

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 March 2018

Public Authority: Chief Constable of West Yorkshire Police
Address: PO Box 9
Laburnum Road
Wakefield
WF1 3QP

Decision (including any steps ordered)

1. The complainant has requested a copy of a report into the escape from custody in the 1980s of someone he believes was a police informant. West Yorkshire Police refused to confirm or deny whether it held the requested information, citing the exemption at section 30(3) (investigations and proceedings) of the FOIA.
2. The Commissioner's decision is that West Yorkshire Police was entitled by section 30(3) of the FOIA to refuse to confirm or deny whether it held the requested information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 28 April 2017, the complainant wrote to West Yorkshire Police ("WYP") and requested information in the following terms:

"My FOIA request concerns a cocaine trafficker who absconded from West Yorkshire Police custody in [date redacted].

[Name redacted] was arrested in London. From what I understand he was arrested as part of a joint DEA/New Scotland Yard operation. Once arrested he offered to go supergrass, most notably to testify against corrupt British police officers. He was transferred [location redacted] where he was debriefed. On [date redacted] he broke out of [location redacted] and has not been seen since.

In the wake of his escape there was an inquiry and a report was commissioned.

I am now requesting the final report into [name redacted]'s escape through FOIA. I understand that the report may have been deemed sensitive at the time but my assertion is that it has now been [time period redacted] since his escape and any such sensitivities are long past. I believe that it is in the public interest for the report to be available as a historical document of interest."

5. WYP responded on 22 June 2017 and would neither confirm nor deny ("NCND") whether it held the requested information, by virtue of the exemptions at sections 30(3) (investigations and proceedings) and 40(5) (personal information) of the FOIA.
6. Following an internal review, WYP wrote to the complainant on 15 September 2017. It upheld its application of the above NCND exemptions.

Scope of the case

7. The complainant contacted the Commissioner on 16 November 2017 to complain about the way his request for information had been handled. He challenged WYP's decision to issue a NCND response.
8. The Commissioner has considered in this decision notice whether WYP was entitled to rely on section 30(3) of the FOIA to issue a NCND response. As her decision is that WYP was entitled to apply section 30(3) of the FOIA, it has not been necessary for the Commissioner to consider its application of section 40(5) of the FOIA.
9. Nothing within this decision notice should be taken as implying that WYP does or does not hold the requested information, or that the named individual was or was not a police informant.

Reasons for decision

10. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request. However, there may be occasions when complying with the duty to confirm or deny under section 1(1)(a) would itself disclose sensitive or potentially damaging information that falls under an exemption. In these circumstances, the FOIA allows a public authority to respond by refusing to confirm or deny whether it holds the requested information.
11. The decision to use a NCND response will not be affected by whether a public authority does or does not hold the requested information. The starting point, and main focus in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.
12. A public authority may issue a NCND response consistently, over a series of separate requests, regardless of whether it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held.
13. It is sufficient to demonstrate that either a hypothetical confirmation, or a denial, would engage the exemption. In other words, it is not necessary to show that both confirming and denying information is held would engage the exemption from complying with section 1(1)(a) of the FOIA.

Section 30 – investigations and proceedings conducted by public authorities

14. Speaking hypothetically, WYP said that if it held the information described in the request, it would be exempt from disclosure by virtue of section 30(1)(a)(i).
15. Section 30(1)(a)(i) of the FOIA provides an exemption for information which has at any time been held for the purposes of an investigation with a view to ascertaining whether a person should be charged with an offence.
16. Section 30(3) of the FOIA provides an exclusion from the duty to confirm or deny whether information is held in relation to any information which, if it was held, would fall within section 30(1)(a)(i) of the FOIA.
17. Consideration of section 30(3) of the FOIA involves two stages; first, the information described in the request must fall within the class described

in section 30(1)(a)(i). Secondly, the exemption is qualified by the public interest. This means that if the public interest in the maintenance of the exemption does not outweigh the public interest in confirming or denying whether information is held, then confirmation or denial must be provided.

18. As a police force, WYP clearly has a duty to investigate offences and allegations of offences. Information held for the purposes of a police investigation will generally fall within the description at section 30(1)(a)(i) of the FOIA. WYP has said that, if held, the information would form part of the police investigation into the named individual's escape from police custody. The Commissioner therefore accepts that the information described in the request, if it was held, would be held by WYP for the purposes of an investigation and so would be within the class described in section 30(1)(a)(i).
19. The Commissioner is therefore satisfied that the exemption provided by section 30(3) of the FOIA is engaged.
20. However, section 30(3) is subject to the public interest test. Although the exemption may be automatically engaged where the information described in a request would be exempt under section 30(1)(a)(i), it may only be maintained in the public interest if confirmation or denial would interfere with the effective conduct of the investigations or proceedings.

Public interest test

21. In reaching a conclusion on the balance of the public interest, the Commissioner has considered what public interest there is in WYP confirming or denying whether it holds the requested information. The Commissioner also considered whether confirmation or denial would be likely to harm any investigation, which would be counter to the public interest, and what weight to give to these competing public interest factors.

The complainant's position

22. The complainant believed that WYP concluded incorrectly that the public interest favoured issuing a NCND response. He said that the fact that an investigation had been conducted into the named individual's escape from custody, and that a report had subsequently been produced, was in the public domain, and he cited specific newspaper reports to that effect. In light of that he found it "*absurd*" that WYP would issue a NCND response.
23. He also challenged a statement that WYP had made that confirming or denying would be detrimental to its procedures for dealing with police informants, saying:

"Whilst I can quite imagine that informants were utilised in the hunt for [name redacted] after his escape, I cannot see how they could impact on an inquiry into how he escaped."

24. He did not believe that any informants would be identified in an investigation report, but if they were, he said their identities could be redacted and there would be no threat to them.
25. Finally, the complainant observed that the events took place in the 1980s and as such, *"...are clearly of a historical nature and can have no impact on current investigations"*.

WYP's position

26. WYP accepted that the fact that an investigation report existed was information which was in the public domain at the time of the request. It also said that the public interest in openness and transparency about its investigative processes, which is inherent in the exemption, would, to some extent, be served by it confirming or denying whether it holds the requested information.
27. However, it said that the request was predicated on an assertion about the named individual and therefore that confirming or denying whether it held information would reveal more than whether or not it held the report. It would involve an inference as to whether or not the named individual was a police informer.

"The scope of the request however also includes a positive assertion by the Requestor that [name redacted] was a police supergrass. This means that information about the status of [name redacted] as a possible police informant/confidential source will fall within the scope of the request".

28. WYP said that it had never placed any information into the public domain as to whether the named individual was or was not a police informant. It said that the complainant's assertion that he was, and that he was in police custody with a view to providing information against corrupt police officers, was, therefore, supposition.
29. In light of the specific wording of the request, WYP said that issuing anything other than a NCND response would effectively be seen as endorsing the complainant's assertion that the named individual was a police informant.
30. WYP said that this was significant for two reasons. First, any suggestion that the named individual was a police informant (even if that inference was incorrectly drawn) could endanger him (assuming he was alive) and any family members. He might still be identifiable to members of the

criminal fraternity and he and his family could be targeted if it was perceived (rightly or wrongly) that he had been a police informant.

31. Secondly, WYP said the act of revealing information about a supposed informant would severely undermine the confidentiality that exists between all police informants and the police. It would prejudice the recruitment of future informants and the sustainment of current informants, not only by WYP but by the wider police and by other public authorities.
32. WYP said that informants provide the police, and other government departments, with extremely valuable intelligence, particularly in the current climate of heightened national security. They provide the police with an insight into motives and criminal activities and can be key to both detecting and preventing crime.
33. WYP said that in agreeing to become an informant, an individual takes a major step of trust, and the relationship potentially involves personal risk and the betrayal of associates. It is therefore vital that nothing should undermine the confidence of past, current or potential informants in the ability of the police to keep their relationship secret.
34. WYP said that the period of time that has elapsed since the escape was irrelevant because all police informants expect their identities to be protected indefinitely. Informants need to be reassured that their anonymity will not be prejudiced in the future, even long after the event, by disclosures made under the FOIA.
35. Without this reassurance, WYP (and other bodies) would find it very difficult to recruit future informants and to sustain current informants. This would inevitably disrupt the flow of information to the police, which would have an adverse effect on public safety and crime reduction.

The Commissioner's conclusion

36. The purpose of section 30 is to preserve the ability of the police (and other applicable public authorities) to carry out effective investigations. Key to the balance of the public interest in cases where this exemption is found to be engaged, is whether the act of confirming or denying whether the requested information is held could have a harmful impact on the ability of the police to carry out effective investigations. Clearly, it is not in the public interest to jeopardise the ability of the police to investigate crime effectively.
37. The Commissioner recognises the importance of the public having confidence in those public authorities tasked with upholding the law. Confidence will be increased by allowing scrutiny of their performance and this may involve examining the decisions taken in particular cases. To this end, she recognises that confirmation or denial in this case would

demonstrate to the public WYP's commitment to openness and transparency.

38. However, the possibility of harm occurring as a result of confirming or denying must be given serious consideration.
39. The Commissioner accepts that there is some possibility that, if WYP held a copy of the report, confirmation in response to the request could give it the appearance of endorsing the complainant's claim that the named individual was a police informant, even if that was not the case. She is therefore mindful that confirming or denying may have serious consequences for the named individual and/or his family.
40. The Commissioner is of the view, however, that more significant is the perception that the act of confirming or denying could create about how likely it is that cooperation with WYP will remain confidential. Due to the way the request was worded she considers that there is a real possibility that WYP's response could lead people to infer from it (rightly or wrongly) whether or not the named individual was a police informant. She considers that this could create a perception among the wider public that individuals who cooperate with WYP (or any police force) risk having this fact disclosed into the public domain, and that communications with the police may prove not to be truly confidential. Clearly, it is vital that WYP is able to give a guarantee of confidentiality to anyone who may be willing to cooperate with it about criminal matters.
41. If the credibility of such guarantees were to be undermined in this way, it would be likely to deter people from cooperating with the police. This would be likely to disrupt and undermine the flow of information and intelligence to WYP, and would impact on its ability to conduct efficient and well evidenced criminal investigations, which would weigh strongly against the public interest.
42. In view of the wording of the request (and specifically, the assertion contained in it about the named individual), the Commissioner considers that confirmation or denial in this case could give rise to a perception that WYP is not able to guarantee confidentiality to informants and that this would be likely to result in disruption to the future flow of information to the police, thereby jeopardising future investigations. There is a very significant public interest in avoiding that outcome and it is a factor of considerable weight in favour of maintenance of the exemption in this case.
43. Having given due consideration to the arguments put forward by both parties, on this occasion the Commissioner accepts that the public interest favours maintaining the exemption at section 30(3) of the FOIA

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and that WYP was not obliged to confirm or deny whether it held the information described in the request.

Right of appeal

44. 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

45. 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.
46. 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

Samantha Bracegirdle
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