

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 August 2013

Public Authority: The Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested CCTV footage from cameras on Whitehall which showed Andrew Mitchell MP attempting to leave Downing Street on his bicycle by the main gate in September 2012. The Cabinet Office originally refused to provide it citing section 40 (unfair disclosure of personal data) as its basis for doing so. During the Commissioner's investigation it changed its position and argued that the footage was exempt under section 31 (prejudice to law enforcement) because the matter had become the subject of an investigation by the Metropolitan Police. It argued that the public interest favoured maintaining this exemption.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 31 as a basis for withholding the requested information. However, he has concluded that the Cabinet Office contravened section 10(1) and section 17 of the FOIA in failing to provide a refusal notice within 20 working days.
3. No steps are required.

Request and response

4. On 23 December 2012, the complainant requested information of the following description:

"I write to ask for a copy of the footage of Mr Andrew Mitchell, the former Chief Whip, taken from Whitehall and showing him leaving Downing Street on the evening of September 19 this year or a link to where that footage is online. Specifically, I request footage from the period 19:35 to 19:40 from all available angles on Whitehall.

5. Please note that I request a copy of the footage unedited - and with the timecode properly and full visible - and not deliberately obscured as was the case in the Channel Four News broadcast."
6. On 6 February 2013, the Cabinet Office responded. It refused to provide the requested information. It cited the FOIA exemption at section 40(2) - Unfair disclosure of personal data - as its basis for doing so.
7. The complainant requested an internal review on 7 February 2013. The Cabinet Office sent him the outcome of its internal review on 7 March 2013. It upheld its original position and explained that an unedited version of the footage would show individuals unconnected with the incident and disclosure would be unfair to those individuals.

Scope of the case

8. The complainant contacted the Commissioner on 10 March 2013 to complain about the way his request for information had been handled.
9. He explained to the Commissioner that he now agreed to accept footage with images of individuals unconnected with the incident pixelated such that their identities were obscured. This appeared to remove the barrier to disclosure that the Cabinet Office had initially raised.
10. The Commissioner sought the Cabinet Office's view on this proposal for informal resolution of the matter on 14 May 2013. After considerable delay on the Cabinet Office's part during which time no further arguments against disclosure were provided to the Commissioner, a representative of the Commissioner viewed the footage on 23 July 2013. The Cabinet Office then provided its arguments against disclosure of any of the footage on 31 July 2013. It now argued that the footage was exempt under section 31(1)(a), (b) and (c). It explained that this was "on the basis of ongoing investigations by the Metropolitan Police and the Crown Prosecution Service". It also explained that it was applying this exemption in relation to both pixelated and unpixelated footage.
11. It should be noted that the Cabinet Office interpreted the request broadly. It included within the scope of the request footage taken from cameras that cover both Whitehall and Downing Street and not "footage ...from Whitehall" as stated in the request.
12. The Commissioner has therefore considered whether the Cabinet Office is entitled to rely on the provisions of section 31 that it has cited as a basis for withholding the requested information.

13. The Commissioner has also looked at whether the Cabinet Office complied with its procedural obligations under the Act in respect of the time it took to respond to the complainant's request.

Reasons for decision

Section 31(1)(a)

14. Information which is not exempt from disclosure by virtue of section 30 is exempt on the basis of section 31(1)(a) if its disclosure would, or would be likely to, prejudice the prevention or detection of crime.
15. Section 31(1)(a) is a prejudice based exemption. This means that in order to engage the exemption, there must be likelihood that disclosure would cause prejudice to the interest that the exemption protects. 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 disputed information was disclosed must 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 disputed information and the prejudice 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. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold (would be likely), the Commissioner believes 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.

16. In support of its reliance on section 31, the Cabinet Office explained that the footage was being considered as part of "ongoing investigations by the Metropolitan Police Service and the Crown Prosecution Service".¹
17. Regarding the first criterion, the Commissioner is satisfied that the harm envisaged by the CPS is one which section 31(1)(a) is designed to avoid. It relates to the applicable interest in the relevant exemption. He is satisfied that there is an ongoing investigation and notes coverage of this in the media.²
18. Regarding the second criterion, the Commissioner considered the withheld information. He is satisfied that it covers events which are currently the subject of an ongoing police investigation.
19. Regarding the third criterion, the CPS did not specify which level of prejudice it was seeking to argue. The Commissioner has therefore considered the lower level of "likely" prejudice. He has considered the information and has concluded that the prejudicial outcome described in the exemption would be likely where the information were to be disclosed. If the footage were to be made publicly available at this stage of the investigation, the Commissioner can see how witnesses to events or those against whom wrongdoing is alleged could alter their testimony to match the footage. It is important for any investigation that witnesses provide statements and testimony according to their own recollection and not to match other evidence which they know to be available to the police.
20. The Commissioner also notes that certain parts of the requested footage have been put into the public domain and were broadcast by Channel 4 News. This is referred to in the complainant's request.³ However, the footage put into the public domain did not show the exact time that events took place. The complainant has specifically requested footage with the "timecode properly and full visible". In considering disclosure of footage that is already in the public domain, the Commissioner has considered whether the footage plus the time information should be disclosed because this is what the complainant specifically requested.

¹ There had been two arrests in December prior to the date of the request
<http://www.itv.com/news/update/2012-12-20/man-arrested-as-part-of-downing-street-inquiry-into-mitchell-incident/>

² <http://www.bbc.co.uk/news/uk-politics-23170959>

³ <http://www.channel4.com/news/andrew-mitchell>

21. In light of the above, the Commissioner is therefore satisfied the withheld information is exempt information under section 31(1)(a). He agrees that disclosure would be likely to prejudice the prevention or detection of crime.
22. By virtue of the effect of section 2(2)(b), exempt information must be disclosed if, in all the circumstances of the case, the public interest in maintaining the applicable exemption does not outweigh the public interest in disclosure.

Public interest factors favouring disclosure

23. The Cabinet Office recognised a general public interest in transparency and accountability but did not consider that this added sufficient weight to the public interest in disclosure.
24. The events covered in the footage have been the subject of considerable coverage in the media (see example at Note 1). Shortly after the events recorded in the requested footage, there was an allegation made against Andrew Mitchell MP (at the time he was the newly appointed Government Chief Whip). It was alleged that he had used a derogatory term against officers who had refused to allow him to exit Downing Street on his bicycle via the main gate. Mr Mitchell admitted swearing and apologised for doing so but denied that he had used a derogatory term against officers. After considerable public furore, during which Mr Mitchell consistently denied using the derogatory term in question, he resigned as Chief Whip. Subsequently, questions were raised as to veracity of the allegation that he had used a derogatory term during the incident. At the time of writing this decision notice, the matter had become the subject of a police investigation and individuals have been arrested.
25. The events in question have had (and continue to have) sensitive and complex consequences. A number of individuals have been directly and adversely affected by what has happened. The furore referred to above initially lead to suggestions that senior public figures did not have sufficient respect for Crown servants such as the police and for other public servants. The subsequent investigation into the veracity of the allegations against Mr Mitchell have, in turn, led to doubts about other individuals in whom considerable public trust has been vested. There is considerable public interest in obtaining a clearer picture of what happened and whether there has been any wrong doing in public office by any party. Disclosure of the footage would provide a piece of the puzzle that would allow the public to learn more about the events.

Public interest factors against disclosure

26. The Cabinet Office set out the following arguments against disclosure:
"Disclosure of the information held could prejudice the investigation into the conduct of certain individuals ... it is clearly in the public interest, where investigations are ongoing, to allow those investigations to take their course and conclude without interference or pressure caused by premature release of information subject to those investigations."

Balance of the public interest

27. As noted above, the Commissioner must consider the circumstances of each case when reaching a view as to the balance of public interest. He recognises that routine disclosure of material that has become the subject of a police investigation would clearly have a negative impact on the conduct of criminal investigations to the obvious detriment of the public interest. However, the subject matter in this case, alleged wrongdoing by individuals in public service or in public office not only attracts considerable public attention but has also given rise to a loss of trust in those in public office or those undertaking public service. This would seem like a compelling argument in favour of transparency of available evidence (such as the requested information) in order to aid in the rebuilding of trust.
28. However, the Commissioner is firmly of the view that the investigation should be allowed to proceed unhindered by the disclosure of part of the evidence being considered as part of that investigation. While he accepts that the public may be very interested to see what the footage shows, this does not mean that the public interest would be best served by such disclosure while an investigation is ongoing.
29. Although the public is entitled to expect the highest standards of probity from those in public service and in public office, the public is also entitled to expect that allegations of wrong-doing by those in public service and public office are fully investigated and that those investigations are not hampered in any way.
30. In light of the above, the Commissioner is therefore satisfied that on balance, the public interest in maintain section 31(1)(a) outweighs the public interest in disclosing the requested information. In reaching this view, he has given particular weight to the fact that an investigation is ongoing. He has also given weight to the seriousness of the allegations that are under investigation.
31. The Commissioner has not considered whether sections 31(1)(b) and 31(1)(c) are applicable because he is already satisfied that the information is exempt under section 31(1)(a) and that the public interest favours maintaining this exemption.

Section 10(1) and section 17(1)

32. Section 10(1) of the FOIA requires that a public authority complies with section 1(1) promptly and in any event not later than 20 working days following the date that a request was received. If public authority is seeking to rely on an exemption to refuse to comply with a request then, in line with section 17(1), it must provide the requestor with a refusal notice, within 20 working days, stating which exemption(s) is being relied upon. It can extend the deadline for response where it is considering the balance of public interest test but it must first tell the complainant within 20 working days which exemption it is seeking to rely on.
33. By the Commissioner's calculation, it took 37 working days for the Cabinet Office to tell the complainant that it was seeking to rely on section 40(2) although it later withdrew reliance on this exemption.
34. In failing to comply with section 1(1) within 20 working days of the request, the Cabinet Office contravened the requirements of section 10(1) of the FOIA. In failing to cite which exemption it was seeking to rely on within 20 working days, the Cabinet Office contravened the requirements of section 17(1) of the FOIA.

Right of appeal

35. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

36. 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.
37. 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

Graham Smith
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