information on the basis of section 31(3) of FOIA – the 'NCND' provision for law enforcement. Having considered the public interest, WMP concluded that it lay in favour of maintaining the exemption.
9. The complainant did not request an internal review until several months later (on 20 November 2017) due to issues he had experienced with his computer and "severe business needs". Although the review request was submitted outside its accepted time parameters, WMP agreed to process it and provided the outcome on 11 December 2017. It maintained its original position.

Scope of the case

10. The complainant contacted the Commissioner on 22 December 2017 to complain about the way his request for information had been handled.
11. On commencing her investigation the Commissioner advised the complainant that WMP had already explained that the use of agent provocateurs is illegal and that they were not used, but that it had refused to confirm or deny that it held any remaining requested information citing section 31(3). She advised that this is what she would investigate unless he provided any further grounds.
12. In response, the complainant stated that he considered WMP's response to his request to be as follows (see also the 'Other matters' section at the end of this notice):

"I read their reply to mean that other agencies do the agents provocatuer [sic] (DIRTY WORK) and them [sic] they have a case to prosecute. I believe that this practice is widespread."
13. As the complainant's response does not clarify his grounds of complaint any more clearly, the Commissioner has proceeded on the grounds that he accepts that agents provocateurs are not used but disputes the application of section 31(3) to any remaining information which may be held on 'similar techniques'.

14. During the course of the Commissioner's investigation, WMP advised that, in addition to section 31(3), it now also wished to rely on section 38(2), the NCND provision for health and safety. It considered that the public interest lay in favour of withholding the requested information. At the Commissioner's request, WMP wrote to the complainant to advise him of its late reliance on this exemption.
15. The complainant did not submit any specific points to the Commissioner in relation to section 38(2) other than stating that he found WMP's response "*bizarre*". However, he contacted WMP directly following its reliance on section 38, copies of which were forwarded to the Commissioner for her consideration (see 'Other matters' section).

Reasons for decision

Section 31 - law enforcement

16. Section 31(1)(a) states that:

*"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to prejudice, -
(a) the prevention or detection of crime..."*

17. Section 31(3) provides an exclusion from the requirement to confirm or deny whether information is held if to do so would, or would be likely to, prejudice any of the functions in sections 31(1); WMP relied on section 31(1)(a), the prevention or detection of crime. As it did not specify the level of likelihood of this prejudice occurring, the Commissioner has relied on the lower level of prejudice, ie that confirmation or denial "*would be likely*" to prejudice the prevention or detection of crime.
18. When considering a prejudice based exemption the Commissioner will:
 - identify the applicable interests within the relevant exemption;
 - identify the nature of the prejudice and that the prejudice claimed is real, actual and of substance;
 - show that there is a causal link between disclosure and the prejudice claimed; and,
 - decide whether prejudice would or would be likely to occur.

19. Confirming or denying whether or not it holds the requested information would effectively disclose whether or not WMP has used the specified tactics as part of its investigations. As such, the Commissioner accepts that this relates to the prevention or detection of crime and that this is an applicable interest.
20. The Commissioner will now consider whether issuing a confirmation or denial in response to the request would be likely to result in a real and significant likelihood of prejudice to the prevention or detection of crime.
21. In its explanation for citing this exemption, WMP stated that:

"The prevention and detection of crime is the foundation upon which policing is built. The Police Service has a clear responsibility to prevent and detect crime and disorder as well as maintaining public safety. There are a number of tactics available to the Police Service to ensure public safety is at the top of the agenda.

The College of Policing has an Authorised Professional Practice² ('APP') for Intelligence Management which is a national standard adhered to by all police forces across England and Wales. There are four products which are the deliverables of intelligence led policing. They are the result of a collaboration between analysts, intelligence officers and policing units. Each product has a defined purpose and provides recommendations for making decisions and options for action.

These four products are strategic assessment, tactical assessment, subject profile and problem profile.

It is a business process with an intention to provide focus to operational policing and to achieve a disproportionately greater impact from the resources applied to any problem. It is dependent on a clear framework of analysis of information and intelligence allowing a problem solving approach to law enforcement and crime prevention techniques.

² <http://www.app.college.police.uk/app-content/intelligence-management/intelligence-products/#content-of-the-strategic-assessment>

Within the APP is a chapter titled 'Intelligence report'³ which articulates the procedure to be followed for intelligence collection, development and dissemination."

22. WMP stated that to disclose information relating to the tactical options available to it would undermine the College of Policing APP for Intelligence Management.

23. WMP explained that there is a national Code of Conduct for undercover operatives⁴ which specifically states:

"Undercover operatives remain bound by the laws, regulations and rules governing the respective law agencies."

24. It also advised that all staff who manage undercover operatives ('UCOs') and Covert Human Intelligence Sources ('CHIS') are trained to avoid the tactics of an agent provocateur.

25. It is clear to the Commissioner that WMP has a recognised framework under the APP for national Intelligence Management in the UK, but that specific tactical options and procedures are not in the public domain. The Commissioner therefore accepts that confirmation or denial could inform the public as to the likelihood of any criminal activity they are involved with being investigated via the stated means in the request, and that this could prejudice WMP's ability to effectively prevent or detect crime.

26. The Commissioner's view is that how strong or effective intelligence/covert techniques are as a deterrent is tied to the knowledge of if, when and how frequently they are used. If it is known that a specific technique is used, and how and when, then its deterrent value may be diminished.

27. Conversely, if it is known that it is used frequently, that may increase its deterrent value but such an increase in deterrence must be off-set against the possibility that it will cause some individuals to alter their criminal behaviour to avoid detection.

³ <https://www.app.college.police.uk/app-content/intelligence-management/intelligence-report/#top>

⁴ <https://www.app.college.police.uk/app-content/covert-policing/undercover-policing/>

28. Based on the reasoning above the Commissioner is satisfied that the envisaged prejudice is real and significant and that this it would be likely to occur. Furthermore, she is satisfied that there is a causal link between the information requested and the prejudice claimed and she therefore accepts that the exemption is properly engaged.

Public interest test

29. Section 31(3) is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in confirming or denying whether information is held outweighs that in issuing an NCND response.

Public interest arguments in favour of confirmation or denial

30. WMP acknowledged the public interest in transparency about the management of intelligence gathering and the techniques used to achieve it. Further, it stated that disclosure of information may aid in showing the public how it directs its resources to invest in their safety, which is of paramount importance. It recognised that this in turn may promote and instil greater confidence in the communities it serves.
31. It has also argued that the public must be confident that WMP is committed to the principle of accountability, stating there is a clear public interest in ensuring that it does not act outside its authority by investigating matters which fall outside its remit.

Public interest arguments in favour of maintaining the exclusion

32. WMP has argued that there is a public interest in ensuring its ability to prevent and detect crime is not compromised and has concluded that it is therefore not in the public interest to reveal police tactics. It said that where any disclosure of information compromises police tactics, it has the potential to place public safety at risk.
33. WMP reiterated that it does not use agents provocateurs, stating that due to this phrase being used by the requester alongside the phrase 'similar techniques', confirming or denying that any information is held in relation to this request could give rise to the risk of it being perceived that WMP engages in illegal activities not governed by the Research and Investigatory Powers Act ('RIPA'). Therefore WMP said that public confidence could be seriously undermined in relation to accountability.
34. However, the Commissioner does not consider this public interest argument to carry much weight as WMP has already confirmed it does not use agents provocateurs.

Balance of the public interest

35. The Commissioner accepts that confirming or denying whether the information exists would potentially assist those who would gain from knowing whether it is possible they are, or could in the future be, under surveillance. The information could help individuals gauge the extent to which covert surveillance is undertaken which could lead to the alteration of behaviour and methods which may frustrate attempts to investigate offences and criminal behaviour. Similarly those intent on, or actually engaged in, criminal activities could use the disclosure of such information to avert detection or to be encouraged (or not) to continue their illegal activity.
36. The Commissioner acknowledges there is a legitimate and important public debate to be had about the scope and extent of powers available under RIPA and there is a need for transparency and accountability in this regard. However, she notes that this interest is partly met by work undertaken at the Office of Surveillance Commissioners ('OSC'), which carries out regular inspections of the use of RIPA powers and publishes an annual breakdown of all authorisations sought by offence type, although not by public authority. Any breaches of the legislation must be reported to the OSC and are included in its annual report to the Prime Minister – the report being available to the general public. The Commissioner therefore considers that there is already existing independent oversight of the exercise of RIPA powers.
37. Whilst the Commissioner does consider each case on its own merits, she cannot ignore the previous decisions made on requests for information on the use of RIPA powers and the importance of ensuring consistency in the approach taken to these cases, particularly when, by its very nature, RIPA is intended to allow public authorities to conduct covert surveillance. The Commissioner therefore considers that disclosure of information about the use of RIPA powers or, in this case, confirming or denying if RIPA powers have been used, would not be in the public interest as it would undermine the purpose of the powers and therefore their effectiveness in detecting and preventing crime.
38. In reaching her decision, the Commissioner accepts that confirming or denying if the requested information is held would be likely to assist those engaged in, or contemplating, unlawful activity, and that where there is criminal activity there are invariably victims. In the circumstances of this case, the Commissioner is of the view that this factor, combined with the other factors discussed above, outweighs the benefits that confirming or denying if the information is held would bring. The Commissioner therefore finds that WMP was entitled to rely on section 31(3) of FOIA to neither confirm nor deny it held the requested information and the public interest favours maintaining the exemption.

39. As she has reached this conclusion the Commissioner has not found it necessary to consider the other exemption cited.

Breach of section 17 for late reliance on section 38(2)

40. Section 1(1) of FOIA states:

“(1) Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

41. Section 17(1) of FOIA states:

*“(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, **within the time for complying with section 1(1)**, give the applicant a notice which –*

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

42. Breaches of section 17 will also be found if the public authority seeks to rely on another exemption during the investigation which it had not mentioned at or before internal review.

43. In this case, WMP relied on section 38(2) during the course of the Commissioner's investigation thereby breaching section 17(1).

Other matters

44. Having reviewed the additional correspondence the complainant had submitted to WMP following its late reliance on section 38(2), the Commissioner did not find any specific arguments. Instead, she identified a possible new FOIA request which the complainant confirmed he had made. This matter is separate to the complaint and request under consideration here.

45. In response to the complainant's view set out under paragraph 12, WMP told the Commissioner that:

"I cannot understand why the requester has drawn this conclusion. The response mentions a joint approach to multi-agency investigations, but at no point does it say that we use 'other agencies' in the way described. Multi-agency working is an integral part of modern policing. The response was merely acknowledging that fact.

<https://www.app.college.police.uk/app-content/major-investigation-and-public-protection/domestic-abuse/partnership-working-and-multi-agency-responses/>

In any case any evidence gained by the means of Agent Provocateur would be illegally gathered and inadmissible at court. That would apply, whether the Agent Provocateur was a West Midlands Police employee or the employee of any other agency. We clearly state that we do not use these tactics and this would include any situation where anyone from an 'other agency' did so at our request."

Right of appeal

46. 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

47. 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.
48. 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
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SK9 5AF