

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 09 November 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 costs in respect of a legal case, from the Metropolitan Police Service (the "MPS"). The MPS advised that most of the information was not held, as costs are not recorded at case level. However, it advised that the fees for two barristers were held but were exempt from disclosure by virtue of section 40(2) (Personal information) of FOIA.
2. The Commissioner's decision is that the MPS does not hold most of the information requested. Regarding the two fees, he finds that the MPS was correct to withhold the amounts under section 40 of FOIA.
3. No steps are required.

Request and response

4. On 31 May 2022, the complainant wrote to the MPS and requested information in the following terms:

"I am making a request under the Freedom of Information act 2000, relating to the cost of appeals in the Leigh vs Met Police case (<https://www.judiciary.uk/wp-content/uploads/2022/03/Leigh-v-Commissioner-of-the-Metropolitan-Police-judgment.pdf>)

In particular,

1. The cost of the application to appeal to the High Court
(<https://www.bbc.co.uk/news/uk-england-london-61073371>)

2. The cost of the application to the Court of Appeal
(<https://www.bbc.co.uk/news/uk-england-london-61276743>)

Please provide details of legal costs associated with these appeals, broken down where possible.

If you are also able to provide

3. The cost to the MPS of contesting the original case

Within the constraints of the act, then please do so. But if not, I am happy to receive answers to 1 and 2".

5. On 30 June 2022, the MPS responded. It explained that it does not collect cost information in a way that can be attributed to individual cases. It did confirm that it holds a record of fees charged by external counsel, which it advised the complainant he could request separately; it added that this information would be exempt by virtue of section 40(2) FOIA, as the fees were paid to two identifiable individuals.
6. On 12 July 2022, the complainant requested an internal review. He referred to the external fees, which he considered would fall within his original request.
7. The MPS provided an internal review on 23 July 2022 in which it considered disclosure of the external fees (correctly, in the Commissioner's view). It maintained its position regarding the majority of the information not being held and the fees being the personal information of the two barristers concerned.

Reasons for decision

Section 1 – general right of access

8. Section 1 is being considered in respect of any information caught within the scope of the request, other than the barristers' fees, which will be considered separately below.
9. Section 1 of FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds that information and, if so, to have that information communicated to them.

10. In this case, the complainant has argued as to why he thinks the MPS should provide the total amount spent on the specified case. The MPS has not disagreed with this; it has stated that it is not able to do so as costs are not captured in a way which allows them to be attributed to individual cases.
11. In cases where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner – following the lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.
12. The Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the public authority to check whether the information is held and any other reasons offered by the public authority to explain why the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.
13. Therefore, the Commissioner has sought to determine whether, on the balance of probabilities, the MPS holds any recorded information within the scope of the request.
14. In its refusal notice, the MPS explained:

“... searches were conducted within the Directorate of Legal Services. The budget in the Directorate of Legal Services is not collected and profiled against individual cases but instead is broken down by how the money is spent, for example pay, overtime, supplies and services. It is not possible to attribute all of these costs to individual cases. The Directorate of Legal Services register cases on a case management system to manage cases, which includes time recording so that fee earners (lawyers and paralegals) can record the amount of time worked on each case. Using this data we would be able to provide the amount of time our in-house lawyers and paralegals spent working on the case, but this would be the number of hours spent rather than the cost which is what you have requested. Furthermore it would exclude those who have worked on the case but are not lawyers and paralegals, for example administrative assistants so it would give an incomplete picture.”
15. In its internal review it added:

"We do not collect information as to the costs attributed to the granular level of individual cases. Instead budgets can be broken down by pay, overtime, transport, supplies and services, etc. For our fee earners (lawyers and paralegals) we may be able to disclose the number of hours worked on each case but this would not give a complete profile which would answer the question asked. They do not have hourly rates like external lawyers. To provide the salary cost of DLS fee earners it would be necessary to calculate this from the time spent on the case, but this would amount to processing and creating new information".

16. In his complaint to the Commissioner, the complainant refers to the public interest in knowing what the overall costs are, which is a point the Commissioner accepts. However, if the requested costs are not recorded in a way which allows them to be aligned to a particular case, then this is not information which the MPS is able to provide. The Commissioner understands that a public authority will run its systems based on its own business needs, and that this may not reflect what someone wishes to know by way of an information request.
17. The Commissioner has viewed relevant correspondence with the Directorate of Legal Services maintaining this position.

The Commissioner's conclusion

18. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in the paragraphs above, the Commissioner is required to make a finding on the balance of probabilities.
19. When dealing with a complaint to him under FOIA, it is not the Commissioner's role to make a ruling on how a public authority deploys its resources, on how it chooses to hold its information, or the decisions it makes to hold some, but not other, information. Rather, in a case such as this, the Commissioner's role is simply to decide whether or not, on the balance of probabilities, the public authority holds the requested information.
20. While appreciating the complainant's frustration that the MPS does not hold information within the scope of his request, the Commissioner is

mindful of the comments made by the Information Tribunal in the case of Johnson / MoJ (EA2006/0085)¹ which explained that FOIA:

“... does not extend to what information the public authority should be collecting nor how they should be using the technical tools at their disposal, but rather it is concerned with the disclosure of the information they do hold”.

21. The Commissioner considers that the MPS contacted the relevant party to consider whether or not any information was held in respect of the request. Based on the information provided, the Commissioner is satisfied that, because of the way in which the MPS records financial information, on the balance of probabilities, no recorded information within the scope of the request is held. He is therefore satisfied that the MPS has complied with the requirements of section 1 of FOIA in this case.

Section 40 – personal information

22. Section 40(2) of 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.
23. In this case the relevant condition is contained in section 40(3A)(a)². This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
24. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
25. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

¹<http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i90/Johnson.pdf>

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

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

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

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

28. 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.

29. 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.

30. The withheld information relates to two barristers. Whilst they are not directly mentioned in the request, they can be identified from online searches in connection with the case. Were the amounts disclosed either as two figures or as one bulk figure, each barrister would be able to determine what the other one had earned as a fee.

31. Whilst the complainant has suggested that the MPS: “...could provide the figures rounded to the nearest, say, £5,000 - like the BBC does for senior staff salaries, as a way of protecting the specific personal information”, it is noted that this was not specified in the request, so the Commissioner has not further considered it here.

32. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information both relates to, and identifies, the two named barristers. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.

33. 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.

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

Would disclosure contravene principle (a)?

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

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

36. 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.
37. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

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

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

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

39. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-
 - i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;

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

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

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

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

- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
40. 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

41. In considering any legitimate interests in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interests 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.
42. The complainant is seeking to ascertain the costs to the MPS of a legal appeal case. As this is public money, the Commissioner understands that the subject is of general public interest and there is a legitimate interest in the disclosure of such costs.

Is disclosure necessary?

43. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
44. The Commissioner is unaware of any other way that the complainant would be able to obtain details of the fees received by the two barristers. Therefore, disclosure under FOIA is the only way by which the legitimate interest could be met in this case.

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

45. 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.

46. 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.

47. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

48. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

49. The Commissioner initially notes that the complainant, when asking for an internal review, stated: "if there is a way for you to release the information on spending on the cases without identifying individuals, I would be open to that. For instance, the combined spending". However, the Commissioner considers that this isn't feasible as there are only two individuals. Once the overall figure has been disclosed, the parties concerned can accurately calculate what the other has earned. Halving the total sum may not allow for an accurate calculation as they may be on different rates or have had a different amount of involvement. However, anyone involved with the case may be able to estimate the individual fees for each barrister based on the overall amount.

50. The MPS explained to the complainant:

"The review considers that the two individuals whose personal information falls within the scope of your request would have no expectation that the MPS would put their personal financial information and / or information which leads to their identification into the public domain, as the release and publication of this personal data would be unexpected, unfair and unlawful.

... The consequence of disclosing such information is that individuals may be deterred in the future from assisting the MPS with legal matters if through FOIA disclosures, their personal financial

information is placed into the public domain. Such disclosures may cause harm to partnership arrangements”.

51. Whilst the Commissioner understands the legitimate interest in disclosure in this case, this needs to be weighed against the intrusion to the two individuals concerned and balanced against the overall value. As the fees to these individuals would only form a small part of the overall costs of the appeal, the Commissioner considers that the value of disclosure here is considerably diminished as it in no way reflects an accurate overall cost to the general public.
52. 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.
53. 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

54. 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).

Right of appeal

55. 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

56. 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.
57. 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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