

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 May 2024

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 correspondence between an Assistant Commissioner ("AC") and two police staff Muslim associations, from the Metropolitan Police Service (the "MPS"). The MPS disclosed some information but said that a personal email was exempt from disclosure by virtue of sections 31(1)(a) (Law enforcement) and 40(2) (Personal information) of FOIA. During the Commissioner's investigation, the MPS withdrew reliance on section 31(1)(a) and added reliance on section 38(1) (Health and safety) of FOIA. It also advised that it considered a further letter was now suitable for disclosure.
2. In respect of the personal email, the Commissioner's decision is that section 40(2) of FOIA is properly engaged. Regarding the letter it identified as suitable for disclosure, if it has not already done so, the Commissioner requires it to take the following step to ensure compliance with the legislation:
 - disclose the letter which was emailed from AC Jukes to the Chair of the National Association of Muslim Police on 4 October 2022.
3. The MPS must take these steps within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

4. The withheld personal email chain under consideration relates to feedback following a listening circle meeting. The MPS has explained:

“The AMP organise listening circles giving attendees an opportunity to come together to share any concerns and discuss ideas in a ‘safe space’ for ‘free and frank’ discussions in **strict confidence** in order to help influence change. It is also worthy of note that Chatham House rules apply.

...The purpose of the listening circle is that information is provided in confidence therefore disclosure would defeat the whole purpose of a listening circle and the feedback mechanism. It would disrupt open dialogue between officers and senior officers which again would negatively impact the principle of listening circles.

It is also imperative senior officers are able to attend the listening circles in order for them to be effective with individuals who wish to attend them as they are not closed to any particular group. Any suggestions of the discussions being disclosed could undermine the principle of the listening circles and therefore render their effectiveness to deal with various issues which the MPS are trying to address especially post Baroness Casey¹ Report.

The listening circle email exchange is intrinsically linked. It is a result of feedback from the listening circle which the MPS have an obligation to protect the discussions and exchanges rather than [sic] disclose sensitive and difficult discussions which are not compromised through and [sic] adverse FOIA. The members of the listening circle (irrelevant of the rank of the officers) would have no reasonable expectation of private confidential discussions being disclosed into the public domain for the world to see via FOIA”.

¹ <https://www.met.police.uk/SysSiteAssets/media/downloads/met/about-us/baroness-casey-review/update-march-2023/baroness-casey-review-march-2023a.pdf>

Request and response

5. On 7 November 2023, following an earlier request, the complainant wrote to the MPS and requested the following information:

“Please could I refine my request so it is limited to email correspondence held by AC Jukes.

ORIGINAL REQUEST:

Since and including June 2022, communications between Assistant Commissioner Matt Jukes and/or his office with:

1. The Metropolitan Police’s Association of Muslim Police [“AMP”]
 2. The National Association of Muslim Police [“NAMP”].”
6. On 27 November 2023, the MPS wrote to the complainant to advise that it was considering the public interest test within the exemption at section 31 of FOIA, and therefore needed to extend the 20 working day deadline in which to provide its response. It gave a revised response date of 5 January 2024.
7. On 5 February 2024, the MPS responded. It disclosed some information, and advised that the remainder was exempt from disclosure by virtue of sections 31(1)(a) and 40(2) of FOIA.
8. The complainant requested an internal review on 6 February 2024. When doing so, he specified that he only wished to have the following points reconsidered concerning the MPS’ application of sections 40 and 31, respectively:

“I appreciate that the withholding of the identities of lower ranks is generally appropriate. However I would like a reconsideration of the withholding of the identity of the chair of the AMP since that person is acting in a formal capacity as an office holder rather than in the MPS hierarchy as a lower ranked officer. In this limited sphere of the officer’s activity, I feel it is not intrusive, unexpected, unfair or upsetting for that individual to be identified”.

And:

“The only part of this which I would like to be reconsidered is ‘comments made in a confidential forum’. I am not convinced that it is appropriate for the MPS to have a forum which is confidential except to a privileged few and is regarded as exempt from freedom of information”.

9. The MPS provided an internal review on 12 March 2024 in which it maintained its position.

Scope of the case

10. The complainant contacted the Commissioner on 12 March 2024 to complain about the way his request for information had been handled. His grounds of complaint were as follows:

“Under Section 40 Personal Information, the police withheld the identity of the chair of the Muslim Police Association (AMP). I disagree with that decision. The chair of the AMP is treated formally within the service as a significant individual representing colleagues and with the ability to influence policy and relationships with outside bodies. As one of the disclosed documents shows [Doc 4] the chair of the AMP tried to get Matt Jukes, an assistant police commissioner, to attend a Muslim Council of Britain (MCB) celebration - this is significant since the Government declines to engage with the MCB over unresolved extremism concerns. The chair also sought what appears to be public funding for an event at Regents Park Mosque, according to DOC 1. As such I believe the chair should be identified as an influential member of the police service and that this is not personal information.

The police rely on Section 31 Law Enforcement to withhold ‘comments in a confidential forum’. The influence which these ‘community faith groups’ have on law enforcement is of great public concern and interest. Since the police refer in their internal review to the Israel/Palestine conflict, I shall also highlight that there have been serious concerns that police may have permitted jihadi chanting, antisemitism and intimidation of Jewish people on the streets. There is no reason to doubt that these secret discussion groups have ultimately affected the approach taken to the policing of public order problems arising from the Israel/Palestine conflict. The police say that the discussion groups would not expect publication ‘in an unfettered manner and without context’ but the Act does not require unfettered publication - there could be appropriate redactions in line with the Act's protections. There is nothing to prevent the police from providing context in its covering letter of response - this is routinely done by public authorities when they provide me with information”.

And:

“Section 40 is inappropriate because the identity of the AMP chair and how the chair acts in that formal capacity is not personal information. Section 31 is being used in a blanket way to prevent

any information being provided about important communications between police and those who may influence their decision-making. This should be disclosed”.

11. On 15 May 2024, during the Commissioner’s investigation, the MPS revised its position. It withdrew reliance on section 31(1) of FOIA, and it added reliance on section 38(1); it maintained reliance on section 40(2).
12. The MPS also revised its position in respect of a letter which was emailed from AC Jukes to the Chair of the NAMP on 4 October 2022 and advised the Commissioner that this can be fully disclosed. Therefore, if this has not already been disclosed, the MPS should comply with the step at paragraph 2 above.
13. The complainant has not been advised regarding the change of position in respect of the exemptions cited. The Commissioner does not consider that he is disadvantaged by this as he has already advised the MPS that he requires a decision notice in this case. The Commissioner considers that proceeding in this way is therefore both appropriate and expeditious.
14. The Commissioner has viewed the withheld information which consists of a short email chain of a personal nature between an officer and AC Jukes, where AC Jukes briefly references a third party.
15. The complainant has stated that he wishes to know the name of the Chair of the AMP, which Commissioner will consider under section 40 below. He will also consider the withholding of the email chain which covers any “confidential forum” information.

Reasons for decision

Section 40 – Personal information

16. 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.
 17. 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
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² As amended by Schedule 19 Paragraph 58(3) DPA.

processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').

18. 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.
19. 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?

20. Section 3(2) of the DPA defines personal data as: "any information relating to an identified or identifiable living individual".
21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
22. 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.
23. 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.
24. The complainant is seeking the name of the Chair of the AMP, which would clearly enable them to be identified. In respect of the email chain, any comments within it relate to those concerned personally and the Commissioner considers that redaction of their names would not prevent their reidentification.
25. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to a specific party (the Chair of the AMP) and the parties in the email chain. He is satisfied that this information both relates to and identifies the persons concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
26. 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.
27. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

28. 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".
29. In the case of a 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.
30. 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.

Is the information special category data?

31. Information relating to special category data is given special status in the UK GDPR.
32. Article 9 of the UK GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
33. Having considered the wording of the request, and having viewed the withheld information, the Commissioner finds that some of the requested information does consist of special category data. He has reached this conclusion on the basis that the request concerns communications with Muslim staff groups. The withheld information therefore relates to the religion of the officer concerned. Furthermore, some of the commentary in the email chain, which is clearly attributable to the officer concerned, reflects the same subject matter.
34. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
35. The Commissioner considers that the only conditions that could be relevant to a disclosure under FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
36. The MPS has confirmed that the officer concerned has been contacted. The officer does **not** consent to their name being disclosed and their name is not available online in connection with the AMP. Accordingly, the Commissioner has seen no evidence or indication that the individual concerned has specifically consented to this data being disclosed to the

world in response to an FOIA request or that they have deliberately made this data public.

37. As none of the conditions required for processing special category data are satisfied, there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt from disclosure under section 40(2) of the FOIA.

Information which is not special category data

38. Some of the withheld information is not special category data but does relate to AC Jukes, the officer and one other party who is named (but not copied-in) in the email chain; this information therefore needs to be considered separately. As it does not comprise special category data it has different considerations under the DPA. Nevertheless, it is personal in nature, as opposed to being specifically work-related.

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

39. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" lawful bases for processing listed in the Article applies.
40. 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.

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 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".

41. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
42. 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

43. In considering any legitimate interest(s) 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 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.
44. There is a legitimate interest behind the request as the complainant has concerns that there may be 'inappropriate' contact between the parties. Disclosure could then reassure the public regarding such matters.

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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
46. As the request concerns a private email chain being sent between two parties, there is no other way that the complainant may access this information other than via FOIA.

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

47. 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.
48. 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.
49. 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.
50. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
51. Clearly the parties concerned would have no reasonable expectation that a personal email chain would be disclosed to the general public via FOIA. The content is not already in the public domain and consent to disclose has not been given.
52. The Commissioner has been given a confidential submission by the MPS which reflects its concerns. Whilst many of these concerns relate to the holding of listening circle meetings in general and the impact that any disclosure may have on the conducting of these types of meetings, the Commissioner nevertheless notes the personal direct impact that disclosure could have on the parties concerned. He also notes that there is no 'inappropriate' content, as suggested by the complainant.
53. 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.

54. 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

55. The Commissioner has therefore decided that the MPS was entitled to withhold the remaining information under section 40(2), by way of section 40(3A)(a).
56. In view of these findings, the Commissioner has not found it necessary to consider the citing of section 38 of FOIA.

Right of appeal

57. 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

58. 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.
59. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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