

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 August 2022

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested files relating to the Habershon Report (1975). The Home Office refused to disclose any information within the scope of the request.
2. The Commissioner's decision is that the Home Office is entitled to rely on sections 31(1) and 40(2) of FOIA to withhold the requested information.
3. The Commissioner does not require the Home Office to take any remedial steps.

Background

4. The Habershon Report was written on 25th September 1975 by Commander Roy Haberson – Head of the Metropolitan Police Service Bomb Squad.
5. The Home Office clarified that the full titles of the requested files are as follows:

BS 27/365 – Documents supplied by the Metropolitan Police: the Haberson Report (1975) on Provisional IRA campaign of bombings and shootings in London and the Home Counties, October 1974 – February 1975

BS 27/366 - Documents supplied by the Metropolitan Police: the Haberson Report (1975) on Provisional IRA campaign of bombings and shootings in London and the Home Counties, October 1974 – February 1975; reports and appendices, documents 1-12

BS 27/367 - Documents supplied by the Metropolitan Police: the Haberson Report (1975) on Provisional IRA campaign of bombings and shootings in London and the Home Counties, October 1974 – February 1975; appendices 8, 17, 18

Request and response

6. On 9 August 2021, the complainant wrote to the Home Office and requested information in the following terms:

“Please may I have access to the following files:

BS 27/365

BS 27/366

BS 27/367”

7. The Home Office responded on 7 September 2021. It stated that it holds the requested information, but that it is exempt from disclosure by virtue of section 31(1) of FOIA, and that the balance of the public interest fell in favour of maintaining the exemption.
8. Following an internal review the Home Office wrote to the complainant on 8 November 2021. It stated that it was upholding its original decision to withhold the requested information.

Scope of the case

9. The complainant contacted the Commissioner on 9 November 2021 to complain about the way their request for information had been handled.
10. The complainant’s main grounds for disagreeing with the Home Office withholding the information were that there are no current open investigations into the bombings, nor have there been any for a number of years.
11. The complainant also argued that disclosure of the requested information would not jeopardise the inquest currently being undertaken by the Surrey Coroner as he has determined that the files are of no relevance to his inquiry.
12. During the course of the Commissioner’s investigation the Home Office clarified that it was relying on subsections (a), (b) and (c) of section 31(1) as its basis for withholding the requested information. It also added arguments as to why the exemptions provided by sections 40(2)(personal information) and 38(1)(health and safety) are applicable in withholding the requested information.

13. The Home Office stated that redaction of all of the exempt information contained within the three files would render any remaining contents unusable and of no discernible value to the complainant or the general public.
14. The Commissioner considers the scope of his investigation, along with the following analysis, is to determine if the Home Office is correct when it says that the withheld information is exempt from disclosure by virtue of section 31(1), section 40(2) and section 38(1) of FOIA.

Reasons for decision

Section 31 – Law enforcement

15. Section 31(1) of FOIA provides that –

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice”

16. Section 31 is a prejudice based exemption and is subject to the public interest test. This means that not only does the information have to prejudice one of the purposes listed, but also that it can only be withheld if the public interest in the maintenance of the exemption outweighs the public interest in disclosure.
17. In the Commissioner’s view, three criteria must be met in order to engage a prejudice based exemption:
 - Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and prejudice to the interests which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and,

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. whether disclosure 'would be likely to' result in prejudice or disclosure 'would' result in prejudice.

18. In relation to the lower threshold of 'would be likely', the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. The Commissioner considers that the higher threshold places a stronger evidential burden on a public authority to discharge. The chances of the prejudice occurring should be more probable than not.

The applicable interests

19. The Commissioner recognises, in his published guidance¹, that section 31(1)(a) will cover all aspects of the prevention and detection of crime, and, therefore, there is clearly some overlap between this subsection and 31(1)(b) which protects the process of the apprehension or prosecution of offenders.
20. Further, the Commissioner notes that the administration of justice, which section 31(1)(c) is designed to protect, is a broad term and therefore also has some overlap with section 31(1)(b) which protects the process for prosecuting offenders.
21. Due to the close relationship between the three subsections, the Commissioner's view is that it is entirely plausible that all three can be applicable to the same information.
22. In light of the subject matter of the information in this case, the Commissioner is satisfied that the prejudice which the Home Office envisages, is relevant to the particular interests that these three subsections of the exemption are designed to protect, and so the first criterion as referred to within paragraph 17 has been met.

The nature of the prejudice

23. In order for the second criterion to be met, there must be a logical connection between disclosure and the prejudice envisaged.
24. The Home Office states that the Habershon Report has never been published, released or officially placed in the public domain. The Home Office acknowledged the existence of a BBC article which suggests that

¹ <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

it has seen the report, however the Home Office does not believe that this should be considered as information in the public domain as it does not appear to have been obtained from an official source.

25. The Home Office states that the crimes which the requested files relate to could still be investigated in the future, and an offender brought to justice, as there is no statute of limitations for murder and many of the crimes listed within the files remain unsolved. To place the withheld information into the public domain would allow those who should be brought to justice to continue to evade detection by identifying what level of police activity had taken place and assess the evidence/information in the possession of the police and other authorities, resulting in any future case for the prosecution or defence being undermined.
26. The Home Office further argued that disclosure of the requested information would prejudice the impartiality of the ongoing Coroner's inquest and in turn the administration of justice.
27. The Home Office provided further rationale which the Commissioner is unable to reproduce here, as to do so would compromise its withholding of the information.
28. The Commissioner is satisfied that the Home Office has demonstrated a causal relationship between disclosure of the requested information and the functions which sections 31(1)(a), 31(1)(b) and 31(1)(c) are designed to protect.

The likelihood of the prejudice

29. A prejudice based exemption such as section 31 must be engaged on either the basis of 'would' or 'would be likely to'. These terms have separate and distinct meanings in this context.
30. The higher threshold of prejudice is defined in the Commissioner's guidance as 'the chain of events is so convincing that prejudice is clearly more likely than not to arise.' The chance of prejudice has to be significant to engage this higher threshold of prejudice and greater than 50%.
31. The lower threshold of prejudice is defined in the Commissioner's guidance as 'there must be more than a hypothetical or remote possibility of prejudice occurring; there must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%.'
32. The Home Office has applied the exemption on the basis of the higher threshold of prejudice, that disclosure 'would' result in prejudice to the

law enforcement activities which are protected by sections 31(1)(a), 31(1)(b) and 31(1)(c).

Is the exemption engaged?

33. Having viewed the withheld information, and having duly considered the rationale set out by the Home Office in its responses to the complainant and in its submissions to the Commissioner, he finds that section 31(1) is engaged at the higher threshold of prejudice, that disclosure 'would' occur to the law enforcement functions protected by subsections (a), (b) and (c).
34. Since the Commissioner has established that the exemption is engaged, he will move on to consider the balance of the public interest arguments, which the Home Office provided further clarification of in its submissions to the Commissioner during his investigation.

Public interest arguments in favour of disclosure

35. Firstly the Home Office gave consideration to the wider public interest in openness and transparency in all aspect of government, including the functions of the Home Office itself as well as the police. It stated that:

"There is obviously a need for law enforcement bodies to be accountable for their actions and for the public to have confidence in the operational aspects of their work particularly concerning the prevention and detection of terrorist activity which is an enduring and evolving type of crime that has the potential to impact the lives of the population.

There is a need to understand what measures are being taken by law enforcement agencies to keep people safe to provide reassurance to the public that appropriate procedures are in place and that those procedures are fit for purpose."

36. The Home Office then went on to consider the more specific circumstances of this case, stating:

"we also considered the public interest in being able to examine details of specific events or cases from the past that were controversial, complex and long-running, or involved questions of integrity or process or miscarriage of justice.

Where there has been a significant impact on the lives of civilians and accompanying media scrutiny, there is always a strong argument in favour of disclosure after an appropriate period of time, to allow people to examine all the available information to understand the full picture of events for themselves."

Public interest arguments in favour of maintaining the exemption

37. In providing its public interest arguments in favour of maintaining the exemption, and therefore withholding the requested information, the Home Office clarified that the requested files are not limited to one high profile event, but that they discuss, in detail, the links between multiple events. The Home Office went on to state:

“These records contain information concerning multiple murders by means of explosive devices and shootings carried out by the Provisional IRA in the 1970’s. The Habershon report analyses the evidence found at various crime scenes, incidents involving vehicles, ballistic and fingerprint evidence and evidence found at several ‘safe houses’.

Given the gravity of the offences which include unsolved shootings, unsolved bombings and the hostage taking of a child, in addition to the number of casualties and the families forever affected; there would be an expectation that the authorities would exploit any and every opportunity to identify those responsible and bring them to justice. There is no Statute of Limitations for murder and many of these cases remain ‘open’.

There is no way of identifying which pieces of evidence may be relevant to a future investigation or prosecution. Disclosure would allow those who are guilty to continue to evade justice by identifying what evidence the police have, what level of knowledge of events, what events were seen by witnesses and the descriptions of those involved. This could allow these individuals to destroy further evidence which would link them to these crimes or to evidence recovered.”

Balance of the public interest

38. In reaching a view on where the public interest balance lies in this case, the Commissioner has taken into account the nature of the withheld information as well as the views of both the complainant and the Home Office.
39. He accepts that it is important for the general public to have confidence in the UK’s law enforcement capabilities. Accordingly, there is a general public interest in disclosing information that promotes accountability and transparency in order to maintain that confidence and trust.
40. He also recognises that there is a very strong public interest in protecting the law enforcement capabilities of public authorities. The Commissioner considers that appropriate weight must be afforded to the public interest inherent in the exemption – that is, the public interest in the prevention and detection of crime, the apprehension and prosecution of offenders, and in avoiding prejudice to the administration of justice.

41. The Home Office concluded that the balance of the public interest lies in favour of maintaining the exemption, as there is greater public interest in ensuring that the police and judiciary are able to conduct their law enforcement functions effectively.
42. The Home Office went on to explain that the complex nature of the information contained in the files makes them as relevant today as when the documents were originally written in the 1970s, and that the many different strands of investigations and intelligence make it virtually impossible to foresee which pieces of evidence could become relevant to future investigations or prosecutions.
43. Having given due consideration to the opposing public interest factors in this case, the Commissioner has concluded that the factors in favour of disclosure do not equal or outweigh those in favour of maintaining the exemption. Accordingly, the Commissioner is satisfied that the Home Office was entitled to apply section s31(1) of FOIA to refuse to disclose all but two of the documents contained within the requested files.

Section 40 – Personal information

44. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
45. In this case, where the Home Office has identified that the remaining two documents within the requested files which are not exempt by virtue of section 31(1) constitute third-party personal data, the relevant condition is contained in section 40(3A)(a)². This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data (the DP principles), as set out in Article 5 of the UK General Data Protection Regulation (UK GDPR).
46. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
47. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

² As amended by Schedule 19 Paragraph 58(3) DPA

Is the information personal data?

48. Section 3(2) of the DPA defines personal data as:

“any information relating to an identified or identifiable living individual”.

49. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

50. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

51. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

52. In the circumstances of this case, having viewed and considered the withheld information which the Home Office claims can be withheld by virtue of section 40(2), the Commissioner is satisfied that the information relates to the data subjects. The names of data subjects quite obviously is information that both relates to and identifies those concerned. Again, the Home Office provided further rationale regarding the content of the sections of withheld information which it has applied section 40(2) of FOIA to, which the Commissioner is unable to reproduce here, as to do so would compromise its withholding of the information. This information, therefore, clearly falls within the definition of ‘personal data’ in section 3(2) of the DPA.

53. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

54. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

55. Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

56. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

57. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

58. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”³.

59. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:

i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;

iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

60. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

61. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.

³ Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

62. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
63. The Commissioner considers that there is a general legitimate interest in transparency surrounding the actions taken by law enforcement bodies in relation to high profile crimes which have had a significant impact on the lives of many civilians, and thus the public being able to hold those bodies involved to account. Further, there is a general legitimate interest in high profile crimes in which the perpetrators continue to evade justice, and whereby previous proceedings resulted in miscarriages of justice.
64. The complainant also has a vested legitimate interest in the withheld information, due to their previous involvement in the proceedings of some of the crimes which are discussed within the requested files. The Commissioner will not detail in this notice the nature of the complainants involvement in order to protect their identity.

Is disclosure necessary?

65. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
66. The Commissioner is satisfied in this case that disclosure of the requested information would be necessary to achieve the legitimate aims identified and that there are no less intrusive means of achieving the legitimate aims identified.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

67. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
68. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
69. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
70. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
71. The Commissioner is mindful that disclosure under FOIA is disclosure to the world at large and not just to the requester. It is the equivalent of the Home Office publishing the information on its website.
72. As part of its considerations of the balance between the legitimate interests in disclosure and the rights and freedoms of the data subjects, the Home Office has confirmed that it does not have the consent of the data subjects to disclose their personal information in response to a request for information under FOIA.
73. Given the highly sensitive nature of the information contained within the requested files, the Commissioner considers that the data subjects would have a reasonable expectation that their identities would not be disclosed to the world at large, and to do so would be an entirely disproportionate step to take, resulting in unwarranted intrusion into the lives of the data subjects and, therefore, unfair and unjustified adverse effects on the individuals concerned.
74. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing the parts of the files which the Home Office has identified as constituting personal data, and so the disclosure of the information would not be lawful.
75. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent. The Home

Office is entitled to rely on section 40(2) of FOIA to withhold the parts of the information which constitute third-party personal data.

76. In view of the Commissioner's decision that the Home Office has correctly relied on section 31(1) and section 40(2) of FOIA, he is satisfied that these exemptions cover all of the withheld information, therefore it has not been necessary for the Commissioner to consider the Home Office's arguments that section 38(1) of FOIA also provided grounds for refusing the request. The Commissioner requires no further action to be taken by the Home Office in relation to this request.

Right of appeal

77. 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

78. 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.

79. 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

Claire Churchill
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