

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 August 2023

Public Authority: Commissioner of Police of the Metropolis
Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant has requested details of complaints against officers regarding use of Body Worn Video ("BWV") from the Metropolitan Police Service (the "MPS"). The MPS disclosed most of the requested information but refused the remainder, citing sections 30(1)(a) (Investigations and proceedings), 31(1)(a) (Law Enforcement) and 40(2) (Personal information) of FOIA.
2. The complainant did not contest the citing of sections 30 and 31, which were used to withhold a very small amount of information. Where cited, the Commissioner is satisfied that section 40 is properly engaged. The Commissioner does not require any steps.

Background

3. In its response to an earlier request for information, the MPS explained to the complainant that:

"Between 2018 and 2022, Met officers activated body worn video (BWV) to record their actions and interactions with members of the public on 19,411,101 occasions. This should be taken into account when considering the 630 [sic - 628] cases in which BWV is mentioned in the summary section of complaints or conduct matters".

Request and response

4. On 19 July 2022, the complainant wrote to the MPS and made the following amended request for information:

"...I will amend the request:

Please provide all complaints or conduct cases where body worn video is mentioned in the summary section or a flag has been added, as suggest [sic] by the PAU [Public Access Unit]. This is based on the understanding that there may [sic] complaints which are not included in this collated data. Please state the year of the incident and a description of the mis-use (e.g. the camera was turned off by an officer) and complaint outcome (upheld/misconduct verdict etc).

Please proceed with this amended request or process as a new request, whichever is preferable to you".

(The earlier request¹ referred to a time span of 1 January 2018 to the response date. These are therefore the dates that the Commissioner has used for this investigation.)

5. On 8 February 2023, more than 6 months later, the MPS responded. It disclosed some information but withheld the remainder, citing sections 30(1)(a), 31(1)(a) and 40(2) of FOIA.
6. The complainant requested an internal review on 11 February 2023. He believed the exemptions to have been applied excessively.
7. The MPS provided an internal review on 16 March 2023 in which it maintained its position.
8. During the course of the Commissioner's investigation there was further consultation which resulted in the MPS disclosing more information. It continued to withhold five entries which relate to the ongoing Grenfell enquiry (being withheld under section 31) and one non-public police Operation name (withheld under section 30). The remaining information is withheld under section 40 as it refers either to names of officers or complainants, or is deemed to contain some detail which could be used to identify one of the parties concerned.

¹ See the annex at the end of this notice for the wording of this request

Scope of the case

9. The complainant contacted the Commissioner on 26 April 2023 to complain about the way his request for information had been handled. He said:

“The Met has redacted information beyond any comprehension using blanket exemptions. They have declined to provide broad descriptions of mis-use of body worn video and some failings, such as number 6 in 'Conduct Matters' are simply listed as one long succession of asterisks, despite an officer being dismissed. This leaves many descriptions of mis-use as very difficult to interpret. Even given the force's documented failings in openness and transparency, this is a disturbing failure to provide understanding on matters of substantial public interest and of which there is a significant lack of public scrutiny”.

10. In correspondence with the MPS the complainant had previously stated: “I accept the force's decision to redact names of officers”. Therefore, the Commissioner accepts that the MPS is entitled to rely on section 40 to withhold the names of those officers concerned; this will not be further considered.

11. Following the further consultation he had with the MPS, the Commissioner contacted the complainant the next day for his views. When doing so, he advised the complainant that the redactions had been done with his full oversight and all had been agreed.

12. In his response, the complainant stated:

“Unfortunately, many clearly unnecessary redactions remain. I accept the decision to use redactions for specific job names and dates but there are clear instances where other redactions remain. Some entire entries are listed as redactions as so clearly unintelligible, others appear to include offensive language. Many examples including misused redactions were upheld or found to have a case to answer. This is really concerning – and I remain dissatisfied with these examples - many of which I have marked in red in the attached version of the document. There are also examples of apparent locations (i.e. police station) which have been redacted, presumably because they include the name of the location. Most forces would typically be specific about the type of location but name the specific police station - however, it is clearly relevant to the nature of the mis-use to reveal the type of location and not simply redact fully”.

13. In response, the Commissioner again stated that he had overseen the redactions, which were largely done to ensure anonymisation of those concerned.

14. In response the complainant said:

"How can an entry that is entirely redacted be accepted as a redaction? What could the rationale possibly be? It's really concerning if that has been 'agreed' separately with the Met without any consultation. Likewise, recordings that have caught officers using offensive language which are redacted in nature (i.e. not characterised as 'racist'), are rendered meaningless through these redactions - we only know there were comments made. I would normally expect the ICO to discuss the process".

15. The Commissioner again responded to the complainant saying:

"Only 5 of the entries are withheld in full. These are ... part of the ongoing Grenfell enquiry. They are being withheld under section 30. If you think they should be released please let me know.

There is one redaction for a police Operation name ... I note you have indicated that this type of information can be withheld.

The remaining redactions are all considered to be personal information as their disclosure could identify either officers or members of the public.

Would you like me to proceed to a Decision Notice?"

16. On 7 August 2023, the complainant responded. He said:

"The redacted information clearly relates to the nature of the policy [sic] activity (not the name of the officer). There is clearly no reason to redact this information".

17. Although not commented on by the MPS, the Commissioner notes that, whilst the actual wording of the request refers to "all complaints or conduct cases where body worn video is mentioned", which would capture everything that has been identified by the MPS, reference is made throughout the complainant's correspondence to the request being for "a description of the mis-use" of the BWV. Having viewed all of the withheld information, over 200 entries don't actually refer to any misuse of BWV per se. Rather, they are complaints made by members of the public who, for example, have not been provided with BWV that they have requested or where BWV could be used to investigate matters where the footage can establish events, ie there is no suggestion of any "misuse" of BWV. As such, the Commissioner considers that the related

description of any of these entries could have been considered to fall outside the scope of the request. Nevertheless, the MPS did not scope its response to the request in this way so the Commissioner will therefore consider all of the entries.

18. The Commissioner will not consider the application of section 30(1) to the Operation name as the complainant has indicated that "specific job names" can be withheld. He will also not consider the five entries withheld under section 31(1) as part of the Grenfell enquiry as no grounds of complaint have been provided (albeit none relate to the misuse of BWV). He will consider the citing of section 40(2) to the remaining withheld information below.
19. The Commissioner has also commented on the matter of engagement with complainants in "Other matters" at the end of this notice.

Reasons for decision

Section 40 – Personal information

20. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
21. In this case the relevant condition is contained in section 40(3A)(a)². This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
22. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
23. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

² As amended by Schedule 19 Paragraph 58(3) DPA.

Is the information personal data?

24. Section 3(2) of the DPA defines personal data as: "any information relating to an identified or identifiable living individual".
25. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
26. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
27. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
28. Some of the people who have raised complaints are named in the summaries, therefore they are clearly identifiable, were their names to be disclosed.
29. Regarding the other information that has been withheld, specific units, alleged comments made by officers and some other brief descriptors such as the name of a building or road, have been withheld on the basis that the parties may be identifiable were this information disclosed. The Commissioner cannot give any specific examples as this would obviously disclose the content so, in such scenarios the Commissioner will consider whether or not the information is personal information using the following test.

Motivated intruder

30. A test used by both the Commissioner and the First-tier tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of reidentification of an individual from information which, on the face of it, appears truly anonymised.

31. The ICO's Code of Practice on Anonymisation³ notes that:

"The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA".

32. In summary, the motivated intruder test is that if the risk of identification is "reasonably likely" the information should be regarded as personal data.

33. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to officers and members of the public. Whilst the redacted content is only minimal, colleagues may recognise each other from the descriptors given, along with the time frame of the complaint. Furthermore, members of the public and their friends / family may also recognise each other from the more detailed events described. The Commissioner is therefore satisfied that the risk of identification is reasonably likely. The information both relates to, and identifies, those concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

34. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

35. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

36. Article 5(1)(a) of the UK GDPR states that: "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

37. In the case of an 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 lawful, fair and transparent.

³ <https://ico.org.uk/media/fororganisations/documents/1061/anonymisation-code.pdf>

38. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

39. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”⁴.

40. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

⁴ Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

41. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

42. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
43. It is not clear what legitimate interest the complainant has in the requested information. He refers to a "substantial public interest" and a "significant lack of public scrutiny", but it isn't clear how disclosure of the remaining withheld information would assist. The individuals who have raised their concerns with the MPS will be given a finding and outcome at the end of the investigation into their concerns. Additionally, the MPS has been open and disclosed a list of any complaint it has receiving which contains the word "BWV", thereby providing some information about every individual complaint, albeit some limited content has been withheld. Whilst the complainant finds it "really concerning" it is not clear on what premise.
44. Furthermore, the complainant has commented that a few of the recordings have "caught officers using offensive language" and that this content has been redacted. However, the Commissioner does not consider that this demonstrates a legitimate interest in disclosure. For example, one entry has been disclosed as follows "Officer is heard on BWV to say 'REDACTED'" and, as a result of the allegation received, the officer received a written warning. The complainant has specifically queried what the redacted comment actually is. In the Commissioner's view, the comment is irrelevant to any misuse of BWV and the complainant has not provided any legitimate interest in its disclosure. However, colleagues who were with the officer at the time may well remember the occurrence, thereby making the officer identifiable. As a result, they would discover that the officer had received a written warning, something which they may not have known and which the officer would be unlikely to want to be placed in the public domain. Associates of the member of the public who were present at the time may also learn that the person made a complaint to the police, which that party may also not wish them to know. In any event, the Commissioner considers that the legitimate interest has been met by

learning that the officer, who allegedly said something inappropriate, received a written warning.

45. Nevertheless, whilst the complainant had not provided a specific legitimate interest in disclosure, the Commissioner accepts that there will always be a public interest in transparency regarding the work of the police and he accepts that there is a limited legitimate interest on this basis.

Is disclosure necessary?

46. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
47. It is noted that the MPS has already provided a significant amount of the requested information. However, as far as the Commissioner is aware, the remaining content is not available to the complainant via any other channel.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

48. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
49. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
50. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

51. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
52. The information provided demonstrates instances where MPS officers have allegedly 'misused' BWV and there is generally sufficient information to show in what circumstances this has occurred. As the allegations, some details about them and their outcomes have largely been disclosed, the Commissioner cannot see any necessity to disclose those remaining details, disclosure of which may allow for reidentification of the parties concerned. The complainant has not provided any argument as to why such disclosure would be necessary.
53. The law provides that there must be a pressing social need for any interference with privacy rights and that the interference must be proportionate.
54. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, he has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

The Commissioner's view

55. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.

Other matters

56. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

Timeliness

57. Although not specifically referred to by the complainant in his grounds of complaint, the Commissioner notes the considerable delay in responding to the request. The MPS did apologise but there is no apparent reason or explanation for the delay.
58. The Commissioner has therefore made a record of the delay in this case. This may form evidence in future enforcement action against the MPS should evidence from other cases suggest that there are systemic issues within the MPS that are causing delays.

Engagement with complainants

59. In his correspondence, the complainant has raised concerns that the Commissioner had agreed to acceptable redactions with the MPS "separately" and "without any consultation". In light of the hundreds of entries in the spreadsheets that the MPS had collated, the Commissioner considered it appropriate for him to engage with the MPS and look at each one; indeed, this had a positive impact for the complainant as more information was disclosed as a result of the Commissioner doing so. As the regulator for Data Protection matters, the Commissioner is of the view that such liaison to consider personal information concerns is proportionate and acceptable.
60. Of the remaining withheld information, it would not be feasible for the Commissioner to engage with the complainant. In order to explain what personal information was being withheld, he would need to give out a significant amount of detail. It is also important to note that the Commissioner's complaints process is not an adversarial one, and engagement at the level suggested is not something which is generally offered by the Commissioner, unless there is a particular point to clarify or where there is the potential to informally resolve a case, ie without the need for a decision notice. He did not consider this outcome likely after the further disclosure was deemed insufficient.

Right of appeal

61. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

62. 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.

63. 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

Non-confidential annex

The wording of the previous request was as follows:

"Under the Freedom of Information Act, please can you provide me with the following:

1/ All records of mis-use or incorrect use of body worn video over the last four years (from January 1st 2018 to the date this response is answered), providing the year of the incident and a description of the mis-use (e.g. the camera was turned off by an officer). If the force does not collect these records, please state why it does not scrutinise use of this policing tool.

2/ All records of any known complaints made about mis-use or incorrect use of body worn video over the last four years (from January 1st 2018 to the date this response is answered), providing the year of the incident, description and complaint (e.g. video turned off or video not turned on).

3/ All records of all misconduct cases against officers for mis-use or incorrect use of body worn video over the last four years (from January 1st 2018 to the date this response is answered), providing the year of the incident, description of the mis-use and reason for misconduct, and misconduct outcome and investigatory body (e.g. management advice by PSD).

Please send me the data requested in the form of an Excel spreadsheet or as a csv file.

If you are able to supply some of this information more quickly than other items, please supply each item when you can rather than delay everything until it is all available.

If there are any clarifications requested or exemptions cited for certain parts of the request, please provide responses for others in the meantime, as advised by the Information Commissioner.

If you need any clarification then please email me.

Under your section 16 duty to provide advice and assistance I would expect you to contact me if you find this request unmanageable in any way so we can negotiate how best to proceed.

I would be grateful if you could confirm in writing that you have received this request, and I look forward to hearing from you in the near future,

Many thanks for your assistance".