

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 September 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 (MPS) information relating to what the complainant describes as the relocation of the venue for a speech of the Prime Minister (PM) at the time, Theresa May, during a visit to Derby in 2018. The MPS refused to confirm or deny whether it held the requested information by citing sections 24(2) and 31(3).
2. The Commissioner's decision is that the MPS has incorrectly applied sections 24(2) and 31(3) FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The MPS is required to confirm or deny whether the requested information is held and either disclose it or issue a fresh response compliant with section 17 of the FOIA.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

Request and response

5. On 19 August 2021 the complainant wrote to the MPS and requested information in the following terms:

“Please provide sight of records related to the late relocation (on security grounds - to include fire safety) of the venue for the Prime Minister's education review speech made during her visit to Derby on 19.02.18.

Alternatively, if it is deemed that there are security concerns related to this FOI request, a simple 'yes' or 'no' will suffice to confirm internal reports that the venue for the Prime Minister's speech was moved at the last minute from the University of Derby's Law School to the Roundhouse at Derby College.”

6. On 13 September 2021 MPS sent a refusal notice neither confirming nor denying (NCND) whether it held the requested information. The refusal notice cited section 24(2) (safeguarding national security) and section 31(3) (law enforcement).
7. The complainant requested an internal review on 20 September 2021 on the grounds of an overriding public interest and unnecessary secrecy.
8. MPS acknowledged the review request on 23 September 2021.
9. At internal review on 19 October 2021, MPS maintained its position.

Scope of the case

10. The complainant contacted the Commissioner on 3 November 2021 to complain about the way their request for information had been handled by the MPS in providing an NCND response.
11. The Commissioner considers the scope of this case to be whether the MPS was correct in citing section 24(2) NCND and section 31(3) NCND to this request.

Reasons for decision

Section 24 - safeguarding national security

12. Section 1(1)(a) of FOIA requires a public authority to confirm whether it holds the information that has been requested. Section 24(2) provides an exemption from this duty. This allows a public authority to neither confirm nor deny whether it holds the requested information.
13. When considering the application of NCND provisions, a public authority is not restricted to only considering the consequences of the actual response that it is required to provide under section 1(1)(a). The focus of an NCND response will usually be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held. Considerations about the consequences of denying information is held can be as revelatory as confirming that it is held.
14. A public authority needs to demonstrate a link between confirming or denying that it holds information and the alleged harm to national security. The causal effect does not have to be immediate or direct.
15. Definitions of "national security" are set out below:
 - "national security" means the security of the United Kingdom and its people;
 - the interests of national security are not limited to actions by an individual which are targeted at the UK, its system of government or its people;
 - the protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence;
 - action against a foreign state may be capable indirectly of affecting the security of the UK ; and
 - reciprocal co-operation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom's national security.¹

¹ Norman Baker v the Information Commissioner and the Cabinet Office ([EA/2006/0045](#) 4 April 2007)

16. Safeguarding national security also includes protecting potential targets even if there is no evidence that an attack is imminent.
17. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not 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.

The MPS's view

18. The MPS has confirmed that there are no press lines held or issued regarding the PM's security relating to this particular matter and it emphasised that the MPS does not discuss matters of security.
19. The MPS acknowledged that the complainant had provided two media articles relating to this matter but that it did not consider media articles to constitute 'official' confirmation and, as these are 'unofficial', they may be wholly or partly inaccurate.
20. The MPS stressed that it has never confirmed or commented on security concerning any Prime Minister and would not be prepared to do so. The information being requested has never been confirmed or denied as 'held'. Additionally, the MPS argues that the use of NCND needs to be consistent as set out in the ICO guidance:

"It can be important to use a neither confirm nor deny response consistently, every time a certain type of information is requested, regardless of whether the information is actually held or not. For this reason public authorities need to be alert to the possibility of receiving future requests for the same type of information when handling very specific or detailed requests."

and

"...public authorities should consider both whether any harm would arise from confirming that information is held and whether harm would arise from stating that no information is held. Otherwise, if the same (or same type of) requests were made on several occasions, a changing response could reveal whether information was held."²

² [When to refuse to confirm or deny information is held \(ico.org.uk\)](https://ico.org.uk)

21. A consistent approach must be adopted when responding to similar requests and therefore a "degree of generality is inevitable" when explaining "why the MPS is exempt from the duty to confirm or deny".
22. The MPS points out that applying the exemption "is not in respect of whether the information relates to national security itself, but whether this exemption is required for the purpose of safeguarding national security". It has identified an undesirable effect on national security or, at least, the MPS can foresee the risk of an undesirable effect if it does not rely on the exemption.
23. The MPS refers to the Commissioner's decision notice [FS50570727](#) and the need for consistency:

"Moreover, it is not simply the consequences of revealing whether information is held in respect of a particular request that is relevant to the assessment as to whether the application of the exemption is required for the purposes of safeguarding national security, but the consequences of maintaining a consistent approach to the application of Section 24(2)."
24. According to the MPS, at the time of the request, the terrorist threat level in the UK stood at "severe" which means that the Home Office considered that such an attack was "highly likely" which magnifies the extent of prejudice in any disclosure or acknowledgement of pertinent information respecting security. The MPS explained that it considered the personal safety of any PM to be "inextricably linked to the national security of the UK". Though the MPS refers to the complainant having an interest in the fire escape at the University of Derby's law school and the alleged change of venue, publicly acknowledging whether or not security arrangements have been changed would be likely to prejudice the safeguarding of national security. Even responding to the second part of the complainant's request with a "yes" or "no" could be relevant to the PM's security arrangements.
25. The MPS contends that routinely confirming or denying the PM's security arrangements or changes at any time would increase the risk of harm to the individuals concerned. It could result in setting a precedent for future requests of a similar nature which could result in criminals changing their behaviour or their targets based on details disclosed under the FOIA. Confirming whether any security arrangements had been changed regarding Theresa May's visit could potentially place a current PM and other individuals in a position of vulnerability, pose a risk to national security, and render security measures less effective, compromising ongoing or future security arrangements.

26. In its internal review the MPS explained to the complainant the reasons why it had NCND whether it,

“holds any information on whether the PM’s venue for a speech was changed from the University of Derby's Law School to the Roundhouse at Derby College in December 2018 and that this was on the grounds of security, would identify whether or not specific concerns had been raised and what these might have been. Any disclosure of information, if held, that could highlight areas of vulnerability would have a detrimental effect on any other VIP whose intention it was to deliver a speech at the University, as well as the possibility of the staff and students themselves...”

27. Confirming or denying whether the requested information is held would provide individuals intent on committing acts of terrorism with valuable information as to the level of resistance they might encounter. The MPS raised the possibility of a mosaic effect occurring through continual confirmation or denial of security arrangements via FOI requests and coupling this information with other available information. It argued that individuals planning terrorist attacks make use of a wide range of sources regarding their targets including press reports and physical reconnaissance to build up a picture of the security arrangements for specific individuals. Therefore, to avoid prejudice to the PM or any individual who is high profile, the MPS is required to NCND whether information is held. Any threat or possible harm due to an FOIA disclosure could result in a constitutional as well as a national or international crisis.

The complainant’s view

28. The complainant argued in the internal review request that they had had “experience of public bodies’ overreliance on unnecessary secrecy and blanket ban exemptions to avoid external scrutiny and political embarrassment”. Their view is that the MPS cannot impose a blanket ban on a particular category of information. The complainant states that the MPS had not provided any rationale for its NCND response meeting the requirements of the two exemptions cited. Their response did not focus on tall building fire safety in public buildings and whether the questions in the request would be likely to harm either national security or law enforcement.

The Commissioner’s view

29. The Commissioner accepts that at the time of the visit of the PM to Derby the threat level was “severe” (meaning “highly likely”) but at the time the request was made it had decreased to “substantial” (meaning

"likely"). Nonetheless the Commissioner accepts that there is always a terrorist threat to the PM which increases or decreases at different times.

30. The next step is to consider whether the MPS has established a causal link between confirming or denying that it holds the requested information and the potential outcome of undermining the ability of the MPS to protect the PM or any high profile political figure from terrorism.
31. The MPS has expressed the view that if it were to confirm or deny that any concerns had been raised on the grounds of security it would identify whether or not there had been concerns and what these might have been. This could highlight areas of vulnerability that could have a detrimental effect on any other VIP visiting or the staff and students. The Commissioner makes the assumption that, had any areas of concern or vulnerability been identified, they would have been addressed long before the request was made and therefore confirming whether it held such information would be unlikely to cause the effect described.
32. The Commissioner has reached the conclusion that, in this instance, section 24(2) is not engaged. The onus is on the MPS to demonstrate a link between confirming or denying whether information is held and the alleged harm to national security. The Commissioner's guidance states that the causal effect does not have to be immediate or direct. However, the complainant has acknowledged the potential for jeopardising security concerns in their request and provided an alternative option to respond with a "yes" or "no" as to whether the venue had been changed. In responding to this alternative part of the request, it is hard to see what threats there would be to national security. The MPS has provided many arguments about the potential threat to national security in disclosing this information, if held, but not focused on the threat in confirming or denying whether it was held. The likelihood of confirming or denying whether this particular information is held leading to an undermining of the MPS's ability to protect the PM or any high ranking political figure, and using any information that may or may not be held to increase the risk of a terrorist attack so long after the date of the alleged change of venue, is not persuasive.
33. Having concluded that the exemption is not engaged, the Commissioner has not gone on to consider the public interest test. However, he would like to highlight the fact that he is not underestimating the importance of safeguarding national security and that NCND will frequently be the appropriate response when requests are made that have the potential to undermine that security, depending on the particular information requested and the timing of the request. In this instance he does not

accept that an NCND response was required in relation to this particular information that was requested over three years after the visit.

Section 31 – law enforcement

34. Section 31(3) FOIA excludes a public authority from complying with the duty to confirm or deny in relation to information if to do so would, or would be likely to, prejudice any of the functions in sections 31(1). The section 31 exemption is qualified and, if engaged, is therefore subject to the public interest test.
35. The MPS emphasises that this relates to neither confirming nor denying whether information is held and that its arguments relate to the nature of the information requested rather than the actual information that may or may not be held. As a result the MPS explains that there is a degree of generality in explaining why this exemption applies. It is also relying on the lower threshold of “would be likely” to prejudice.
36. Confirming or denying security details would place the PM and other individuals in a position of vulnerability and may lead criminals to alter their behaviour or actions based on the response provided. It would compromise the MPS’s law enforcement tactics which may be used in the future to avoid similar incidents where changes need to be made for security reasons. The MPS’s view is that this would hinder its ability to prevent and detect crime.
37. The MPS then goes on to detail the threat of physical harm from the terrorist threat or individual criminals and those individuals who are considered to be fixated with certain persons or ideas. The fixated group are more likely to pose a threat to prominent individuals. It then lists attempts to assassinate David Cameron in 2010, Theresa May in 2018, Tony Blair in 2014, Gordon Brown in 2008 and John Major in 1999 which are all in the public domain. These show the potential for harm.
38. The MPS explains that if it confirmed or denied whether it held this information, it would be confirming whether or not the PM’s visit required security changes to be made and that this would set a precedent for future requests of a similar nature under the FOIA. Any decision would establish a precedent for putting police security into the public domain and should therefore be treated cautiously and the MPS stated that such an eventuality is not beyond the bounds of probability.
39. Confirming that security changes were made (if that was the case) would make it difficult to not continue to make similar statements on other cases or incidents. Confirmation or denial regarding specific individuals increases the threat of or actual physical harm to a particular

individual and highlights security vulnerabilities. This would constitute a criminal offence and make a perpetrator open to arrest and prosecution. The MPS's view is that this action, by definition, engages section 31(1)(a)(the prevention and detection of crime) and (b)(the apprehension and prosecution of offenders).

The Commissioner's view

40. The Commissioner understands that arguments pertaining to providing an NCND response might have a certain generic nature and the MPS has drawn attention to this. However, given the nature of the request and the alternatives the complainant included in their request, the Commissioner does not consider that an NCND response was required. Consequently, section 31(3) is not engaged.
41. Having concluded that the exemption is not engaged, the Commissioner has not gone on to consider the public interest test. Though the Commissioner accepts that any undermining of law enforcement is clearly undesirable, he is not persuaded that providing an NCND response to this particular request is appropriate or that it needs to set any precedent.

Right of appeal

42. 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@justice.gov.uk

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

43. 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.
44. 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

Janine Gregory
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