

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 October 2012

Public Authority: Commissioner of the Metropolitan Police Service

Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant has requested diverse and multiple information regarding reported crime at Royal residences over a three-year period.
2. The public authority refused to either confirm or deny it held some of the requested information but where it did confirm it held requested information it said it was exempt from disclosure.
3. Where it refused to either confirm or deny it held requested information MPS relied on sections 40(5), 24(2), 30(3) and 31(3) to do so.
4. Where it confirmed it held requested information it relied on sections 24(1), 30(1)(a)(i)(ii) & (b), 31(1)(a)(b) and 40(2)(a)(b) & (3)(a)(i) not to communicate it to the complainant.
5. The Commissioner's decision is that the public authority correctly relied upon section 24 (2) neither to confirm nor deny that it held the majority of the requested information. However, as regards one request, the Commissioner's decision is that the information in question should be disclosed.
6. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To convey to the complainant the requested information regarding the total number of alleged criminal offences reported at all of the Royal residences as per the specified period in "request 1".

7. The public authority must take these steps within 35 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.

Request and response

8. On 20 January 2012, the complainant wrote to the Metropolitan Police Service ("MPS"). He stated that the requests he was making "only relate to the Royal Protection branch (SO 14) and covers each of the last three years". He then requested information regarding reported crime at Royal residences.
9. In its reply, dated 3 May 2012, the MPS confirmed it held requested information but said it was exempt from disclosure by operation of sections 24 (national security), 30(1)(investigations) and 40(2) (personal data) of FOIA and that, where appropriate, the public interest test favoured the maintenance of the exemption.
10. The complainant requested the MPS to review its decision. The MPS undertook the review, which altered its original decision. It now refused to either confirm or deny that it held some of the requested information or, where it did confirm it held requested information, it said it was exempt from disclosure.
11. Where it refused to either confirm or deny it held requested information MPS relied on sections 40(5), 24(2), 30(3) and 31(3) to do so. Where it did confirm it held requested information, it relied on sections 24(1), 30(1)(a)(i)(ii) & (b), 31(1)(a)(b) and 40(2) by virtue of 40(3)(a)(i) not to communicate it to the complainant. Moreover, where it was required by section 2 to apply the public interest test, it favoured the maintenance of the exemption.
12. At the conclusion of the review process, the information requests were answered by the MPS' as follows:

Request 1

The number of alleged criminal offences reported at all of the Royal residences covering the last three years.

Reply

Information held but exempt from the duty of disclosure.

Exemptions: Sections 24(1), 30(1)(a)(i)(ii) & (b), 31(1)(a)(b) and 40(2)(a)(b) & (3)(a)(i) of the Act.

Request 2

A breakdown of the type of alleged crime, the residence where it was reported and the date

Reply

Information held but exempt from the duty of disclosure.

Exemptions: Sections 24(1), 30(1)(a)(i)(ii) & (b), 31(1)(a)(b) and 40(2)(a)(b) & (3)(a)(i) of the Act.

Request 3

Was the alleged victim a member of the royal family and if so which one?

Reply

MPS neither confirms nor denies it holds this information.

Exemptions: Sections 40(5), 24(2), 30(3) and 31(3)

Request 4

If the alleged crime was theft, please tell me what was taken

Reply

MPS neither confirms nor denies it holds this information.

Exemptions: Sections 24(2), 30(3) and 31(3)

Request 5

If it was a harassment offence, please tell me who the alleged victim was.

Reply:

MPS neither confirms nor denies it holds this information.

Relevant exemptions: Sections 24(2), 30(3) and 31(3)

Request 6

Please tell me how many people have been arrested for breaking into a royal residence.

Reply:

MPS neither confirms nor denies it holds this information.

Relevant exemptions: Sections 24(2), 30(3) and 31(3)

Request 7

In each case, please tell me if any arrests were made as a result of the alleged crime. If they were charged please provide name and age of the person charged.

- Please tell me exactly what they were arrested for.
- Have any weapons been recovered from any of the residences? When and where? What type and was anyone arrested? What were they arrested for?

Reply

Information held but exempt from the duty of disclosure.

Exemptions: Sections 24(1), 30(1)(a)(i)(ii) & (b), 31(1)(a)(b) and 40(2)(a)(b) & (3)(a)(i).

Request 8

Please tell me exactly what they were arrested for

Reply

Information held but exempt from the duty of disclosure.

Exemptions: Sections 24(1), 30(1)(a)(i)(ii) & (b), 31(1)(a)(b) and 40(2)(a)(b) & (3)(a)(i) of the Act.

Request 9

Have any illegal drugs been recovered from any of the Royal residences over the period? Please provide type and quantity of suspected drug. When and where was it found? Was anyone arrested? If so what were they arrested for?

Reply

MPS neither confirms nor denies it holds this information.

Exemptions: Sections 24(2), 30(3) and 31(3)

Request 10

Have any weapons been recovered from any of the residences? When and where? What type and was anyone arrested? What were they arrested for?

Reply

MPS neither confirms nor denies it holds this information.

Exemptions: Sections 24(2), 30(3) and 31(3)

Scope of the case

13. On 20 January 2012, the complainant contacted the Commissioner to complain about MPS' handling of his request for information.
14. On 8 February 2012, the Commissioner sought from the MPS clarification as to its use of the exemptions and a copy of the withheld information. The MPS provided the Commissioner with what he had asked for under cover of a letter dated 21 March 2012.
15. The MPS explained that the Royal residences pertinent to this request are Buckingham Palace, St James' Palace (including Clarence House) and Kensington Palace. Windsor Castle, although policed by MPS officers, is within the Thames Valley police area and therefore it did not hold requested information regarding it.
16. Additionally, the MPS added that it now considered that the exemption afforded by section 40(5) applied to information requests 3, 5, 6, 9 and 10. In accordance with the Upper Tribunal's decision in *Home Office v Information Commissioner (GIA/2098/2010)*¹ the Commissioner will, if needs be, consider the applicability of section 40(5) to those requests.

¹ <http://www.osspsc.gov.uk/judgmentfiles/j3160/GIA%201694%202010-01.doc>

Reasons for decision

17. Section 1 of FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities.

These are:

- the duty to inform the applicant whether or not requested information is held and, if so,
- the duty to communicate that information to the applicant.

Requests 3, 4, 5, 6, 9 and 10

18. MPS relies on, amongst other exemptions, section 24(2) to neither confirm nor deny that it holds the information as per the complainant's requests numbered 3, 4, 5, 6, 9 and 10.

19. The Commissioner notes that these requests, both individually and collectively, seek information regarding the type and victims of crimes at Royal residences.

20. Section 24(2) of FOIA provides :-

'The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.'

21. The term 'required' is not defined within FOIA and the Commissioner's view concerning the degree to which the section 24 exemption is required for the purposes of safeguarding national security has evolved with experience in applying FOIA in specific cases.

22. The Commissioner draws on the approach set out by the House of Lords in a non-freedom of information case, Secretary of State for the Home Department v Rehman² (Lord Slynn) at paragraph 16:

'To require the matters in question to be capable of resulting 'directly' in a threat to national security limits too tightly the discretion of the executive in deciding how the interests of the state, including not merely military defence but democracy, the legal and constitutional systems of the state need to be protected. I accept that there must be

² <http://www.bailii.org/uk/cases/UKHL/2001/47.html>

a real possibility of an adverse effect on the United Kingdom for what is done by the individual under inquiry but I do not accept that it has to be direct or immediate'.

Lord Slynn added,

'If an act is capable of creating indirectly a real possibility of harm to national security it is in principle wrong to say that the state must wait until action is taken which has a direct effect against the United Kingdom.'

23. Therefore, the Commissioner interprets "required" in the context of section 24 to mean 'reasonably necessary'. In effect, this means that there has to be a risk of harm to national security for the exemption to engage but there is no need for a public authority to prove that there is a specific, direct or imminent threat.
24. The MPS maintains that at the time of the complainant's request, the terrorist threat in the United Kingdom stood at "severe". This indicates that the Home Office considered that such an attack was "highly likely" and this magnified the extent of any prejudice which would arise from disclosure or acknowledgement of pertinent information in respect of security, real or perceived, at Royal residences.
25. MPS referred the Commissioner to the Information Tribunal decision of *Summers v Information Commissioner and Commissioner of Police of the Metropolis*: Case No. EA/2011/0186³ as one that supported its reliance on section 24(2). That appeal was from the Commissioner's Decision Notice FS50368290⁴.
26. MPS averred that whilst the Summers decision was based upon a request for annual costs for Royalty Protection Command, the Tribunal's consideration of the consequences of disclosure in respect of section 24, particularly the mosaic effect, are clearly relevant to this case.
27. The MPS further stated that, in the context of preventing attacks on members of the Royal Family (and Royal residences), confidence and

³<http://www.informationtribunal.gov.uk/DBFiles/Decision/i685/20120224%20Decision%20corrected%2008022012%20EA20110186.pdf>

⁴http://www.ico.gov.uk/~media/documents/decisionnotices/2011/fs_50368290.ashx

perception were often much more important than an accurate picture of the situation. That is, potential attackers were likely to be deterred by believing that chances of success were not particularly good. Contrary beliefs had therefore to be minimised by ensuring that potential attackers remained uncertain about the levels of protection and crime detection.

28. The Commissioner repeats his finding in FS50368290 that the Royal Family is at the heart of the United Kingdom's legal and constitutional system. The Commissioner also repeats his support of the contention that gathering publicly available information and analysing it to compile profiles and identify targets is one of a number of recognised strategies employed by those planning criminal activities, including terrorism. The Tribunal in Summers, at paragraphs 75 and 87, endorsed both these contentions.
29. The Commissioner accepts that there exist terrorists, fixated individuals (those with violent or dangerous obsessions of various types) and other criminals intent on attacking the United Kingdom and its constitutional organs including members of the Royal Family.
30. The Commissioner accepts that the MPS was correct to neither confirm nor deny holding the information requested at requests 3, 4, 5, 6, 9 and 10 since such a refusal is required for the purpose of safeguarding national security. The Commissioner accepts the mosaic arguments of the MPS, that disclosing whether the requested information is held, when combined with other accessible information, could pose a threat to members of the Royal Family and thus to "national security". The Commissioner considers it naïve to disregard the probability that seemingly innocuous pieces of information can and are being stitched together so as to form a patchwork quilt of intelligence which could be utilised by those who would harm the country's national security.
31. Section 24 (2) is a qualified exemption and therefore subject to the public interest test as set out in section 2 FOIA which provides that:

(1)Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where...

in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, section 1(1)(a) does not apply.

32. Thus, though there is engagement of the exemption, the MPS should still confirm or deny it holds the requested information unless the public interest in maintaining the exclusion of that duty outweighs the public interest in confirming or denying that the requested information is held.
33. In considering public interest factors, the Commissioner agrees with the approach set out by the Information Tribunal in *England & London Borough of Bexley v Information Commissioner EA/2006/0060 & 0066*, at paragraph 65 which provides:
- “(f) In considering public interest factors in favour of maintaining the exemption, they relate to the particular interest which the exemption is protecting...
- (g) The public interest factors in favour of disclosure are not so restricted and can take into account the general public interests in the promotion of transparency, accountability, public understanding and involvement in the democratic process.”
34. The public interest factors in maintaining the exclusion (as identified by the MPS)
- Generally minimising the risk to the Royal family and thus national security
 - Minimising risk has a favourable impact on police resources and the protection of matters required for the purpose of safeguarding national security
 - Not to maintain the exclusion facilitates those who pose a risk to the security of the nation
 - The strong public interest in avoiding prejudice to the prevention of crime that would otherwise harm national security
35. The public interest factors in providing confirmation or denial (as identified by the MPS)
- The public interest in knowing whether the Royal family have been the victims of crime and whether Royal residences have been the locations of crime
 - General arguments in favour of promoting transparency, accountability and participation
 - Disclosure might enhance the quality of discussions and decision making regarding a facet of national security.

36. The Commissioner considers that the public interest factors for confirming or denying whether the requested information is held are not compelling. Whilst there is always a degree of value in openness and transparency, these cannot be, in themselves, definitive as to what is in the public interest. There is little doubt that the public would be interested and curious as to which, if any, members of the Royal Family or its residences have been a victim of criminal activity. However, this curiosity does not, in this case, equate to a public interest in disclosure.
37. The factors for maintaining the exclusion are those inherent in the exemption provided by section 24 (2) and they are contextually compelling given the subject matter of the request.
38. The Commissioner finds that the public interest factors in maintaining the exclusion significantly outweigh those that favour the MPS confirming or denying whether it holds the information requested. Accordingly the Commissioner finds that the MPS correctly relied on section 24 (2) to neither confirm nor deny whether it held the information at requests 3, 4, 5, 6, 9 and 10.
39. As the Commissioner has found that by virtue of section 24(2) the MPS is not required to either confirm nor deny whether it held the information at requests 3, 4, 5, 6, 9 and 10 he did not go on to make a determination the exemptions cited in the alternative. However, without going into a detailed analysis, he considers it most likely that some or all of them would apply.

Request 7, 8

40. The complainant asks, if request 6 was answered in the affirmative (i.e., where people had been arrested for breaking into a Royal residence), for more detailed information via requests 7 and 8. However, the Commissioner has determined that request 6 merited the MPS neither confirming nor denying that it held the information requested. Logically, the only correct response to requests 7 and 8 is likewise neither to confirm nor deny that the information is held and that the public interest favours the maintenance of the exclusion of that duty.

Request 1

41. The MPS confirms that it holds the information in response to request 1. However it is, it says, exempt from the duty of disclosure by virtue of sections 24(1), 30(1)(a)(i)(ii) & (b), 31(1)(a)(b) and 40(2)(a)(b) & (3)(a)(i) of the Act.

Section 40(2)(a)(b) & (3)(a)(i)

42. Generally, the provisions of section 40(1) to (4) exempt 'personal data' from disclosure under FOIA if to do so would breach the data protection principles as laid out in the Data Protection Act 1998 ("DPA").

Is the withheld information personal data?

43. Personal data is defined in section 1(1) of the DPA as:

"...data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual."

44. Truly anonymised data is not personal data and thus is disclosable without reference to the DPA (unless otherwise exempt). However, if a member of the public could, on the balance of probabilities, identify an individual by cross-referencing the anonymised data with other information that was available to them, then the information is to be treated as personal data for the purposes of a potential disclosure under FOIA. Whether it is possible to identify individuals from the anonymised data is a question of fact based on the circumstances of the specific case.
45. The Commissioner's view is that the public disclosure of the information withheld in response to request 1, would not allow the public to identify any living individual. The withheld information is simply the number of alleged criminal offences reported at all of the Royal residences. This by itself does not identify a living individual or, when linked to other available information, lead to the identification of a living individual. Additionally, the Commissioner is not aware of any other public information that, combined with the withheld information, identifies a living person. Therefore the section 40(2) exemption is not engaged.

Section 24(1) – National Security

46. Section 24(1) states that:

'Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security'.

47. Whilst the Commissioner adopts a wide interpretation of "required for the purpose of safeguarding national security"⁵ it does not extend to exempt the information falling within this request. The world knowing the bare number of alleged criminal offences reported at all of the Royal residences, as held by the MPS, does not equate to constituting a threat to the United Kingdom. The fact the number is x or y does not realistically threaten the country's military defence, its democracy, its legal and constitutional systems or any other of its cornerstones. The Commissioner finds, accordingly, that there is no engagement of the exemption afforded by section 24(1) in relation to request 1.
48. The Commissioner agreed that with the MPS's reliance on section 24 not to provide the level of detail needed to confirm whether it held requested information as per requests numbered 3, 4, 5, 6, 9 and 10. No such similar detail is at issue here.

Section 30(1) (a) (i) (ii) & (b) -Investigations and proceedings conducted by public authorities

49. Section 30(1)(a)(i) states that:

'Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained -

(i) whether a person should be charged with an offence'

(ii) whether a person charged with an offence is guilty of it,

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct'

50. In the case of *Toms v The Information Commissioner*, the Information Tribunal stated that "... for the exemption to apply, the information in question must be held for the purpose of any investigation which the public authority has a duty to conduct, that is, a specific or particular investigation with which the public authority is concerned..." Accordingly it is the Commissioner's view that in order for the exemption in section

⁵ Paragraph 24 above

30(1) to be applicable the information must be held for a specific or particular investigation, not for investigations in general.

51. The Commissioner does not accept that the withheld information was held by an investigation to determine whether a person should be charged with an offence. The withheld information is a composite figure of crimes reported at a number of residences over some years. The MPS does not aver that the offences were committed, or suspected of being committed, by a single person or persons embarking on a joint criminal enterprise. So, although the withheld information may well be derived from information to which the exemption might apply, it does not apply to the requested information itself. Accordingly, the Commissioner finds that there is no engagement of the exemption afforded by 30(1) (a).
52. The public authority relies on section 30(1) (b) which applies to information generated by the investigations which may lead the authority to initiate criminal proceedings which it has the power to conduct. As above, the Commissioner is not persuaded that the withheld information was so generated and thus the exemption is not engaged.

Section 31 – Law Enforcement

53. Section 31 provides that -

‘(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders’

54. The terms ‘would’ and ‘would be likely’ have separate and distinct meanings in this context.

55. The Tribunal in *Hogan* said at paragraph 33:

“there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not.”

56. As the MPS claims that prejudice would occur, it needs to establish that either the chain of events is so convincing that prejudice is clearly more likely than not to arise. This could be the case even if prejudice would

occur on only one occasion or affect one person or situation; or given the potential for prejudice to arise in certain circumstances, and the frequency with which such circumstances arise (i.e. the number of people, cases or situations in which the prejudice would occur) the likelihood of prejudice is more probable than not.

57. The MPS avers that the public dissemination of the withheld information would prejudice the prevention or detection of crime and/or the apprehension or prosecution of offenders. In particular, if one takes into account other information publically available then releasing the withheld information would prejudice those matters that the exemption seeks to protect. Additionally, the MPS says, individuals who may believe their actions have gone undetected would ascertain this to be the case by knowing how many crimes were reported.
58. The Commissioner does not accept the reasoning of the MPS. Knowing the withheld figure of reported crimes would only significantly help those who knew the actual figure of crimes committed, as they would be able to form a reasonable view as to how many crimes go unreported. The Commissioner is not aware of such a person or persons who know the totality of unreported crimes occurring at the Royal residences. The Commissioner on the balance of probabilities is not persuaded that disclosing the withheld information would lead to the prejudices laid out in section 31(1) (a) and (b) and the exemption is not engaged.
59. Having found that none of exemptions provided by sections 24(1), 30(1)(a)(i)(ii) & (b), 31(1)(a)(b) and 40(2)(a)(b) & (3)(a)(i) of the Act are engaged then the duty imposed by section 1(1)(b) prevails and the withheld information is to be communicated to the complainant.

Request 2

60. The MPS confirms that it holds the information in response to request 2 however it is, it says, exempt from the duty of disclosure by virtue of sections 24(1), 30(1)(a)(i)(ii) & (b), 31(1)(a)(b) and 40(2)(a)(b) & (3)(a)(i) of the Act.

Section 31(1) (a) and (b) (Law Enforcement)

61. The exemption(s) are as laid out in paragraph 49 above.
62. The Commissioner accepts that on the balance of probabilities disclosing the details of alleged criminal offences at Royal residences, as requested, would be likely to prejudice the prevention of crime.
63. He appreciates that by disseminating the requested details it also provides information as to which crimes have gone undetected and/or un-reported. This allows offenders who have committed an unreported

crime to know with certainty that, for whatever reason, the crime has gone unreported. Similarly, those offenders who have committed a reported crime but have yet to be apprehended will be informed that though the crime is known its perpetrator is not necessarily known or suspected. An offender may well be emboldened by this acquired knowledge such that he or she commits further similar offences. Similarly, such persons may modify their continuing criminal behaviour to reduce the probability of being apprehended.

64. Section 31 is a qualified exemption so the public interest test set out in section 2(2) (b) must be applied. That is, the information can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure.
65. The MPS identified that a public interest factor in favour of releasing the information was that the "public have a general interest in knowing the details" in relation to reported crimes at Royal residences. The Commissioner also acknowledges the more general public interest factors favouring releasing the information referred to in paragraph 34 above.
66. As for the maintenance of the exemption, the MPS identified rather more factors.
 - It is not in the public interest that offenders are assisted in gauging whether crimes they have committed have not been noticed or for some other reason have not been reported.
 - Releasing the information increases the probability of crimes being committed. This is strongly against the public interest.
67. The Commissioner's view is that the public interest in maintaining the exemption does outweigh the public interest in disclosing this information. In particular he is minded that by releasing the information there is a possibility that this will embolden some to commit crime on the perception that it may go unreported and/or the likelihood of them being suspected or apprehended is low. This would have an adverse effect on the victims of their crimes and on society generally. The Commissioner also considers that the public interest in releasing this information is not significant. Whilst the public would almost certainly be interested in the information, this is not commensurate with what is "in the public interest".

Right of appeal

68. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

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

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

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

69. 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.
70. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

**Graham Smith
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