



Neutral citation number: [2024] UKFTT 2 (GRC)

Case Reference: EA-2022-0236

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: By CVP/telephone hybrid
Heard on: 17 November 2023
Decision given on: 16 January 2024

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER SUSAN WOLF
TRIBUNAL MEMBER KATE GRIMLEY EVANS

Between

EDWARD WILLIAMS

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) GREATER MANCHESTER COMBINED AUTHORITY

Respondents

Representation:

For the Appellant: In person (by telephone)

For the First Respondent: Did not attend

For the Second Respondent: Mr. Leo Davidson (Counsel) (by CVP)

Decision: The appeal is allowed in part.

Substituted Decision Notice:

Organisation: Greater Manchester Combined Authority

Complainant: Mr Edward Williams

The Substitute Decision - IC-122587-N5G2

1. The GMCA was not entitled to withhold the parts of the withheld information that were released to Mr. Williams in September 2023 ('Information A').
2. The GMCA is not required to take any steps in relation to Information A.
3. The GMCA is entitled to withhold the following information ('Information B') because it is outside the scope of the request:
 - 1.1. Three substantive paragraphs beginning "We also wanted", "At present" and "We understand" on page A11 of the closed bundle.
 - 1.2. All of pages A13-A14 of the closed bundle except the paragraph on A14 beginning "With this in mind" and except any information disclosed in September 2023.
 - 1.3. The two paragraphs beginning "I recently met with" and "Thank you for providing" on pages A15-A16 of the closed bundle.
4. The GMCA is entitled to withhold the following information ('Information C') under section 36(2)(b) of the Freedom of Information Act 2000 (FOIA):
 - 4.1. The clause beginning "and in advance" on page A8 of the closed bundle.
 - 4.2. The paragraph beginning "This delay" on page A10 of the closed bundle.
 - 4.3. The two redacted sentences beginning "Nor would" and "In any case" on page A11 of the closed bundle.
 - 4.4. The two redacted sentences beginning "My officials" on page A15 of the closed bundle.
5. The GMCA is not entitled to withhold the following information ('Information D') under section 36(2)(b) FOIA:
 - 5.1. The paragraphs beginning "We find" and "We wrote to you" on page A2 of the closed bundle.
 - 5.2. The paragraph beginning "There are" on page A4 of the closed bundle.
 - 5.3. The sentence beginning "In so doing" and the subparagraphs beginning "You said" and "What are" on page A6 of the closed bundle.
 - 5.4. The sentence beginning "As I explained" on page A8 of the closed bundle.

- 5.5. The paragraphs beginning “In your previous” and the sentence beginning “We have not” on page A10 of the closed bundle.
 - 5.6. The sentence beginning “While these orders” on page A10/A11 of the closed bundle.
 - 5.7. The redacted portions of the sentence beginning “With this in mind” including the redacted section beginning “and the ongoing” on page A14 of the closed bundle.
 - 5.8. The two sentences beginning “The immigration cases” and “Indeed” on page A15 of the closed bundle.
 - 5.9. The paragraph beginning “Let me” on page A16 of the closed bundle.
6. The GMCA is required to take the following step:
 - 6.1. Disclose Information D.
 7. The GMCA must take this step within 35 calendar days of the date of this decision notice.
 8. Any failure to abide by the terms of the tribunal’s substituted decision notice may amount to contempt which may, on application, be certified to the Upper Tribunal.

REASONS

Introduction

1. This is an appeal against the Commissioner’s decision notice IC-122587-N5G2 of 30 August 2022 which held that the Greater Manchester Combined Authority (‘the GMCA’) was entitled to rely on section 36(2) of the Freedom of Information Act 2000 (FOIA) to withhold the information. The Commissioner did not require the GMCA to take any steps.
2. This tribunal previously made an interim decision, promulgated on 27 February 2023, that the GMCA was not entitled to rely on sections 36(2)(b)(i) or (ii) FOIA to withhold the information, and that the matter should be listed to determine the application of section 36(2)(c) and section 40(2). At that stage the GMCA was not a party.
3. That decision was set aside after the Commissioner pointed out what the Judge accepted was a material error of fact unsupported by the evidence. The reasons for the set-aside are provided in a ruling on application for permission to appeal dated 2 March 2023 and in a set-aside decision dated 24 March 2023.
4. Subsequently GMCA have been joined as a party. The GMCA confirmed in their response dated 18 May 2023 that they no longer rely on sections

36(2)(b)(i) and (ii) or section 40(2) and the only live exemption relied for the purposes of this decision on is section 36(2)(c).

5. As well as a narrowing of the legal issues, in September 2023 the GMCA released a large part of the initially withheld material to Mr. Williams. The arguments of the parties focussed primarily on the remaining redactions.
6. Leading up to the hearing there had been a disclosure by GMCA to Mr. Williams, in error, of some closed information to which the Commissioner objected in the form of correspondence between the Commissioner and the GMCA. The tribunal records that Mr. Williams gave an undertaking in the hearing not to make public that particular material.
7. There has been delay between the decision being set aside on 24 March 2023 and the appeal being heard on 17 November 2023. The matter was originally listed for hearing on 26 June 2023. The Judge granted a last-minute application by the Home Office to postpone the hearing on the basis that they had only just been notified of the appeal and were considering whether to apply to be joined. The Home Office confirmed on 14 July 2023 that they did not intend to apply to be joined. Unfortunately by that stage the next available date for all three panel members and the parties was the 17 November 2023.

Factual background

8. We adopt the summary of background facts from paragraphs 4-6 of the Commissioner's response:
 4. In May 2012 a gang of men were convicted of various sexual offences against underage girls in Rochdale, widely reported and referred to as the Rochdale Grooming Scandal. In 2021, media reports claimed that whilst the abusers awaited deportation, they had been spotted in Rochdale, where they could come face-to-face with the victims.
 5. On 26 April 2021, The Sun published an article outlining that the Mayor of Manchester, Andy Burnham, had exchanged correspondence with then- Home Secretary Priti Patel MP, about the issue.
 6. Andy Burnham chairs and leads the Greater Manchester Combined Authority ("the Authority") which is made up of the 10 Greater Manchester councils (of which Rochdale is one), who, alongside the Mayor, 'work with other local businesses, communities and other partners to improve the city-region'.

Requests, Decision Notice and appeal

The Request

9. Mr. Williams made the following request to the GMCA on 26 April 2021:

BACKGROUND

[[link to article in the Sun](#)]

Now the Home Secretary and local MP Chris Clarkson have questioned why Sexual Harm Prevention Orders – which can ban individuals from an area to stop them from running into their victims. Ms Patel wrote to the mayor last year, but claims to have never received a response on that issue. Sources close to Mr Burnham said they did respond and accused the Home Secretary of politicising the victims of these horrendous crimes.

REQUEST Disclose the letter(s) from Priti Patel and Mayor's reply(s) regarding [*name redacted*] and [*name redacted*].

The GMCA's reply

10. The GMCA replied on 5 July 2021 confirming that it held the requested information. It refused to supply the information relying on section 36(2)(b)(i) FOIA (prejudice to ability to give free and frank advice or exchange of views), section 36(2)(c) (prejudice to the effective conduct of public affairs) and, in relation to some of the information, section 40(2) FOIA. Mr. Williams requested an internal review. The GMCA upheld its position on 5 August 2021. Mr. Williams referred the matter to the Commissioner on 5 August 2021.
11. Although Mr. Williams asked in his request for an internal review for the initial request to be varied, he subsequently confirmed that he wished this to be treated as a separate request and the Commissioner did not consider a complaint in relation to this later request. It is therefore outside our remit.

The Decision Notice

12. In a decision notice dated 30 August 2022 the Commissioner decided that the GMCA was entitled to rely on section 36(2)(b) FOIA.
13. The Commissioner was satisfied that the GMCA's Monitoring Officer was a qualified person ('QP') for the purposes of section 36(5) FOIA. The Commissioner was satisfied that the QP did provide their opinion that the information in question was exempt under sections 36(2)(b) and 36(2)(c).
14. The Commissioner noted that the record of the QP's opinion confirmed that in reaching their decision they had full view of the information in the scope of the request. It was the QP's opinion that sections 36(2)(b) and (c) applied to all the requested letters between the Home Secretary and the Mayor.
15. The Commissioner recorded that the GMCA confirmed that the QP considered that release of the information:
 - 15.1. may hinder the full and frank sharing of information and the receipt of detailed advice;
 - 15.2. may put health and safety of a group or individual at risk;
 - 15.3. may result in unfairness to others;

- 15.4. will inhibit the effective delivery of services and/or undermine the GMCA's ability to fulfil its role.
16. The Commissioner noted that the QP stated that the Mayor in his role of the Police Crime Commissioner (PCC) has duties relating to victims of crime. The Mayor must therefore be able to advocate on behalf of victims in Greater Manchester on a confidential basis.
17. The Commissioner noted that the QP's opinion was that release of the withheld information may hinder the full and frank sharing of information and the receipt of detailed advice and this would be unfair to victims.
18. The Commissioner stated that he considered that the exemption at section 36(2)(b) concerned processes that might be inhibited at the time of the request and in the future, not necessarily inhibition arising from the content or subject matter of the requested information itself. He stated that the key issue in this case was whether disclosure could inhibit the process of providing advice or recommendations, in order to advocate on behalf of the victims and to progress decisions about the offenders of CSE crimes.
19. The Commissioner noted that arguments under section 36(2)(b) 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. If the issue in question is still live, arguments about a chilling effect on those ongoing discussions are likely to be most convincing.
20. Having reviewed the withheld information, the Commissioner considered that the parties involved (both the senior officials and the victims) would have expected the information to be held in confidence so, he concluded, it was logical that disclosure would inhibit the processes of providing advice or exchanging views in any future debate.
21. The Commissioner noted that the deportation issue remained live, being reported in the press in July 2022. The legal processes concerning deportation were ongoing, as was the related political debate.
22. Based on the nature of the withheld information, and the current status of the debate regarding the deportation of those convicted of CSE crimes, the Commissioner was satisfied that the opinion given by the QP, being that inhibition relevant to section 36(2)(b) would be likely to occur, was a reasonable one. Therefore he found that the exemption at section 36(2)(b) was engaged.

23. In relation to the public interest balance, the Commissioner considered that this case carried a great deal of weight in terms of achieving accountability and transparency through the disclosure of information. This was a matter of great concern to many and how public bodies handled the issue of CSE was highly controversial, so there was a strong public interest in disclosure. The subject matter was particularly sensitive and was still widely reported in the press. Disclosure in this case would allow the public to scrutinise the basis of the claims that appropriate actions have not been taken to exclude individuals from areas using powers provided by “Sexual Harm Prevention Orders”.
24. Given that the subject matter of the request was high profile and political in nature, the Commissioner considered that disclosure would have a significant chilling effect on future frank deliberations between senior office holders. The Commissioner considered that it was important to preserve a safe space for frank deliberations on such an important issue.
25. The Commissioner concluded that the information contained frank exchanges regarding the victims of crime, potential risks, operations underway in Greater Manchester, investigations and cases. The Commissioner found that the extent of the impact of disclosure was potentially very wide, including on the victims, their families and the support agencies.
26. The Commissioner considered it important that the Mayor was able to intervene effectively in a situation as sensitive as this. Whilst the situation is not likely to be very frequent, the negative effect of disclosure on the victims could be potentially very high.
27. Taking account of the QP’s opinion, the sensitivity of the withheld information, the potential impact on victims, and the need for a safe space to deliberate such issues, the Commissioner concluded that the public interest was narrowly balanced in favour of maintaining the exemption.
28. The Commissioner did not consider the application of sections 36(2)(c) or 40(2).

Notice of Appeal

29. Mr Williams appealed against the Commissioner’s decision notice. His grounds of appeal are, in summary:
 - 29.1. The Commissioner erred in concluding that disclosure would be likely to inhibit the free and frank provision of advice. The duties of the Mayor do not include the provision of advice. A Police and Crime Commissioner is not an advocate for victims of crime.
 - 29.2. The Commissioner applied the wrong legal test. She asks whether disclosure ‘could’ (para 31) or ‘may’ (para 41) inhibit the relevant matters and refers to ‘prejudice’ rather than ‘inhibit’ at para 38. The correct test is whether disclosure would or would be likely to inhibit.

- 29.3. The Commissioner should have taken account of the fact that personal data of victims could be redacted.
- 29.4. There is no reason given why the Monitoring Officer is a QP.
- 29.5. The public interest balance test was wrongly decided.

The ICO's response

30. The Commissioner relies on the Decision Notice. In response to the grounds of appeal the Commissioner states, in summary, as follows.
31. It is unclear if Mr. Williams is asserting that the exemption is wrongly applied *because* the opinion of the qualified person is unreasonable *because* she misunderstood the duties of the Mayor.
32. Neither the QP nor the Decision Notice state the Mayor gives advice. Paragraph 23 of the Decision Notice states that the QP considered that 'release of the information may hinder...the receipt of detailed advice'. The phrase 'receipt of detailed advice' is repeated in paragraph 27 of the DN. The Commissioner's Guidance on section 36 makes clear that 'the free and frank provision of advice' captures the receipt of as well as the giving of advice.
33. The assertion that the Mayor is not an advocate for the victims of crime does not dislodge any of the findings of the Decision Notice. In any event the Mayor has duties relating to victims of crime. He has devolved responsibility to his Deputy Mayor, Baroness Beverley Hughes who, according to the GMCA website, 'was appointed to ensure the voices of victims are heard and championed'.
34. The Commissioner applied the correct legal test. Mr. Williams is focussing on semantics and drafting style.
35. The QP for the purposes of this appeal is defined in section 36(5)(o) FOIA as any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown. Section 5 of the Authority's constitution outlines delegations to the Monitoring Officer (Liz Treacy) - 5.14 states one of these delegations is "to determine exemptions under Section 36 of the Freedom of Information Act 2000."
36. The Commissioner maintains that the public interest is narrowly in favour of withholding the disclosure.

Mr William's reply

37. The Mayor's functions, as PCC, do not include being an advocate of victims of crime or anything else. Functions are defined as powers and duties given by

Parliament. Mr. Williams relies on an article regarding the statutory functions of PCCs.

38. The Decision Notice states that the key issue is whether disclosure could inhibit the process of providing advice or recommendations, in order to advocate on behalf of the victims and to progress decisions about the offenders of SCA crimes, and that release of the information may hinder the sharing of information and the receipt of detailed advice in the future, both between officials and between the officials and the victims of crimes for whom they advocate.
39. Mr. Williams submits that it is not the function of the PCC to advocate on behalf of the victims and to progress decisions about the offenders of CSE crimes. Decisions about offenders are made by courts, not politicians.
40. The requested information was correspondence between a Labour Mayor and a Conservative Home Secretary. FOIA was created with exactly this sort of data in mind. It is armed with this sort of data that the electorate can make informed voting decisions at local and national level.

Submissions of Mr. Williams dated 3 March 2023

41. These submissions related to the Judge's proposal to set aside the decision of 27 February 2023 but are relevant to the substantive issues.
42. Mr. Williams submitted that he does not agree that the Police and Crime Commissioner does not 'advocate' for anyone and refers to section 1 of the Police Reform and Social Responsibility Act 2011.
43. Mr Williams submits that at p D83 the opinion of the QP only refers to section 36(2)(b)(i). Mr. Williams submits that the record of the QP opinion appears to be in an email at D93 onward. He states that he is not prepared to accept it in his current form and that it is unintelligible.
44. Mr Williams submits that no explanation is given by the Commissioner for his conclusion at para 44 in the Decision Notice that release of the information may hinder the sharing of information. He submits that sharing of information is irrelevant under the exemption claimed.
45. Mr. Williams questions what the Commissioner's findings in paragraph 53 of the decision notice on the sensitivity of the withheld information, the potential impact on victims and the safe space to deliberate have to do with the opinion of the QP being reasonable that release of the information would have the required effect under section 36(2)(b)(i).
46. Mr. Williams submits that the statutory test is the opinion at the time the request was refused. Any opinion after that date is irrelevant and inadmissible.

Submissions of the Commissioner on section 36(2)(c) dated 31 March 2023

47. The Commissioner notes that the public authority relied on section 36(2)(c) in their refusal notice and internal review outcome. They did not rely upon section 36(2)(c) nor mention it in their submissions to the Commissioner during the Commissioner's investigation.

Reply of Mr. Williams dated 1 April 2023

48. Mr. Williams denies that the opinion of the QP in relation to section 36(2)(c) was reasonable. No cogent reasons are provided.
49. There is no serious attempt by the Commissioner to explain the findings in paragraph 53 of the decision notice on the public interest balance. The term 'safe space' is particularly unhelpful.
50. The public interest in understanding how public authorities deal with child sexual exploitation, in this case following convictions, is particularly strong.

Response of the GMCA

Material outside the scope of the request

51. The GMCA submits that the following material in the closed bundle does not fall within the subject matter of the request:
- 51.1. **Page A11** three substantive paragraphs beginning "We also wanted", "At present" and "We understand".
 - 51.2. **Pages A13-A14** all except the paragraph on A14 beginning "With this in mind".
 - 51.3. **Pages A1-A16** the paragraphs beginning "I recently met with" and "Thank you for providing".

Section 36(2)(c) - engagement

52. The GMCA note that there is no set format in which the QP is required to provide an opinion. In this case, the QP did so by (i) reviewing and editing GMCA's response to Mr. Williams FOIA request, which summarised the QP's opinion and (ii) reviewing the withheld information itself with which the QP was familiar. This was done by 2 July 2021, 3 days before the GMCA provided its refusal notice. During the Commissioner's investigation the GMCA provided an additional document to capture the key points relating to the QP's opinion via GMCA completing the Commissioner's pro forma for such opinions.
53. The GMCA state that although the date given on the pro forma was 2 July 2022 this was a typing error, it was intended to read 1 July 2021 to reflect the date on which

the QP's opinion was provided by email and by review and edits to the refusal letter. The pro forma is not a contemporaneous record of the QP's opinion.

54. It is submitted that the key reason given for the engagement of section 36(2) in the refusal notice was:

“The Mayor and Deputy Mayor in their roles relating to the Police Crime and Commissioner have duties relating to victims of crime. The Mayor and Deputy Mayor must be able to advocate on behalf of victims of crime in Greater Manchester on a confidential basis. The ongoing public discourse about progress in these cases is likely to cause further upset and distress to the victims without warning, and without police organisations providing support being able to offer immediate additional support or information.”

55. The refusal notice and the response to the internal review also refer to prejudice to the free and frank exchange of views.

56. The GMCA submit that the primary reason for the QP's opinion was thus that disclosure of the withheld correspondence could be very upsetting to X and Y's victims (and their families) who had expressed their views to the Mayor and Deputy Mayor of the GMCA (in their capacities relating to Police and Crime Commissioner functions) on a confidential basis so that they could advocate for victims by making frank and confidential representations to the Home Secretary/Home Office about X and Y.

57. It is submitted that if letters conveying victims' experiences and perspectives were to be published to the world at large without their consent, this is likely to cause them upset and distress. There would be a very significant and weighty chance of such upset and distress even though the victims are not individually identifiable. This is likely to deter victims (and their families) from sharing their experiences with GMCA on a confidential basis in the future. That reluctance would significantly impede the ability of the Mayor and Deputy Mayor to advocate robustly on victims' behalf. Such an outcome would be strongly prejudicial to the effective conduct of this aspect of GMCA's public affairs and strongly contrary to the public interest.

58. It is submitted that it was plainly reasonable for the QP to conclude that section 36(2) was engaged on that basis. The conduct of public affairs is a wide concept that is not confined to the discharge of any specific statutory functions. Mr. Williams' submissions about the ambit of the Mayor of the GMCA's functions are nothing to the point. It clearly includes advocating on behalf of victims and putting their concerns to the Home Secretary/Home Office as robustly and effectively as possible to press for positive outcomes for these victims. Section 36(2)(c) is relied upon because the publication of this correspondence would entail a very significant and weighty chance of real, actual and substantial prejudice to GMCA's ability to do this as effectively as possible.

59. A secondary reason for the engagement of section 36(2)(c) is that disclosure would be likely to have a chilling effect on the free and frank exchange of views between GMCA and the Home Secretary/Home Office. This flows in part from the reasons above. If victims are less forthcoming the GMCA's advocacy will be less free and frank. In addition if the GMCA and the Home Secretary/Home Office envisage their correspondence on issues such as this being published shortly after it is written and while the issues under discussion remain live, they are likely to be less candid. This would weaken GMCA's ability to put forward cases and to understand the position of the Home Secretary/Home Office. This would be strongly contrary to the effective conduct of public affairs and to the public interest.

Section 36(2)(c) – public interest

60. The key reasons for maintaining the exemption are summarised at paragraphs 50-52 of the Commissioner's decision:

“50. The Commissioner has considered the severity of disclosure. The subject matter of the request is both high profile with the public, and political in nature. He considers that disclosure could have a significant chilling effect on future frank deliberations between senior office holders. The Commissioner considers that it is important to preserve a safe space for frank deliberations on such an important issue, being the abuse of children.

51. The Commissioner has considered the content of the withheld information. Whilst the subject of the withheld information is regarding the convicted offenders, it also contains frank exchanges regarding the victims of crime, potential risks, operations underway in Greater Manchester, investigations and cases. The extent of the impact of disclosure is potentially very wide, including on the victims, their families and the support agencies.

52. The Commissioner considers it important that the Mayor is able to intervene effectively in a situation as sensitive as this. Whilst the situation is not likely to be very frequent, the negative effect of disclosure on the victims could be potentially very high.”

61. The GMCA submits that these reasons are right and apply squarely to the public interest in maintaining the section 36(2)(c) exemption. It is submitted that there is a very weighty public interest in maintaining that exemption to avert the prejudicial consequences.

62. It is submitted that a further crucial factor is that the issues addressed in the relevant correspondence remained live at the relevant date and remain live now. It is important that this dialogue can continue in a confidential safe space.
63. The public interest in disclosure at the relevant time was much less weighty. There is a significant public interest in transparency in relation to the GMCA's actions in general and specifically in respect of raising concerns with the Home Secretary/Home Office but:
- 63.1. Timing is crucial. There were no very weighty reasons to deliver maximal transparency at the time. Speculative media coverage is not a sufficient reason for immediate disclosure of unresolved ongoing correspondence about highly sensitive issues.
- 63.2. In the circumstances of the case GMCA's duties to the victims of X and Y are more important than its duties of disclosure and transparency to the wider public.

Reply/submissions of Mr. Williams dated 19 May 2023 and 23 June 2023

64. Mr. Williams does not admit that either of the two men were subject to Sexual Harm Prevention Orders made under the Sexual Offences Act 2003.
65. It is denied that the Mayor and Deputy Mayor have duties which mean that they must be able to advocate on behalf of victims of crime on a confidential basis. There is no statutory basis claimed for such duties.
66. The identities of victims of sexual offences are protected by statute. Redactions can be made to the dispute information if required. It is not lawful to take an all or nothing approach to disclosure. The victim's experiences were given in open court at trial.
67. Mr. Williams submits that the reliance on the chilling effect is 'the usual generic plea'.
68. Mr. Williams submits that the QP's opinion is the opinion at the time of answering the request, not later during contact with the Commissioner. It is frozen in time.
69. Mr. Williams quotes the Sun article quoted in the request and highlights the wording: 'Sources close to Mr. **Burnham said they did respond**'. Mr Williams submits that the public interest can only be served by seeing the evidence - the disputed information - and then the voters can make up their mind accordingly.

Evidence

70. We have before us and have read:
70.1. An open hearing bundle

- 70.2. A supplementary hearing bundle
- 70.3. An update closed bundle (file named 'marked redactions')

- 71. The closed bundle consists of an unredacted version of the withheld data and a short exchange of correspondence between the Commissioner and the GMCA in essence confirming that all letters within the scope of the request have been shared with the Commissioner.
- 72. The GMCA has now disclosed a redacted version of the withheld information to Mr. Williams. It is necessary not to disclose to Mr. Williams the information that has been redacted otherwise the purpose of the appeal would be defeated. The copies of correspondence between the Commissioner and the GMCA have now been disclosed to Mr. Williams by the GMCA in error. In the circumstances although those documents remain in the closed bundle it is no longer necessary to withhold them from Mr. Williams, and he has given his undertaking not to disclose them further.
- 73. A closed session was held during the hearing. The following gist of the closed session was given to Mr. Williams:

“Mr Davidson went through the redacted sections, explaining which bases for withholding the information (irrelevance; prejudice to public affairs vis-à-vis victims; prejudice to public affairs vis-à-vis public authority interactions) applied to each.

The Tribunal queried the ways in which these applied to some of the excerpts. Mr Davidson responded.

The Tribunal also queried why some sections remained redacted, whereas some apparently similar sections had been disclosed. Mr Davidson provided an explanation for why the redacted sections were deemed particularly sensitive and potentially prejudicial.

The Tribunal queried more broadly the extent to which the GMCA's position had changed, and why. Mr Davidson explained that, as a matter of black-letter FOIA law, the analysis had not changed. However, as a matter of the overriding objective, the duty to cooperate in narrowing issues and taking a pragmatic approach, an attempt was made to release information which might resolve the appeal.”

- 74. **Legal framework**

Section 36 – prejudice to effective conduct of public affairs

- 75. Section 36(2) provides, in so far as is material:

Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act:

...

(b) would, or would be likely to, inhibit –

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

76. A ‘qualified person’ for the purposes of this appeal is defined in section 36(5) as any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.
77. It is for the tribunal to assess whether the qualified person’s (QP’s) opinion that any of the listed prejudices/inhibitions would or would be likely to occur is reasonable, but that opinion ought to be afforded a measure of respect: **Information Commissioner v Malnick** [2018] UKUT 72 (AAC), [2018] AACR 29 at paragraphs 28-29 and 47.
78. The question for the tribunal is whether the opinion is substantively reasonable, and procedural reasonableness is irrelevant (**Malnick** at paragraph 56).
79. Section 36(2) is a qualified exemption, so that the public interest test has to be applied. When assessing the public interest the tribunal should take account of the QP’s opinion.

The Task of the Tribunal

80. The tribunal’s remit is governed by section 58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner’s decision involved exercising discretion, whether she should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Issues

81. The issues we have to determine are as follows:
1. Has a ‘qualified person’ given an opinion that section 36(2)(c) is engaged?
 2. Was that opinion objectively reasonable?
 3. If so, does the public interest favour maintaining the exemption?

Oral submissions

Oral submissions by Mr. Davidson

82. Mr. Davidson focussed his submissions on the information which remained redacted. He submits that the GMCA has made real efforts to be as transparent as possible while avoiding the prejudice and has now disclosed the majority of the requested information, only withholding those sections which really do 'raise red flags'.
83. In relation to the question of the definition of public affairs, Mr. Davidson submits that advocating on behalf of constituents who have relevant political needs relating to statutory issues will be public affairs. All the parties to this correspondence are acting in their elected and political capacities and so the question of the underpinning statutory basis is irrelevant.

Out of scope material

84. Mr. Davidson submits that it is clear from the closed material that these parts are outside the scope of the request.

Prejudice to public affairs in relation to the victims

85. Mr. Davidson submits that it is hard to imagine a more sensitive context in which a public authority has to handle an issue that has been brought to its attention and where it is advocating for the benefit of some of its constituents. It is well known that victims of sexual assaults encounter significant obstacles when it comes to reporting their experiences. The reliving of the trauma and the possibility of publicity and stigma speak for themselves. There is already a strong public interest in trying to mitigate the disincentives to those people access what they need in any sphere, including pursuing a legitimate political interest. There is a particular need for caution to avoid re-traumatising those people and to avoid imposing any kind of chilling effect which would add to the existing suite of disincentives. The focus of authorities should always be in trying to mitigate those disincentives and trying to encourage and foster a safe space for those people to feel they can come forward.
86. Mr. Davidson submits that there are two particularly acute aggravating factors in this appeal. The first is the extent of the sexual misconduct and second the existing public interest in the broader media in these offences. This has already been across the front pages and is therefore something that people will feel particularly strongly that their privacy needs to be protected.
87. It is submitted that it is important to maintain a safe space so that there is not even a hint in the public domain of people's experiences that they brought in confidence to elected officials.

Prejudice to public affairs in relation to interactions between parts of the State.

88. Mr. Davidson submits that between central government and local government there are lots of areas of common and lots of areas of controversy and areas of competing resources and reputational questions. There are therefore a number of areas in which those bodies may have to engage with each other in order to achieve common goals whilst having to deal with their own stakeholders and competing interests. It is obviously preferable for the conduct of public affairs both that those communications can take place without being put in the public domain so that there can be a safe space for those interactions to take place and for people to be frank and transparent, and so that people can express themselves as robustly as possible without worrying that it will be splashed over the papers and sensationalised.
89. Mr. Davidson submits that there is a real risk of prejudice to public affairs if in future the ability of both sides to express themselves robustly was impaired, or if the way in which people expressed themselves was checked because of the risk of disclosure. This is unhelpful for the interaction itself and for the public who depend on the GMCA's public functions being effective. This is exactly what the exemption is intended to preserve. It is designed to ensure that when people are engaged in the business of government and interacting with each other they have that safe space, and there is a compelling threat to that based on these facts and this withheld information.
90. For those reasons it is submitted that not only is it reasonable for the qualifying person to have reached the decision they did but that the public interest strongly favours keeping that information withheld.
91. Conversely Mr. Davidson submits that that there is very little public interest in disclosing the information:
 - 91.1. There is always a public interest in transparency and accountability but that is very substantially covered off by the existing reporting in this area, which has been an issue of public scrutiny both by the press and by relevant public authorities.
 - 91.2. In the context of how much the GMCA have released within the corners of this request the public interest in disclosure is attenuated. The public interest in releasing the remaining snippets is very minor.
 - 91.3. The relevant time to assess the public interest is the time of the response, but if the passage of time is taken in to account it cuts both ways in terms of the public interest.

Oral submissions by Mr. Williams

92. Mr. Williams submits that the tribunal cannot take account of the parts of the withheld information that the GMCA released in September 2023 because they were not in the public domain at the date of the response.
93. Mr. Williams raised the question again of the lack of statutory authority for the Police and Crime Commissioner to advocate for victims.

Discussion and conclusions

Scope of the request

94. Having reviewed the withheld information we accept that the following material in the closed bundle does not fall within the scope of the request and therefore we find that it does not need to be disclosed to Mr. Williams:
 - 94.1. **Page A11** three substantive paragraphs beginning “We also wanted”, “At present” and “We understand”.
 - 94.2. **Pages A13-A14** all except the paragraph on A14 beginning “With this in mind”.
 - 94.3. **Pages A15-A16** the paragraphs beginning “I recently met with” and “Thank you for providing”.
95. We have referred to his information in our substitute decision notice as ‘Information A’.
96. We note that the table at p E113 also appears to identify as out of scope the paragraph beginning ‘Let me reassure you’ on p A16. This may be an error, because this paragraph is not one of those identified as out of scope in the GMCA’s response. In any event, the tribunal has read this paragraph and considers that it is in scope of the request.

Has a qualified person given an opinion that section 36(2)(c) is engaged?

97. It is accepted that Liz Treacy is a qualified person under section 36(5).
98. The GMCA has now made clear that the pro forma ‘record of the qualified person’s opinion’ was completed after the event during the Commissioner’s investigation, and that the QP’s opinion is contained in an email exchange with the QP in July 2021.
99. The email from the QP dated 1 July 2021 states:

Apologies for the delay in responding to this. I’ve made some minor amends to the letter and the checklist.
100. The email chain shows that the QP was sent the draft letter responding to the request, an internal document entitled ‘public interest checklist’ which gives

scores from 0-5 to reflect the weight given to factors in favour of withholding or disclosing, and the withheld information.

101. It is not clear from the email chain, but we have assumed that the version of the checklist in the bundle is the one amended by the QP. The formatting is difficult to follow, and therefore it is difficult to ascertain which factor is under which heading (i.e. in favour of release or disclosure), but the list of factors and their scores is as follows:

PUBLIC INTEREST TEST - CHECKLIST

Does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

Weight - 1 to 5 where 1 = not very important and 5 = very important

It will promote accountability and transparency in public spending 0

May reveal limitations within Authority processes which could be exploited. 0

It will promote accountability and transparency in decision making by the Authority 0

Release will inhibit the effective delivery of services and/or undermine the Authority's ability to fulfil its role 5

It will assist the public to understand why a decision was made 0

Release will result in unfairness to others 4

It will bring to light information affecting public safety 2

Release may put health and safety of a group or individual at risk 5

It will further the understanding of and participation in the debate of current issues 4

Release may jeopardise the Authority's bargaining position and/or result in the less effective use of public money 0

It will promote openness and honesty 3

Release may diminish chance of a fair trial taking place 0

It will assist individuals in challenging decisions 0

Release may jeopardise an investigation or diminish chance of a successful prosecution 3

The case has been completed or abandoned with no real prospect of being re-opened 0

Release may impede other on-going or future investigations and/or facilitate the commission of a crime 0

Release may expose wrongdoing on the part of the Authority or its members of officers 0

Information was volunteered by third parties and release may jeopardise future participation 0

It will be fair to those who are the subject of the information 0

Withholding may protect victims 5

The information will be published in the future, but not for a relatively long period of time or at no set date 0

The information is already in the public domain 0

Release may cause damage and distress to others 5

Release may hinder the full and frank sharing of information and/or the receipt of detailed advice. 5

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102. The reference to the letter refers to the draft response letter sent to the QP. The version in the email chain appears to include the QP's amendments. It includes a note from TL1 (presumably Treacey, Liz the QP) which reads 'I've deleted this as the PCC is not taking a decision'. The QP also seems to have

made a minor wording change. The letter, as amended, is in materially identical terms to the letter sent to Mr. Williams in response to his request.

103. The pro forma sets out that the opinion was sought in relation to sections 36(2)(b)(i) and 36(2)(c). It states that the requested information was shown to the QP. In the section entitled 'arguments put forward as to why inhibition would/would be likely to occur' the submission states:

Release may hinder the full and frank sharing of information and/or the receipt of detailed advice

Release may put health and safety of a group or individual at risk

Release will result in unfairness to others

Release will inhibit the effective delivery of services and/or undermine the Authority's ability to fulfil its role

104. Under 'counter arguments put forward' the submission states:

It will further the understanding of and participation in the debate of current issues

It will promote openness and honesty

105. Under 'any other factors taken into account' the submission states:

The Mayor, Deputy Mayor, a local MP and the Home Secretary have exchanged a series of letters regarding delays to the planned deportation of offenders convicted of CSE offences in Rochdale following media reports about victims meeting their abusers in local shops.

The Mayor and Deputy Mayor in their roles relating to the PCC have duties relating to victims. The Mayor and Deputy Mayor must be able to advocate on behalf of victims in Greater Manchester on a confidential basis.

The ongoing public discourse about progress in these cases is likely to cause further upset and distress to the victims without warning and without police or organisations providing support being prepared to offer additional support or information.

106. In the section headed 'The qualified person's opinion', the boxes indicating the relevant inhibition which the QP considers would or would be likely to occur have not been ticked, and the form is not signed. However text has been inserted under section 36(2)(c) which states 'disclosure of this information would be likely to prejudice the effective conduct of public affairs.

107. It is unfortunate that we have not been provided with any document which clearly contains the opinion of the Qualified Person. If a public authority wishes to rely on the opinion of a Qualified Person, it should ensure that the opinion and the reasons for that opinion are clearly recorded.

108. The internal email from the QP dated 2 July 2021 does not contain any opinion. It simply states that the QP has made 'some minor amends to the letter and the checklist'. We infer from this that the QP has read and agrees with the contents of the response letter ultimately sent to Mr. Williams on 5 July 2021 and the checklist (as amended).
109. The response letter states that the information is exempt from disclosure under 'Section 36(2)(c) of the Freedom of Information Act (FOIA); disclosure of this information would be likely to prejudice the effective conduct of public affairs'.
110. We are prepared to infer from the fact that the QP has read and approved that letter the fact that the QP must have agreed that section 36(2)(c) was engaged. We therefore accept that she has, a least impliedly, given an opinion that section 36(2)(b)(c) is engaged, and we accept that it was her opinion that disclosure would be likely to prejudice the effective conduct of public affairs.

Was that opinion objectively reasonable?

111. We bear in mind that our role is restricted to considering whether the qualified person's opinion is reasonable rather than whether or not we agree with it.
112. We have proceeded on the basis that the reasons for reaching the opinion are set out in the response letter and the checklist, which the QP reviewed and approved. We have also taken into account the fact that the QP had seen the withheld information. This appears to be the basis on which the QP concluded that disclosure of the information would be likely to prejudice the effective conduct of public affairs.
113. The response letter states:

The Mayor and Deputy Mayor in their roles relating to the Police Crime and Commissioner have duties relating to victims of crime. The Mayor and Deputy Mayor must be able to advocate on behalf of victims of crime in Greater Manchester on a confidential basis. The ongoing public discourse about progress in these cases is likely to cause further upset and distress to the victims without warning, and without police or organisations providing support being able to offer immediate additional support or information.
114. In relation to the public interest, the factors in favour of withholding the information are said to be:
 - 114.1. Release may hinder the full and frank sharing of information and/or the receipt of detailed advice
 - 114.2. Release may put health and safety of a group or individual at risk
 - 114.3. Release will result in unfairness to others

- 114.4. Release will inhibit the effective delivery of services and/or undermine the Authority's ability to fulfil its role.
115. The explanation and the factors broadly overlap with the points made by the GMCA in its response and in its submissions before the tribunal. In essence the GMCA relies on two types of prejudice:
- 115.1. That disclosure of letters conveying victims' experiences and perspectives would be likely to cause victims to be reluctant to talk to their elected representatives to try to get matters taken forwards politically, and
- 115.2. That disclosure would be likely to inhibit full, frank and robust communications between central and local government.
116. We accept that neither the Police and Crime Commissioner nor the Mayor or Deputy Mayor have any express statutory duty to 'advocate' on behalf of victims, but we accept that conducting the type of discussions contained in the correspondence, including making representations to the Home Secretary or the Home Office about issues raised by constituents clearly falls within the category of conducting public affairs.
117. Taking into account that we must not substitute our own view for the QP's view, for all the reasons set out above we accept that the opinion is substantively reasonable.

Public interest balance

118. Mr. Davidson did not concede that the information that has now been released should have been released at the time, nor did he make any substantive submissions in relation to the parts that have now been released, or explain in what way the public interest balance had changed since the relevant time, if at all.
119. On that basis, we find that at the time of the response the public interest favoured disclosure in relation to those parts of information that were released in September 2023, but we have ordered no steps to be taken. We have referred to this information in our substitute decision notice as 'Information B'.
120. None of the information in the letters had been released at the date of the response. Although the GMCA has, sensibly, focussed its arguments on the information that remains redacted, the information that was released in September 2023 was not in the public domain at the time of the response and therefore the fact that that information is not in the public domain does not reduce the public interest in disclosure.

121. In assessing the public interest balance, we must reach our own conclusions as to the likelihood and severity of prejudice to public affairs. In doing so, we must accord appropriate weight to the opinion of the QP.
122. We accept that any disclosure of information conveying victims' experiences and perspectives, or indeed any reference to the involvement of victims or reference to representations being made on behalf of victims carries a clear risk of deterring victims (and their families) from sharing their experiences with GMCA in the future. We agree with Mr. Davidson that this applies if there was even a hint in the public domain of people's experiences that they brought in confidence to elected officials. We accept that this would significantly impede the ability of the Mayor and Deputy Mayor to make robust representations on victims' behalf which would be strongly prejudicial to the effective conduct of this aspect of GMCA's public affairs and strongly contrary to the public interest. There is a very strong public interest in maintaining the exemption in relation to these parts of the letters.
123. We consider that this specific prejudice, and thus the very strong public interest in maintaining the exemption, would only arise from the disclosure of the following sections of the letters:
 - 123.1. The clause beginning "and in advance" on page A8 of the closed bundle.
 - 123.2. The paragraph beginning "This delay" on page A10 of the closed bundle.
 - 123.3. The two redacted sentences beginning "Nor would" and "In any case" on page A11 of the closed bundle.
 - 123.4. The two redacted sentences beginning "My officials" on page A15 of the closed bundle.
124. We have referred to this information in our substitute decision notice as 'Information C'.
125. The remaining withheld sections of the letters do not, in our view carry any risk of the above prejudice. These are:
 - 125.1. The paragraphs beginning "We find" and "We wrote to you" on page A2 of the closed bundle.
 - 125.2. The paragraph beginning "There are" on page A4 of the closed bundle.
 - 125.3. The sentence beginning "In so doing" and the subparagraphs beginning "You said" and "What are" on page A6 of the closed bundle.
 - 125.4. The sentence beginning "As I explained" on page A8 of the closed bundle.

- 125.5. The paragraphs beginning "In your previous" and the sentence beginning "We have not" on page A10 of the closed bundle.
 - 125.6. The sentence beginning "While these orders" on page A10/A11 of the closed bundle.
 - 125.7. The redacted portions of the sentence beginning "With this in mind" including the redacted section beginning "and the ongoing" on page A14 of the closed bundle.
 - 125.8. The two sentences beginning "The immigration cases" and "Indeed" on page A15 of the closed bundle.
 - 125.9. The paragraph beginning "Let me" on page A16 of the closed bundle.
126. We refer to those remaining sections in our substitute decision notice as 'Information D'.
127. Those remaining sections have been withheld on the basis that disclosure would be likely to have a chilling effect on the free and frank exchange of views between the GMCA and the Home Secretary/Home Office. This is broadly on the basis that those particular sections either contain robust comments or an acknowledgement by one of the parties of difficulties arising out of the complexity of the issues in these cases.
128. We accept that there is, in general, a public interest in maintaining a safe space for free and frank discussions between central and local government. We accept that the matters discussed in the letters were live at the date of the response to the request (and, we understand from the GMCA's response, remain live). Thus we accept that there remained a need at the relevant time for a 'safe space' for full and frank discussions between central and local government.
129. However, given the content of the redacted sections and the nature of the correspondence, we find that there was a low likelihood of a chilling effect being caused in these particular circumstances and a limited impact on the safe space and therefore we have concluded that this carries only moderate weight in the public interest balance.
130. In our view there is a very low risk that disclosure of Information D would lead to any chilling effect for the following reasons.
131. This is not an informal unguarded email exchange. These are not exchanges in the context of a fast-moving process or in the course of an iterative process. These are formal letters in which the parties are robustly stating their case in a considered manner.
132. Given (i) the type of communications (ii) the nature and content of the discussions, in terms of formality, purpose and subject matter and (iii) the

identities of the parties to those communications, we do not accept that the parties would be surprised by disclosure under FOIA, even though subject matter remained 'live' at the relevant date and indeed remains live, to the extent that disclosure would be likely to alter their future behaviour or the future behaviour of other parties in similar situations.

133. We think there is a very low risk that individuals of that calibre and level of authority would be deterred from fulfilling their public duties and for pressing hard for action on issues of importance to their constituents because of a risk of publicity that they might perceive flowed from our decision to disclose the redacted information.
134. In terms of the specific content that has been withheld, we do not consider that the tone or content of the robust comments made by any of the parties are likely to lead to sensationalist headlines. The points are made robustly, but not in a way that would not be expected of the parties in question in this context. The parties remain polite and professional. If unwarranted publicity does occur, we would expect the individuals in question, and individuals in a similar situation in the future to be well used to media criticism and to be undeterred for the reasons set out above.
135. As well as robust comments, Mr. Davidson highlighted particular parts of the letter where one of the parties acknowledged difficulties arising out of the complexity of the issues. Having considered the specific content of those sections, we find them to be moderate comments which are not of particular note. These are self-evidently complex cases that concern difficult issues. We do not accept that such an acknowledgement made in the particular terms used in the correspondence risks sensationalist headlines, nor do we accept that the parties in question, or parties in similar situations in the future, would be undeterred acknowledging difficulties in the future because of a fear of public criticism.
136. In summary, we do not think there is anything particularly frank or controversial said by either party which would lead to more than a small risk of a future chilling effect if disclosed, either in the context of continuing discussions of this issue, or other similar discussions between local and central government.
137. We take account of the opinion of the QP, but that opinion was not given in relation to the clearly defined prejudices now put forward by Mr. Hopkins and Mr. Davidson. It did not address the specific sections of the correspondence that we are now addressing. It was a broad-brush opinion in relation to the whole set of correspondence, many parts of which have now been released. For those reasons, whilst we take that opinion into account, we do not think it is of significant assistance to us when assessing the level of risk of prejudice that would be caused by release of these particular sections.

138. Overall our conclusions are that there is only fairly moderate public interest in withholding Information D.
139. In terms of the public interest in disclosure, we accept that there would be a high public interest in disclosure of the entire unredacted correspondence because of:
- 139.1. the high public interest in transparency in relation to the actions taken or not taken by the Home Office/the Home Secretary and/or the GMCA in relation to these offenders, given the nature of the crimes of which they were convicted and the ongoing potential consequences/risks for victims or the public;
- 139.2. the high public interest in an informed understanding and informed participation in public debate in relation to those actions.
140. We accept that by the time of the tribunal hearing, the GMCA had taken a pragmatic and proportionate approach and released the majority of the letters. However, this does not alter our conclusion there was a high public interest at the relevant time in seeing the entire unredacted correspondence, to the extent that it was within scope. We bear in mind that the parts that have now been released were not in the public domain at the time.
141. However, we have concluded that the public interest is reduced to some extent by the existing reporting on this issue at the time, which has already enabled public scrutiny to some extent both by the press and by relevant public authorities. For that reason we conclude the public interest in disclosure is only fairly high.
142. Weighing up the public interest balance in relation to information C, we conclude that the fairly high public interest in disclosure is outweighed by the very strong public interest in maintaining the exemption. The GMCA is accordingly entitled to withhold information C.
143. In relation to information D we find that the fairly moderate public interest in maintaining the exemption is outweighed by the fairly high public interest in disclosure. The GMCA is therefore not entitled to withhold information D.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 15 December 2023