

Freedom of Information Act 2000 (Section 51)

Information notice

Date: 27 September 2022

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

Section 51

Under section 51 of the Freedom of Information Act 2000 (the "Act"), which is set out below, the Information Commissioner (the "Commissioner") has the power to serve a notice on a public authority requiring it to furnish him with any information he requires to enforce the requirements of the Act.

51. – (1) If the Commissioner –

(a) has received an application under section 50, ...

he may serve the authority with a notice (in this Act referred to as "an information notice") requiring it, within such time as is specified in the notice, to furnish the Commissioner, in such form as may be so specified, with such information relating to the application, to compliance with Part I or to conformity with the code of practice as is so specified.

Application under section 50

1. The Commissioner has received an application under section 50, reference IC-132278-J3S5, for a decision whether a request for information made by the complainant to the Metropolitan Police Service ('MPS') on 22 June 2021, has been dealt with in accordance with the requirements of Part I of the Act.

Nature of complaint

2. On 22 June 2021, the complainant made the following request for information under FOIA:

"Under the Freedom of Information Act 2000 I wish to see the following:

Full copies of all communications (including SMS/WhatsApp messages, emails, letters and records of meetings) between the Commissioner of the Metropolitan Police and the Home Secretary between 01 March 2021 and 31 May 2021.

Where an email has been identified please disclose the full thread for context. Please also search draft and deleted email folders. Please also include any attachments.

Where a meeting has been identified please include the minutes, agendas and briefing materials.

Please conduct a search of the Commissioner's personal and work phones. Personal devices are not exempt from disclosure under the Freedom of Information Act if they are used for official [sic] business".

3. On 19 July 2021, the MPS advised that it needed additional time in which to consider the public interest in disclosure, saying that it was considering the application of section 36(2)(c) FOIA.
4. On 16 August 2021, the MPS responded. It provided some information but refused to disclose the remainder. It cited the following exemptions: 21(1) (Information reasonably accessible by other means), 23(1) (Information supplied by, or relating to, bodies dealing with security matters), 24(1) (National security), 30(1)(a) (Criminal investigations), 31(1)(a)(b) (Law enforcement), 36(2)(b)(c) (Prejudice to effective conduct of public affairs) and 40(2) (Personal information).
5. The MPS provided an internal review on 30 September 2021, in which it maintained its position.
6. On 1 October 2021, the complainant wrote to the Commissioner to complain about the response.
7. On 15 October 2021, the Commissioner wrote to the MPS to advise that a complaint had been received and that it would be contacted in due course when this case was allocated for investigation. The Commissioner advised that he expected the MPS to have used the interim time to have thoroughly reviewed its handling of the request and to ensure that it

was **fully prepared and ready** to provide its final, detailed submissions to him.

8. On 3 August 2022, the Commissioner wrote to the MPS to commence his investigation, requiring a response by 1 September 2022. On 25 August 2022, the MPS wrote and requested additional time in which to provide a response. On the same day, the Commissioner granted a time extension until 9 September 2022.
9. On 9 September 2022, the MPS wrote requiring a further time extension. Exceptionally, the Commissioner agreed to the date of 26 September 2022.
10. On 26 September 2022, the Commissioner was advised that the MPS was still not in a position to provide a full response.

Information required

11. In view of the matters described above the Commissioner hereby gives notice that in the exercise of his powers under section 51 of the Act he requires that the MPS shall, within 30 calendar days of the date of this notice, furnish the Commissioner with a copy of the following information.
12. The MPS is required to respond to the enquiries in the email which the Commissioner sent to it on 3 August 2022, namely:

"... we need the following information from you to reach a decision.

- A copy of the withheld information (**clearly marked to show where each exemption cited has been applied**).
- Please answer the following questions

General information

Have any of the exemptions been applied to the withheld information in its entirety?

Section 21 - Information reasonably accessible by other means

I have no questions to ask.

Section 23 - Information supplied by, or relating to, bodies dealing with security matters

Please confirm whether you are relying on section 23(1) on the basis

that the requested information was directly or indirectly supplied to it by one of the bodies in sub-section (3) **or** on the basis that requested information relates to one of the bodies in subsection (3).

If the position is that the information was directly or indirectly supplied to you please clarify which of the bodies listed in section (3) it was supplied by. If it was indirectly supplied to you please explain the connection between the information and the relevant security body.

If the position is that the information relates to one of the bodies listed in subsection (3) please clarify which of the bodies the information relates to and why – i.e. what is the connection between the information and the named security body.

Are you relying on section 23(1) to withhold all of the information falling within the scope of the request or just part of it?

Section 24 - National security

Please provide a detailed explanation to support your position that withholding this information is required in order to safeguard national security.

In providing this explanation please be aware that ICO interprets 'required' in the context of section 24 to mean reasonably necessary and therefore this sets a high threshold which has to be met in order for this exemption to be engaged. Consequently, it is not sufficient for the requested information simply to relate to issues of national security, rather there must be evidence of specific and real threats to national security which would occur if the requested information was disclosed.

Are you relying on section 24(1) to withhold all of the information falling within the scope of the request or just part of it?

Please add any further public interest arguments that you would like to rely on.

Section 30 - Criminal investigations

As I understand it, you are relying on section 30(1)(a).

With regard to sections 30(1)(a) please confirm the nature of the investigation and explain why the withheld information relates to this specific investigation. Please also clarify whether this investigation was complete at the time of the request.

Please explain why the withheld information is needed by you to fulfil the investigatory functions set out in 30(1)(a) to (c).

Please add any further public interest arguments that you would like to rely on.

Are you relying on section 30(1) to withhold all of the information falling within the scope of the request or just part of it?

Section 31 - Law enforcement

You have cited sections 31(1)(a) and (b).

Please clearly explain why disclosure of the information would prejudice, or be likely to prejudice, the function which these particular sub-sections are designed to protect.

Please ensure that you provide evidence which demonstrates a clear link between disclosure of the information that has actually been requested and any prejudice which may occur.

Please specify the level of likelihood being relied on, i.e. *would* or *would be likely to* prejudice.

Please add any further public interest arguments that you would like to rely on.

Are you relying on section 31(1) to withhold all of the information falling within the scope of the request or just part of it?

Section 36 - Prejudice to effective conduct of public affairs

Section 36 is a prejudiced based exemption which works in a slightly different way to the other prejudiced based exemptions contained within the Act. Section 36 can only be engaged if in the reasonable opinion of the qualified person disclosure would result in any of the effects set out in section 36(2) of the Act.

In order for the ICO to determine whether section 36 was correctly applied please provide a copy of the submissions given to the qualified person in order for them reach their opinion **and** a copy of the opinion which was subsequently provided. If either the submissions or opinion were not written down please describe the nature of the submissions and the opinion itself.

Furthermore, if in providing such documents, the following is not

clear, please provide a response to the following questions:

- When was this opinion sought and when was it given?
- What information did the qualified person have access to when giving this opinion?
- For example, did the qualified person have access to the information itself or just a summary of the information that had been withheld?
- Was the qualified person provided with any submissions supporting a recommendation that the exemption was engaged?
- Similarly, was the qualified person in fact provided with any contrary arguments supporting the position that the exemption was not engaged?

Please clarify which limb(s) of section 36(2) the qualified person considered to be engaged; please note the limbs are not mutually exclusive, but the qualified person does need to specify which limb or limbs they consider to be engaged.

If you are relying on section 36(2)(c) – i.e. 'otherwise prejudice effective conduct of public affairs' – please clarify what the nature of this prejudice is.

Please add any further public interest arguments that you would like to rely on.

Are you relying on section 36 to withhold all of the information falling within the scope of the request or just part of it?

Section 40 - Personal information

In order to assist the ICO's consideration of the application of section 40(2) please identify whose personal data you consider the requested information to be.

Please explain why this information is that individual's/those individuals' personal data.

Is your position that **all** of the withheld information is personal data?

Principle (a)

Article 5(1)(a) GDPR states that personal data shall be:

"processed lawfully, fairly and in a transparent manner in relation to the data subject".

To determine whether or not disclosure is lawful, you should consider

whether there is a lawful basis for processing in Article 6(1) of the GDPR:

"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".

The Commissioner considers that the lawful basis most likely to be relevant in relation to a request for information under the FOIA is Article 6(1)(f); legitimate interests. In considering the application of Article 6(1)(f) 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 interests, fundamental rights and freedoms of the data subject.

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

In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.

Have you identified any legitimate interests in disclosure in this case?

Is disclosure necessary?

'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and therefore disclosure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

Please set out why you concluded that disclosure is not necessary in this case. How else could the legitimate interests be met in this case?

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

It is necessary to balance the legitimate interests in disclosure against the data subject(s)' interests, fundamental rights or 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, and/or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

Does the information relate to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life)?

What reasonable expectations does the individual have about what will happen to their personal data?

Has the individual named been asked whether they are willing to consent to the disclosure of their personal data that their personal data is held?

Please describe the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual(s) concerned).

Please set out your conclusions as to the balance between the rights and freedoms of the data subject(s) in this case and the legitimate interests of the public in accessing this information.

Please ensure you refer to the specific circumstances of this case.

If not already addressed in the legitimate interest test above, have you considered whether disclosure would be more generally unlawful, for example, by breaching a contractual or other legal obligation or breaching the right to privacy in Article 8 of the European Convention on Human Rights, as incorporated in Schedule 1 of the Human Rights Act?

Fairness

Please set out why you believe disclosure would not be fair if different to the considerations of the data subject(s)' interests, fundamental rights or freedoms above.

I strongly recommend that your response is guided by recent decision

notices, our guidance and our lines to take, which demonstrate our approach to the exemptions and procedural sections of the FOIA. These can be found on our website.

Having revisited the request, you may decide to apply a new exemption. We will consider new exemptions but it is your responsibility to tell the complainant why the new exemption applies and to provide me now with your full submissions.

For the avoidance of doubt, you should now do the following.

- Consider whether to change your response to the information request, and let us know the outcome.
- Send us the withheld information, marked up to show where each exemption applies.
- Send us your full and final arguments as to why you think the exemptions apply.
- Answer all of the questions in this letter.

Please provide your response within 20 working days of the date of this letter, ensuring that you fully set out your final position in relation to this request”.

Failure to comply

13. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act, and may be dealt with as a contempt of court.

Right of appeal

14. There is a right of appeal against this information notice to the First-tier Tribunal (Information Rights). Information about the appeals process can be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: grc@Justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

15. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this information notice is sent. If Notice of Appeal is served late the Tribunal will not accept it unless it is of the opinion that it is just and right to do so by reason of special circumstances.

Signed

Carolyn Howes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF