

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 August 2022

Public Authority: Commissioner of Police of the Metropolis
Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant has requested a copy of body worn video (BWV) footage in connection with a police shooting, from the Metropolitan Police Service (the "MPS"). The MPS refused to provide the footage, citing sections 30(1) (Investigations and proceedings), 31(1) (Law enforcement), 38(1) (Health and safety) and 40(2) (Personal information) of FOIA.
2. The Commissioner's decision is that sections 40(2) and 31(1) are both properly engaged. No steps are required.

Background

3. The request in this case was for information about an incident in which a member of the public was fatally shot by police. While BWV cameras were worn by attending officers, it is understood that that not all cameras were activated.
4. The incident was investigated by the Independent Office for Police Complaints (IOPC) which analysed the BWV footage. The IOPC determined that the officers had acted appropriately. It is not known whether they considered the way the BWV was used.
5. According to media reports which the Commissioner has viewed, two of the officers concerned did not activate their BWV and a third had

buffering issues with the equipment. How accurate these reports are is not known.

Request and response

6. On 7 July 2021, the complainant wrote to the MPS and requested information in the following terms:

“Under the Freedom of Information Act 2000, please can you provide me with the following:

All body worn video recorded by officers on [date redacted] at the shooting of [name and location redacted]. The incident is detailed here: [newspaper article redacted]”.

7. On 13 August 2021, having extended the response time in which to consider the public interest, the MPS responded. It refused to provide the requested information citing the following exemptions: 30(1) (Investigations and proceedings), 31(1) (Law enforcement), 38(1) (Health and safety) and 40(2) (Personal information) of FOIA.
8. On 17 August 2021, the complainant requested an internal review.
9. On 1 September 2021, the MPS provided an internal review. It maintained its position.

Scope of the case

10. The complainant contacted the Commissioner on 17 September 2021, to complain about the way his request for information had been handled. He argued:
- “The Metropolitan Police declined my request for body worn footage revealing failings in use of body work [sic] video during a serious incident. Use of body worn video is a poorly scrutinised policing tool and release of this footage would be of significant public interest in helping provide such scrutiny”.
11. The Commissioner has not viewed the BWV footage. However, he does not deem this necessary in order to reach a decision in this case.
12. Each exemption has been cited in respect of the footage in its entirety.
13. The Commissioner has anonymised the request to prevent any further distress to those who knew the deceased.

14. The Commissioner will consider the application of exemptions to the request below.

Reasons for decision

Section 40 – Personal information

15. 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.
16. In this case the relevant condition is contained in section 40(3A)(a)¹. 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').
17. 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 the FOIA cannot apply.
18. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

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

20. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
21. 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.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

22. 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.
23. The request is for video footage from BWV cameras worn by police officers at a serious incident. Clearly the footage could be used to identify those officers concerned, both visually and vocally, as well as any third parties who were captured on the footage.
24. In the circumstances of this case, the Commissioner is satisfied that the information relates to both the officers concerned and to other third parties. He is therefore satisfied that this information both relates to and identifies these parties. The requested information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
25. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
26. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

27. 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".
28. 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.
29. 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.
30. In addition, if the requested data is criminal offence data, in order for disclosure to be lawful and compliant with principle (a), it must also meet the requirements of Article 10 of the UK GDPR.

Is the information criminal offence data?

31. Information relating to criminal convictions and offences is given special status in the UK GDPR.
32. Article 10 of the UK GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to:

- (a) The alleged commission of offences by the data subject; or
 - (b) Proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.
33. Having considered the wording of the request, the Commissioner finds that the requested information does include criminal offence data. He has reached this conclusion on the basis that the BWV footage was of a crime scene and has been used by the IOPC to identify whether or not the officers concerned had committed any criminal offence that would need to be referred to the Crown Prosecution Service.
34. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.
35. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under the FOIA are the conditions at Part 3 paragraph 29 (consent from the data subject) or Part 3 paragraph 32 (data made manifestly public by the data subject).
36. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
37. As none of the conditions required for processing criminal offence data are satisfied there is no legal basis for its disclosure. Processing this criminal offence data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.
38. As he has not viewed the footage, and in the event that the officers may not be identifiable from all parts of the footage content, the Commissioner has gone on to consider the disclosure of the personal information of any third parties who also may have been captured on the footage.

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

39. 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”².

40. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the 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.
41. 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

42. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a
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² 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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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”.

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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

43. The complainant has argued that release of the footage is necessary as it would allow the public to scrutinise police use of BWV generally. He is also of the view that its disclosure would revealing failings of BWV use during this particular incident.

44. The MPS has recognised that:

"... disclosure of the requested information would demonstrate our commitment to transparency and openness and would show the professionalism of the officers in attendance.

Disclosure may also improve the quality of public debate regarding related issues. This may also enhance public confidence.

There is also a legitimate public interest in informing public debate in relation to issues surrounding the conduct of police officers".

Is disclosure necessary?

45. '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.

46. The Commissioner is limited in what he will argue in this case as he does not wish to distress any of those parties concerned.

47. The complainant considers that disclosure is necessary to allow for public scrutiny into the use of BWV. In his view, disclosure will also evidence failings in how the BWV was used during the incident.

48. The Commissioner accepts that disclosure may go some way in evidencing such a failure, if indeed a failure did occur. As such, there is a legitimate interest in its disclosure.

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

49. 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 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.
50. 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.
51. In the Commissioner's view, a key issue is whether the data subjects 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.
52. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
53. The MPS has explained to the complainant:

"Although the BWV was provided to the IOPC [Independent Office for Police Conduct] as part of their investigation, release of the footage into the public domain would be unfair as those linked to footage captured would not reasonably expect the MPS to publish information that would allow them to be identified and / or their personal information placed into the public domain. Disclosure of the requested information could be prejudicial to those concerned and may lead to an invasion of their privacy by unwanted and unsolicited intrusion from the media or others interested in the facts of the matter and / or could lead to harm to the individuals concerned.

Even though the public has an interest in the BWV footage, information which the public finds of interest about individuals is not necessarily in the public interest to disclose and in respect of personal information would be in contravention of data protection legislation.

The MPS has to be mindful of the impact of disclosure of personal information on all individuals captured by the BWV".

54. The MPS also advised the Commissioner:

"The personal information would directly relate to the ... MPS officers who discharged their weapons, other MPS officers who responded to the incident, witnesses ... London Ambulance staff present at the scene. Therefore disclosure of the BWV Footage would risk identifying these living individuals which would be in breach of DPA principles.

... The data subject(s) to whom the requested information relates too [sic] have not been asked if they are willing to consent to disclosure of the requested information to the world in response to the FOIA request as this would be impractical and inappropriate in the circumstances and neither has this held information been deliberately made public by the MPS.

... Whilst the MPS understands the complainant may have specific reasons for wanting to access the requested information relating to their views about the scrutiny of the use of body worn camera's the MPS have to take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the world. The MPS have considered the wider public interest issues and the fairness to the individual's [sic] (in particular the family of the deceased and the ... police officers) when deciding whether or not the information is suitable for disclosure. This matter was referred to the IOPC for investigation and was investigated thoroughly through their independent processes. The outcome on completion which was published in their report. The IOPC investigation also analysed the BWV footage which we believe meets the public interest".

55. The Commissioner considers that none of the parties concerned would have a reasonable expectation that the BWV footage would be placed in the public domain. The identities and actions of any third parties or other emergency response staff captured in the recordings would be revealed in what would have been a very distressing event at the time. These parties would have no expectation of full disclosure in this way.

56. Furthermore, as there is every likelihood that the media and other interested parties would try to locate the parties concerned, this would be very likely to cause them, and their friends and families, unwarranted damage and distress.

57. 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 and so the disclosure of the information would not be lawful.

58. 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 Commissioner's view

59. The Commissioner has therefore decided that the MPS was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Section 31 – Law enforcement

60. Having not viewed the footage, to the extent that any of it is not personal data, the Commissioner has gone on to consider section 31. This exemption has been applied to the footage in its entirety.
61. Section 31 of FOIA creates an exemption from the right to know if disclosing the information would, or would be likely to, prejudice one or more of a range of law enforcement activities. In this case, the MPS is relying on sections 31(1)(a) and (b) of FOIA in relation to the withheld information.
62. These subsections state that information is exempt if its disclosure would, or would be likely to, prejudice: (a) the prevention or detection of crime; or (b) the apprehension or prosecution of offenders.
63. In order to engage a prejudice based exemption such as section 31 there must be likelihood that disclosure would, or would be likely to, 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 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 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 – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

64. Consideration of the exemption at section 31 is a two-stage process: even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
65. In its submission to the Commissioner, rather than differentiate between the subsections of the exemption, the MPS has presented one set of arguments. The Commissioner recognises that there is clearly some overlap between subsections 31(1)(a) and 31(1)(b) and he has therefore considered these together.

The applicable interests

66. The first step in considering whether this exemption is engaged is to address whether the prejudice predicted by the public authority is relevant to the law enforcement activities mentioned in sections 31(1)(a) and (b) – the prevention or detection of crime and the apprehension or prosecution of offenders.
67. With respect to law enforcement activities, the Commissioner recognises in his published guidance³, that section 31(1)(a) will cover all aspects of the prevention and detection of crime. With respect to section 31(1)(b), he recognises that this subsection: "... could potentially cover information on general procedures relating to the apprehension of offenders or the process for prosecuting offenders".
68. The Commissioner acknowledges that the arguments presented by the MPS refer to prejudice to the prevention or detection of crime and to the apprehension or prosecution of offenders and that the appropriate applicable interests have therefore been considered.

The nature of the prejudice

69. The Commissioner next considered whether the MPS has demonstrated a causal relationship between the disclosure of the information at issue and the prejudice that sections 31(1)(a) and (b) are designed to protect. In his view, disclosure must at least be capable of harming the interest in some way, ie have a damaging or detrimental effect on it.
70. The MPS has explained:

³ <https://ico.org.uk/media/for-organisations/documents/1207/lawenforcement-foi-section-31.pdf>

“Any information captured on the BWV would reveal tactical information in respect of our firearms officers. To release any footage which captures such details would present harm as it would provide the public with sensitive operational details, not just relating to this incident but which could be used to determine how future similar incidents would be controlled by armed officers, which could ultimately undermine operational policing.

Disclosure under the Freedom of Information Act must be considered disclosure to the world. If the MPS disclose the BWV footage the same information would need to be disclosed to any other individual who makes the same request. The content which details firearms operational tactics, techniques and processes would provide the public with insight into how the police do and do not operate to firearms incidents. Disclosure therefore provides those with criminal intent further intelligence into how they may be able to disrupt police activity and seek to undermine and evade detection and apprehension.”

71. The Commissioner accepts that disclosing the type of information that is recorded in the footage would give a valuable insight into how the MPS deal with serious incidents such as this. This would obviously be of use to offenders seeking to avoid detection or wishing to undermine police tactics in the future.
72. With regard to the likelihood of prejudice in this case, the MPS has not confirmed the level of likelihood being relied on. The Commissioner has therefore considered the lower level of ‘would be likely to’ prejudice.

Is the exemption engaged?

73. In a case such as this, it is not enough for the information to relate to an interest protected by sections 31(1)(a) and (b), its disclosure must also at least be likely to prejudice those interests. The onus is on the public authority to explain how that prejudice would arise and why it would occur.
74. The Commissioner recognises the importance of protecting information which, if disclosed, would undermine law enforcement activity or make someone more vulnerable to crime.
75. Having considered the arguments put forward by the MPS, the Commissioner accepts that the requested information would be useful to someone intent on establishing how the MPS would be likely to approach a scenario involving a gun, revealing how the MPS reacts to and deals with situations such as this. Disclosure would reveal actions that it takes, which would, in turn, be likely to be prejudicial to law enforcement. Consequently, the Commissioner is satisfied that

disclosure would be likely to represent a real and significant risk to law enforcement matters.

76. On the evidence provided, the Commissioner is satisfied that the MPS has demonstrated a causal link between the requested information and the applicable interests relied on, and that disclosure would be likely to have a detrimental impact on law enforcement.
77. As the Commissioner accepts that the outcome of disclosure predicted by the MPS would be likely to occur, he is therefore satisfied that the exemptions provided by sections 31(1)(a) and (b) are engaged.
78. Section 31 is a qualified exemption. The Commissioner must now consider whether, in all the circumstances of the case, the public interest in maintaining the exemption at sections 31(1)(a) and (b) of FOIA outweighs the public interest in disclosing the information requested by the complainant.

Public interest considerations favouring disclosure

79. The complainant has argued that disclosure would provide for public scrutiny of police actions in such situations.
80. The MPS recognises that disclosure of the BWV footage would enable the public to understand exactly what happened, along with the specific circumstances of the shooting. Disclosure would demonstrate transparency and accountability.

Public interest arguments in favour of maintaining the exemption

81. The MPS has argued:

“Disclosure of the BWV would in effect reveal the tactics of the firearms officers who attended the scene for example how they approached the scene, how many officers were required/attended, the call signs of the officers and vehicles. This in turn would limit our operational capabilities as individuals would gain a greater understanding of the MPS’s methods and techniques, enabling offenders to take steps to counter them which also could suggest the limitations of our capabilities in firearms incidents which may further encourage criminal activity by exposing potential vulnerabilities.

Just as police collect information for intelligence purposed [sic] so do those intent on committing criminal acts and the release of any information relevant to this request places useful information into the public domain and increases the likely ‘mosaic’ effect.

It would not be in the public interest to disclose the requested information that would compromise our ability to prevent and detect crime. This is particularly important should those with the intent to use the content as intelligence and methodology to evade detection/apprehension and gain an operational advantage over MPS resources and tactics”.

Commissioner's conclusion

82. In carrying out the statutory balancing exercise in this case, the Commissioner considers that appropriate weight must be afforded to the public interest inherent in the exemption - that is, the public interest in avoiding likely prejudice to law enforcement matters. Clearly, it is not in the public interest to disclose information that may compromise the police's ability to accomplish its core function of law enforcement, and by doing so, endanger the public.
83. In that respect, he recognises that there is a very strong public interest in protecting the law enforcement capabilities of a police force and he considers that appropriate weight must be afforded to the public interest inherent in the exemption – that is, the public interest in avoiding prejudice to the prevention or detection of crime and the apprehension or prosecution of offenders.
84. The Commissioner also recognises the need to ensure transparency and accountability on the part of the police. However, he finds that there is a stronger public interest in ensuring that the BWV footage, which would reveal information about policing tactics in serious incidents, is not revealed. He finds that full disclosure in this case would not better serve the interests of the public. Policing techniques can only be properly effective when full policing capabilities are not made available to those who would seek to evade the law and take advantage of such knowledge to the detriment of the wider public.
85. In the circumstances of this case, the Commissioner considers that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. It follows that the MPS was entitled to rely on sections 31(1)(a) and (b) of FOIA to refuse to disclose the requested information.
86. Having found sections 40 and 31 of FOIA to both be properly engaged, the Commissioner has not found it necessary to consider the other exemptions cited.

Right of appeal

87. 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

88. 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.

89. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

**Carolyn Howes
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Wycliffe House
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