

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 October 2024

Public Authority: Greater London Authority
Address: City Hall
London
SE1 2AA

Decision (including any steps ordered)

1. The complainant submitted a multipart request to the Greater London Authority (GLA) seeking information about the decision to select the proposal 'Antelope' by Samson Kambalu for the Fourth Plinth in Trafalgar Square. The GLA responded to some parts of the request, but in relation to part 2 of the request it refused to confirm or deny whether it held any information on the basis of section 38(2) (health and safety) of FOIA.
2. The Commissioner's decision is that the GLA is entitled to rely on section 38(2) to refuse to confirm or deny whether it holds any information falling within the scope of this part of the request.
3. The Commissioner does not require further steps.

Request and response

4. The complainant submitted the following request to the GLA on 21 February 2024:

"[1] Please provide all correspondence related to the decision to place a statue of John Chilembwe in Trafalgar Square.

[2] Please also provide all correspondence identifying John Chilembwe as responsible for carrying out or directing violent

activities, including but not limited to sending his followers to attack missionaries and other civilians, behead Scotsman William Jervis Livingstone and Chilembwe personally giving a sermon next to Livingstone's impaled severed head.

[3] Please also provide all correspondence related to assessing the legal or reputational risk of exhibiting a statue of John Chilembwe, or any other correspondence referencing glorification of the terrorism carried out by Chilembwe and his followers as defined by the Terrorism Act 2006.”

5. The GLA responded on 20 March 2024. In relation to part 1 of the request it explained that the decision regarding the statute was not taken via correspondence. However, it provided the complainant with online links to information about the decision.¹ In relation to part 2 of the request the GLA directed the complainant to an Oral Update to the Mayor’s report regarding the decision to select the statute.² The GLA explained that it did not hold any information falling within part 3 of the request.

6. The complainant contacted the GLA on 20 March 2024 and acknowledged the information provided, but stated that:

“As requested, please provide all correspondence identifying John Chilembwe as responsible for carrying out or directing violent activities, including but not limited to sending his followers to attack missionaries and other civilians, behead Scotsman William Jervis Livingstone and Chilembwe personally giving a sermon next to Livingstone's impaled severed head.”

7. The GLA responded on 18 April 2024 and explained that it had treated the complainant’s email of 20 March as a request for an internal review. In regard to the question raised in that email – which the Commissioner notes essentially repeated part 2 of his original request – the GLA refused to confirm or deny whether it held any information on the basis of section 38(2) (health and safety) of FOIA.

¹ <https://www.london.gov.uk/programmes-strategies/arts-and-culture/current-culture-projects/fourth-plinth-traffic-square/whats-fourth-plinth-now> (Given the passage of time, the information regarding this installation has been moved to this link:

<https://www.london.gov.uk/programmes-strategies/arts-and-culture/current-culture-projects/fourth-plinth-traffic-square/fourth-plinth-past-commissions>
<https://www.london.gov.uk/node/53641>)

² <https://www.london.gov.uk/who-we-are/what-london-assembly-does/questions-mayor/find-an-answer/oral-update-mayors-report-27>

Scope of the case

8. The complainant contacted the Commissioner on 18 April 2024 in order to complain about the GLA's handling of his request, more specifically, its reliance on section 38(2). He disputed the GLA's position that confirming whether or not such information is held would be harmful, and furthermore argued that there is a public interest in the disclosure of any relevant information (if held).

Reasons for decision

Section 38 - health and safety

9. Section 38 of FOIA provides an exemption from disclosing information if it would endanger any individual.
10. Section 38(1)(a) focuses on endangerment to any individual's physical or mental health. Section 38(1)(b) focuses on endangerment to the safety of any individual.
11. Section 38(2), the limb of the exemption cited in this case, provides an exemption from the duty to confirm or deny whether information is held if doing so would, or would be likely to, endanger the physical or mental health or safety of any individual.
12. In its internal review response the GLA explained that:

“Confirming or denying whether or not the GLA does, or does not, hold information relating to this request would potentially instigate a hostile public discourse - which would be damaging to the GLA, its staff and its property. None of these considerations however should be taken as confirmation that any such information on this subject is or is not held by the GLA.”
13. In its submissions to the Commissioner the GLA provided more detailed and specific arguments to support its position to rely on section 38(2) of FOIA in respect of the disputed part of the request. Such submissions were provided to the Commissioner in confidence and contain sensitive information, and therefore have not been repeated in this decision notice.
14. Based upon the GLA's submissions to him the Commissioner is satisfied that if the GLA confirmed whether or not it held information falling within the disputed part of the request this would present a real and significant risk to the issues which the sub-sections of 38(1) are

designed to protect. The Commissioner cannot elaborate on his reasoning for this finding without compromising the content of the GLA's submissions to him.

Public interest test

15. Section 38 is subject to the public interest test, as set out in section 2 of FOIA. This means that although section 38 is engaged, confirmation or denial must still be provided unless, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in confirming or denying.
16. The complainant explained that he was curious as to the GLA's decision making process in choosing "to exhibit a statue of a man who ordered murder of civilians and preached next to a Scotsman's severed impaled head." Given this the complainant explained that he wished to understand why taxpayers' money was spent on this installation.
17. The GLA acknowledged that there is a legitimate interest in it being transparent and accountable for its decisions. However, in the circumstances of this case it argued that there was a stronger public interest in not making any public statement that confirms or denies the existence of information that would likely to prejudice the health and safety of any individual. In reaching this conclusion the GLA also noted that in its view it had put into the public domain sufficient information to inform the public about the history and background of the installation.
18. The Commissioner accepts that the information previously placed into the public domain by the GLA provides some information regarding this installation. However, confirmation as to whether or not it holds any information falling within the scope of part 2 of the request would, in the Commissioner's view, provide the public with a greater understanding of issues considered – or not – by the GLA in relation to this particular installation. The Commissioner accepts such further transparency is in the public interest. However, in the Commissioner's view there is a very significant public interest in ensuring that a response to a FOI request, even simply a confirmation as whether or not information is held, does not harm any individual's health or safety. Based upon the submissions provided to him by the GLA the Commissioner considers that such an argument attracts significant weight in this case.
19. Therefore, the Commissioner has concluded that the public interest in maintaining section 38(2) of FOIA outweighs the public interest in confirming whether or not the GLA holds information in the scope of part 2 of the request.

Right of appeal

20. 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

21. 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.
22. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Jonathan Slee
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Information Commissioner's Office
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