

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 March 2014

Public Authority: Commissioner of the Metropolitan Police Service

Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant has requested photographs taken at the scene of her brother's death. The Metropolitan Police Service (the "MPS") confirmed it held the photographs but refused to disclose them under sections 38 (health and safety) and 30 (investigations and proceedings). The Commissioner's decision is that the exemption at section 38 is engaged and that the public interest favours maintaining it; he has not therefore gone on to consider section 30. The MPS is not required to take any steps.

Request and response

2. On 18 March 2013, the complainant wrote to the MPS and requested information in the following terms:

"I am the sister of [name removed] who died at [location removed] in [date removed].

Under FOIA please confirm that you hold photographs and / or negatives?

Can you release them to the family or their legal representatives?

If you can how do we make an application for their release?

If they cannot be released please provide an explanation?"

3. Following interim correspondence, the MPS responded on 12 June 2013. It confirmed that it had located the photographs but advised that they were exempt from disclosure by virtue of section 38(1)(a) of the FOIA.
4. On 9 July 2013 the complainant asked for an internal review. Following its review the MPS wrote to the complainant on 15 August 2013. It maintained reliance on section 38(1)(a) and added section 30(1)(a)(b).

Scope of the case

5. The complainant contacted the Commissioner on 17 November 2013 to complain about the way her request for information had been handled. She asked for the Commissioner to consider whether or not the MPS was able to rely on the exemptions cited.

Reasons for decision

6. The Commissioner has viewed the requested photographs.
7. They have been described by the public authority as follows:

"The relevant information consists of a set of colour photographs taken by an official MPS photographer on [date redacted]. The pictures show the deceased, at the scene, following his fall [location redacted] some eighty feet up".

8. The public authority has also provided the Commissioner with a 'confidential' submission. This has been read by the Commissioner but he has not referred to it directly in this decision notice.

Section 38 – health and safety

9. Section 38(1) of the FOIA provides that:

*"Information is exempt information if its disclosure under this Act would, or would be likely to –
(a) endanger the physical or mental health of any individual".*

The prejudice test

10. To determine whether the application of section 38(1)(a) to the requested information was correct under the terms of the FOIA, the Commissioner has considered the 'prejudice test', in this case whether

disclosure of the information would cause endangerment to the physical or mental health of one or more individuals.

11. Unlike the other exemptions in the FOIA subject to the prejudice test, the word 'endanger' is used in section 38 rather than the word 'prejudice'. However, the Commissioner does not consider that the use of the term 'endanger', to which section 38 is subject, represents a significant departure from the test of prejudice.
12. In *Hogan v the Information Commissioner and Oxford City Council* (EA/2005/0026 and 0030) the Tribunal stated that:

"The application of the 'prejudice' test should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption ... Second, the nature of 'prejudice' being claimed must be considered...A third step for the decision-maker concerns the likelihood of occurrence of prejudice."

The applicable interest

13. As section 38(1)(a) of the FOIA provides that information relating to the endangerment of the physical or mental health of an individual can be withheld, the prejudice involved in the disclosure of the requested information must therefore relate specifically to the physical or mental health of one or more individuals.
14. In this case the requested information consists of photographs of a deceased person who was found, by a Coroner, to have committed suicide. The applicable interests in this case are the physical or mental health of members of the deceased's family as well as an unknown number of members of the public; the Commissioner would assume this to cover friends and colleagues of the deceased.

The nature of the prejudice

15. The public authority has advised the Commissioner:

"Disclosure of the requested information would, in the MPS view, be likely to endanger the physical or mental health of members of [the deceased]'s family or indeed given that disclosure under the Act is disclosure to the world the endangerment could affect any number of yet unknown individuals. Indeed the fact that the images, if disclosed under the Act would then be available for the world to see, and this fact would be likely to have an added detrimental effect on the family".

16. The Commissioner is satisfied that the level and nature of the prejudice identified would be likely to go beyond stress or worry and constitute an endangerment to the physical or mental health of the parties identified above.

The likelihood of prejudice

17. The Commissioner's duty in this case is to consider whether disclosure of the requested information would be likely to pose a risk to the physical or mental health of the parties identified. The Tribunal, in the case of *John Connor Press Associates Limited v Information Commissioner* (EA/2005/0005), stated that "*the chance of prejudice being suffered should be more than a hypothetical possibility, there must have been a real and significant risk*" (paragraph 15).
18. The Commissioner has interpreted this to mean that, in order for a public authority to satisfy him that disclosure of the requested information would be likely to endanger the health and safety of individuals, it must demonstrate that the risk of prejudice need not be more likely than not, but it must be substantially more than remote.
19. The Commissioner acknowledges that the physical or mental health of family members (rather than just the sister making the information request), and other members of the public, need to be considered when disclosure 'to the world at large' is being made under the FOIA. In the Commissioner's view, for these family members to discover that photographs of the deceased have been released into the public domain could have a significant impact on their physical and mental health. Not least, this could be caused by their belief that the case is considered to have been dealt with by the Coroner and a verdict of suicide has been reached; they would therefore reasonably expect matters to be 'closed'. The prospect of finding what can only be described as graphic photographs of the deceased's body in the public domain would, in the Commissioner's view, have a substantially more than remote likelihood of endangering their mental or physical health.
20. Indeed, the Commissioner considers that even being aware that there is an ongoing consideration of releasing the photographs to the world at large is in itself likely to be detrimental (which is part of the reasoning behind the anonymisation of this decision notice).
21. Although to a lesser degree, he also considers that there is likely to be a detrimental impact on friends and colleagues, and potentially even the wider public, who could find the photographs distressing.
22. The Commissioner is therefore satisfied that section 38(1)(a) of the FOIA is engaged in relation to the requested information. As this is a

qualified exemption, the Commissioner also needs to consider the public interest test.

Public interest factors in favour of disclosure

23. The public authority has advised the complainant as follows:

"The MPS is a public authority and should be held to account for its actions. The public release of the requested information would reinforce the MPS commitment as an open and transparent organisation."

"The general public rightly expects the highest standards of professionalism in the delivery of policing services by the MPS. Any allegations can accordingly serve to damage the relationship between the MPS and the general public. It is important that the MPS shares suitable information with the public at the appropriate time in order to maintain public confidence".

Public interest factors in favour of maintaining the exemption

24. The public authority has advised the complainant as follows:

"In considering your request, I have also considered the effect that the public release of information held in connection with this investigation would have upon the general public and any person who knew [name removed] personally. In doing so, I have considered the risk of any undue emotional stress which would be caused by the release of the information held. I have attached considerable weight to this as one of the primary roles of any Police Service is to serve and protect the general public".

25. At internal review it added:

"On review of the held information, the MPS finds the risk to individual's mental health to be significant and evidenced should it be disclosed under the Freedom of Information Act. I have no doubt that the public release of the information which is held in connection with an investigation would cause unwarranted emotional distress to anybody who knew [name removed].

To disclose photography in regards to this case would lead to a loss of confidence in the MPS to protect the wellbeing of the community. It would not be in the public interest for the public to be concerned that the MPS will continually release such photography when requested (whether this be by family/relatives/friends ... or not)".

26. It also advised the Commissioner:

"The requested information is of a sensitive personal nature to the [name removed] family and not considered appropriate for disclosure in the wider public interest. The events surrounding the death of [name removed] have been investigated by the MPS, reviewed by the Crown Prosecution Service (CPS) and been heard at Coroners Court. These processes, the MPS contends, satisfy the public interest in this case.

In this case, the Coroner found that [name removed]'s death was suicide and the CPS found that no crime had been committed. This was described as; "a thorough and comprehensive police investigation" by the Coroner. The death of [name removed] was certainly tragic and untimely. However, as the Coroner recorded death as suicide and there were no criminal charges brought against any person, there is little public benefit in making the photographs public information (i.e. release would not assist in ensuring that justice is served upon an individual ...)"

The balance of the public interest test

27. In initially refusing the request the public authority concluded its public interest test by advising the complainant as follows:

"Under the Freedom of Information Act 2000, all information and documents released would be out in the public domain and available for anyone to see. The photographs you have requested are of a particularly graphic nature and the release of them into the public domain would not be in the public interest"

28. At internal review it added:

"The MPS find there is very little public interest in disclosing the held information under the Freedom of Information Act. Instead, it is vital for the MPS to maintain public confidence in our ability to handle recorded information relating to the investigation into the death of an individual in a sensitive manner"

29. The Commissioner also notes that the complainant made the following submissions when requesting the information. In her initial request she specifies a limited disclosure, ie whether or not the photographs can be released to *"the family or their legal representatives"*. Later, when asking for an internal review, this is again emphasised when she asks:

"... I would like to request an internal review on the following basis

1. The photographs be sent directly to the legal representatives?

and/or

2. The photographs be sent directly to the pathologist for an independent medical report. We have a home office pathologist who is waiting to examine the crime scene photographs?"

30. The complainant also provided the Commissioner with copies of a letter sent by her solicitor to the public authority regarding the request. The solicitor's letter explains why the information is required and includes this statement:

"We have carefully read through the reasons set out within your response for your decision not to disclose the requested information. You rely on Section 30 and Section 38 of the Freedom of Information Act. It seems that you rely upon the effect of such disclosure upon third parties and the community as a whole. We confirm that there is absolutely no intention for these photographs or any information provided to be disclosed to anyone other than those professionals involved in these current investigative proceedings. Given that [name redacted] is deceased, we are instructed by his sister [name redacted]. It is therefore inevitable that she will see the photographs, along with the other professionals involved in this matter. Save for [sister's name redacted], there will be no other non-professionals that will have sight of these photographs. We would be prepared to provide an undertaking to the MPS to confirm that the photographs will not be released into the public domain and will only be seen and used by our client [name redacted] and other professional bodies who are involved in this investigation and are therefore accustomed to seeing such sensitive documentation".

31. Whilst he does not doubt the sincerity and good intention of the complainant's solicitor, the Commissioner must stress that there is no provision within the FOIA for any such limitation in disclosure. It is essential that information which is released under the provisions of the FOIA must be suitable for disclosure to anyone and everyone. In the Commissioner's opinion, the submission made by the solicitor above serves to reinforce the view that release of the photographs into the public domain is not suitable.
32. The Commissioner has balanced the real and significant threat to the health and safety of the family and friends/colleagues of the deceased, and indeed the general public as a whole, against the public interest arguments in favour of disclosure.

33. In conclusion, the Commissioner does not consider that disclosure of the photographs for the complainant's private requirements justifies the apparent risk to the health and safety of others, primarily the immediate family and any other people who knew the deceased. In reaching this conclusion, the Commissioner notes that the case has been before the Coroner who has already concluded that the death was suicide, that there were no suspicious circumstances and, therefore, that there was no further action required by the police. Although he notes that the complainant is not satisfied with this outcome the Commissioner has to consider the wider public interest rather than the interests of an individual.
34. It is important to note again here that disclosure under the FOIA is not discretionary and must be suitable for one and all. Therefore, whilst the complainant may have genuine aims, and have her own concerns about her brother's death, on this occasion access to the required information via the FOIA is not appropriate.
35. The Commissioner has concluded that the public authority correctly relied on section 38(1)(a) of the FOIA in respect of this request for information. As a result it is not necessary to go on to consider the citing of section 30.

Right of appeal

36. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

37. 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.
38. 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

Graham Smith
Deputy Commissioner
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