

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 April 2017

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 information about whether the Metropolitan Police Service (the "MPS") has begun to determine if Tony Blair has committed the common law criminal offence of misconduct in public office over decisions he took which resulted in the military invasion of Iraq in 2003. The MPS would neither confirm nor deny holding any information citing the exemptions at sections 30(3) (investigations and proceedings) and 40(5)(b)(i) (personal information) of the FOIA.
2. The Commissioner's decision is that the MPS was entitled to rely on 40(5)(b)(i) to neither confirm nor deny whether any information is held; she did not therefore consider section 30(3). No steps are required.

Background

3. The request can be followed on the "*What do they know?*" website¹.
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¹ https://www.whatdotheyknow.com/request/information_relating_to_any_poli

4. The request refers to the Chilcot Report. This can be found on the Iraq Inquiry website² along with further background information.

Request and response

5. On 16 August 2016 the complainant wrote to the MPS and requested information in the following terms:

"Under the terms of the Freedom of Information Act 2000, I ask for disclosure of information on whether a police investigation has begun to determine whether former Prime Minister Tony Blair committed the common law criminal offence of misconduct in public office over decisions he took which resulted in the military invasion of Iraq on 20 March 2003 by British forces. If an investigation has not already started, will an investigation be mounted using evidence from the Chilcot Report and from any other relevant sources?"

6. On 20 October 2016, following an extension to the time limit in which it considered the public interest, the MPS responded. It refused to confirm or deny whether the requested information is held. It cited sections 30(3) and 40(5) of the FOIA.
7. The complainant requested an internal review on 22 October 2016.

Scope of the case

8. The complainant initially contacted the Commissioner on 12 January 2017 to complain about the MPS's lack of response to his request for an internal review. The Commissioner wrote to the MPS chasing a response on 7 February 2017, asking for one to be provided to the complainant within 10 working days.
9. The complainant wrote to the Commissioner again on 23 February 2017 to advise that the MPS had still not responded. The Commissioner therefore used her discretion and decided to investigate the complaint in the absence of an internal review; she wrote to both parties to advise them accordingly.

² <http://www.iraqinquiry.org.uk/>

10. In support of his complaint the complainant has advised the Commissioner that:

"Currently, there is a civil prosecution going forward against former Prime Minister, Tony Blair, for decision making over the 2003 Iraq invasion, brought by the bereaved military families. This case, for 'misfeasance' [sic], bears many common themes to the 'misconduct in public office' criminal offence which lies at the heart of my request. The military families' lawyers state they are building a strong case. In this context, the apparent refusal of the MPS to disclose whether they are investigating- or intend to investigate- this alleged offence must be subject to rigorous scrutiny and question".

11. The complainant has asked the Commissioner to consider the application of exemptions to the request. The Commissioner will consider these below and will also comment on timeliness in "Other matters" at the end of this notice.

Reasons for decision

Section 40 – personal information

12. The analysis below considers section 40(5)(b)(i) FOIA. 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.
13. Consideration of section 40(5) involves two steps: firstly, 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?

14. The first step for the Commissioner to determine is whether the requested information, if held, constitutes personal data, as defined by the DPA. If it is not personal data, then section 40 cannot apply.

15. 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."

16. 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.
17. The request clearly refers to a named individual. The Commissioner is therefore satisfied that confirmation or denial as to whether or not any information is held would disclose something about the named party and therefore result in the processing of his personal data.

Is the information sensitive personal data?

18. Sensitive personal data is personal data which falls into one of the categories set out in section 2 of the DPA. The MPS has cited the following categories 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.*

19. 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.
20. 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.
21. 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?

22. The Commissioner's view, as set out in her guidance on section 40³, 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.
23. 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.
24. 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.
25. 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

Internal review

26. There is no obligation under the FOIA for a public authority to provide an internal review process. However, it is good practice to do so, and where an authority chooses to offer one, the code of practice established under section 45 of the FOIA sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales.
 27. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
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³ <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>

28. The complainant asked for an internal review of his request on 22 October 2016 and the MPS had not provided the outcome of the internal review on the commencement of this investigation some 4 months later. The Commissioner considers that in failing to conduct an internal review within the timescales set out above, MPS has not acted in accordance with the section 45 code.

Right of appeal

29. 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

30. 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.
31. 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