

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 November 2022

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, from the Metropolitan Police Service (the "MPS"), communications between its Commissioner and the Home Secretary over a three month period. The MPS disclosed some information but withheld the remainder, citing sections 21(1) (Information reasonably accessible by other means), 23(1) (Information supplied by, or relating to, bodies dealing with security matters), 24(1) (National security), 30(1)(a) (Investigations and proceedings), 31(1)(a)(b) (Law enforcement), 36(2)(b)(i)(ii) & (c) (Prejudice to effective conduct of public affairs) and 40(2) (Personal information) of FOIA.
2. The Commissioner's decision is that the MPS was entitled to rely on sections 36(2)(b)(i)(ii) to withhold the remaining information. No steps are required.

Request and response

3. On 22 June 2021, the complainant wrote to the MPS and requested information in the following terms:

"Under the Freedom of Information Act 2000 I wish to see the following:

Full copies of all communications (including SMS/WhatsApp messages, emails, letters and records of meetings) between the

Commissioner of the Metropolitan Police and the Home Secretary
between 01 March 2021 and 31 May 2021.

Where an email has been identified please disclose the full thread for context. Please also search draft and deleted email folders. Please also include any attachments.

Where a meeting has been identified please include the minutes, agendas and briefing materials.

Please conduct a search of the Commissioner's personal and work phones.

Personal devices are not exempt from disclosure under the Freedom of Information Act if they are used for official [sic] business".

4. On 19 July 2021, the MPS advised that it needed additional time in which to consider the public interest in disclosure, saying that it was considering the application of section 36(2)(c) of FOIA.
5. On 16 August 2021, the MPS responded. It provided some information but refused to disclose the remainder. It cited the following exemptions: 21(1) (Information reasonably accessible by other means), 23(1) (Information supplied by, or relating to, bodies dealing with security matters), 24(1) (National security), 30(1)(a) (Investigations and proceedings), 31(1)(a)(b) (Law enforcement), 36(2)(b)(i)(ii) & (c) (Prejudice to effective conduct of public affairs) and 40(2) (Personal information).
6. On the same day, the complainant requested an internal review; he did not provide any grounds of complaint.
7. The MPS provided an internal review on 30 September 2021, in which it maintained its position.

Scope of the case

8. The complainant contacted the Commissioner on 1 October 2021 to complain about the way his request for information had been handled. He did not provide any grounds of complaint, even after being invited to do so by the Commissioner.
9. The MPS had already disclosed the dates and attendees of the meetings that took place between the Commissioner and the Home Secretary between the specified dates. The information that has been withheld was described to the complainant as including:

"... one letter from the Home Secretary to the Commissioner, one set of meeting briefing notes and the overviews of what was discussed at each meeting".

10. The complainant has not disputed that this was the extent of the information held, nor has he disputed the citing of section 21 for information which the MPS directed him to online; therefore, these have not been further considered.
11. During the Commissioner's investigation, the MPS revised its position and decided that further information could be disclosed in light of the passage of time. This is helpful and disclosure should be made directly to the complainant, if it has not already taken place. However, this will not be considered as part of this complaint as the Commissioner is only considering the MPS' position at the time of the request.
12. The Commissioner will consider the citing of exemptions in respect of the remaining information, below. He has been provided with copies of the withheld information.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

13. This has been cited in respect of the remaining information in its entirety.
14. Section 36 of FOIA states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, prejudice the effective conduct of public affairs.
15. The MPS has applied sections 36(2)(b)(i) and (ii) and (c) to withhold the requested information in its entirety.
16. The Commissioner will first consider the citing of sections 36(2)(b)(i) and (ii). Arguments under these sections are usually based on the concept of a 'chilling effect'. The chilling effect argument is that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making.

17. The Commissioner's guidance on section 36¹ states that information may be exempt under sections 36(2)(b)(i) and (ii) if its disclosure would, or would be likely to, inhibit the ability of public authority staff, and others, to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. In this case, the MPS has explained that the withheld information forms part of regular discussions between its Commissioner and the Home Secretary (and others) and that the issues being discussed were 'live' ones in:

"... a forum in which the parties in attendance are able to candidly discuss the operational, policy and political dimensions to (in this case ongoing) major policing challenges of the day, both in London and nationally. It is important for these discussions to take place with minds focused firmly not on the public eye but on public safety".

18. It added that those taking part do so on the basis that they are able to work through issues in free and frank exchanges without an expectation that the details will be made public. Release of the information would be likely to lead to more guarded opinions being expressed, thereby resulting in a reduction to the quality of that free and frank advice. It said that the impact would be significant and could affect how senior leaders in policing and in Government are able to handle difficult and sensitive live policing matters.

19. The MPS explained that the briefings were made with a view to equip senior leaders in the MPS with the best: "understanding of the high level political and policy context in which they perform their public duties for the MPS in the pursuit of keeping people safe".

20. It was further noted that the meetings took place in the middle of a national emergency and at a time of considerable concern around public order and public safety.

21. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The Commissioner is satisfied that Commissioner of the Metropolitan Police Service is authorised as the qualified person under section 36(5) of FOIA and that she gave the opinion that the exemption was engaged.

¹ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

22. Having viewed the opinion given, which is clearly expressed in respect of each limb of section 36 that is being relied on, the Commissioner accepts that it was reasonable for the qualified person to consider that there was a need to protect the confidentiality of discussions and deliberations. He is also satisfied that the qualified person's opinion - that inhibition relevant to those subsections would be likely to occur through disclosure of the withheld information - is reasonable. He is therefore satisfied that the exemption was engaged correctly.
23. When considering whether the public interest favours maintaining the exemption or disclosing the requested information, the Commissioner has taken account of the age of the requested information and that the matters under consideration were 'live' at the time of the request. If contributors were concerned that these discussions might be made public, the resultant loss of frankness and candour in the course of discussions and deliberations would be likely to damage the quality of advice to decision makers, and thus inhibit the MPS' ability to make informed decisions.
24. The Commissioner considers the public interest in good decision-making by the MPS to be a compelling argument in favour of maintaining the exemption. While he acknowledges that the public interest in openness and transparency would be served to some extent if the information was disclosed, on balance, he finds the public interest in protecting the MPS' access to unfiltered and frank advice in the middle of a national emergency to be the considerably stronger argument.
25. Consequently, he is satisfied that, in this case the public interest favours maintaining the exemption. It follows that his decision is that the MPS was entitled to rely on sections 36(2)(b)(i) and (ii) of FOIA to refuse the request. In light of this decision, he has not gone on to consider the MPS' application of section 36(2)(c) of FOIA.
26. As sections 36(2)(b)(i) and (ii) are cited in respect of all of the withheld information, the Commissioner has not found it necessary to the other exemptions cited.

Other matters

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

Information Notice

28. As the MPS failed to respond to the Commissioner's enquiries in a timely manner it was necessary for him to issue an Information Notice in this case, formally requiring a response.

Reference: IC-132278-J3S5

29. There were further delays in responding to this notice which will be monitored.

30. The Information Notice will be published on the Commissioner's website.

Right of appeal

31. 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

32. 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.
33. 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
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