

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 November 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 copies of legal agreements connected to "The Met: Policing London" TV programme, from the Metropolitan Police Service (the "MPS"). The MPS provided some information but withheld the remainder citing sections 43(2) (Commercial interests) and 40(2) (Personal information) of FOIA.
2. The Commissioner's decision is that the MPS was entitled to rely on section 43(2) of FOIA to withhold the remaining information. He does not require any steps.

Background

3. The MPS has explained to the Commissioner:

"This request relates to the BBC documentary 'The Met' providing an insight into the Metropolitan Police Service's day to day policing

of London^{1,2} which to date consists of six episodes. The documentary shows the true scale of challenges faced by MPS officers due to the demands of modern-day policing in London. The main objective of the documentary was to improve the public's trust and confidence in the Met and its response to tackling serious violence and crime".

Request and response

4. On 23 February 2024, the complainant wrote to the MPS and requested the following information:

"Under the Freedom of Information Act 2000 I wish to see full copies of all legal agreements you hold with the British Broadcasting Corporation ["BBC"] and the Open University relating to the production of 'The Met: Policing London' TV programme such as:

- Access agreements
- Production assistance agreements
- Memorandums of understanding
- Contracts".

5. On 2 May 2024, the MPS responded. It refused to provide the requested information. It cited section 43(2) (Commercial interests) of FOIA as its basis for doing so.
6. The complainant requested an internal review on 7 May 2024.
7. The MPS provided an internal review on 8 July 2024. It revised its position and disclosed some information, but maintained reliance on section 43(2) for the remainder; it also added reliance on section 40(2) (Personal information) of FOIA.

¹ <https://www.bbc.co.uk/programmes/m001rsvk>

² <https://www5.open.ac.uk/centres/policing/news/oubbc-series-met-returns-fourth-series#:~:text=A%20captivating%20fourth%20series%20of,challenging%20period%20for%20the%20force>

Scope of the case

8. The complainant contacted the Commissioner on 11 July 2024 to complain about the way his request for information had been handled. He included the following:

“I think that most of the reactions [sic] are likely to be excessive. For example some titles of the clauses of contract are redacted as well as the clauses themselves”.

9. During the Commissioner’s investigation the MPS disclosed further information. It maintained reliance on sections 40(2) and 43(2) for the remaining withheld information.
10. The complainant has confirmed he is happy for personal information to be withheld: “...if it is genuinely necessary to do so and within ICO guidelines. I.e., to protect signatures and the identities of junior staff members”.
11. There is only a very small amount of information being withheld under section 40. This consists of the name of one member of police staff and some personal contact details and signatures. The Commissioner considers this information would fall within the parameters described by the complainant so he has used his discretion and section 40 will not be further considered.
12. The Commissioner will consider the application of section 43(2) below. He has viewed the withheld information.

Reasons for decision

Section 43 – Commercial interests

13. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
14. Information may be commercially sensitive, but it does not necessarily follow that it is exempt from disclosure under section 43(2). A public authority must be able to show how and why its disclosure has the potential to prejudice someone’s commercial interests. The prejudice can be to the commercial interests of any person (an individual, a company, the public authority itself or any other legal entity).
15. For the exemption to be engaged the Commissioner considers that each of the following three criteria must be met:

- The actual harm that the public authority alleges would, or would be likely to, occur if the withheld information was disclosed must relate to commercial interests.
 - The public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Any prejudice that results must also be real, actual or of substance.
 - The level of likelihood of prejudice being relied upon by the public authority must be met (ie it must be shown that disclosure would, or would be likely to, result in prejudice occurring).
16. The Commissioner's guidance on section 43³ states that a commercial interest relates to a person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent.
17. Regarding applicable interest, the MPS said:

"The exemption is designed to protect the commercial interests of the BBC/BBCSPL [BBC Studios Production Limited] and the MPS given that these are legal documents which are commercially sensitive and contain confidential information.

...We believe disclosure of the held information would be of advantage to other broadcasters and other programme makers the BBC/BBCSPL's are in direct competition with as the agreements could be replicated at no cost to the BBC's competitors to identify and navigate contentious contractual terms".

18. Regarding a causal link it added:

"...during all stages of this request the BBC and MPS Communications and Engagement Team have been consulted whether any information can be released. Having looked at this appeal afresh I again made contact with the BBC and our Communications and Engagement team to confirm if any additional information could be released the outcome of my enquiries reveal any further disclosure would be detrimental to the commercial interests of the BBC/BBCSPL.

³ <https://ico.org.uk/for-organisations/section-43-commercial-interests/>

Within our original response we stated: -

'The BBC is in direct competition with broadcasters and platforms in the UK and globally in the provision to audiences of ground-breaking and important observational documentary content. The arrangements and agreements that enable the making of that content require the investment of time and resources and have commercial value. We therefore believe to release the documents requested would prejudice the commercial interests of the BBC and negatively impact the MPS's bargaining position with future contractors'.

Therefore, any additional information relating to the production/agreements could be used by other third parties to encourage a copycat production.

Within our internal review response, we stated: -

'Additionally, the commercial interest of the BBC would be affected. The BBC has articulated to the MPS the harm that would be caused to them and their affiliates by disclosure of the information requested. The BBC have been clear that disclosure would give their competitors the benefit of the BBC's investment in their negotiation and drafting and cause them significant commercial detriment. The BBC further add that disclosure would reveal to their competitor's confidential information about the way in which they negotiate and frame such agreements with third parties and would provide a specific road map as to how such programmes are made and issues arising are navigated. It would relieve competitors of the cost burden of framing, drafting and negotiating such agreements on their own'.

Even by releasing information about this process without giving any financial details would not alleviate the commercial disadvantage to the MPS and BBC/BBCSPL.

...The full disclosure of the held information would not only cause a breach of confidence with the BBC/BBCSPL and our relationship with them but also potentially with other private and public authorities as we would have lost our reputation for not respecting confidentiality as disclosing information under the Act would show the MPS not to be trusted".

19. Regarding the envisaged prejudice, the MPS explained the following regarding its own interests:

"... disclosure of the requested information would damage the MPS's relationship and trust held with the BBC by going against the

BBC's express wishes not to disclose due to 'the real and significant risk that disclosure of the agreements would prejudice the commercial interests of the BBC and BBCSPL'. This in turn could impact any future work or projects with the BBC (to date, the BBC have completed and aired a total of 4 series of 'The Met' with series 4 comprising of 6 episodes). The potential of further series to be made in the future could be compromised.

There is also potential to compromise our relationships with other companies and authorities if the MPS are seen to freely release commercially sensitive information into the public domain under the Act without the agreement of the BBC. Dealing with contracts and negotiating contracts in the future with the BBC or any other authorities or private parties could unnecessarily be more challenging for the MPS. The MPS are working hard to rebuild trust and confidence with our communities therefore any additional disclosure against the BBC's wishes could be detrimental for the MPS".

20. Regarding prejudice to the commercial interests of the BBC it added:

"The BBC is in direct competition with other broadcasters who are not themselves subject to FOI rules, so do not have to publicly reveal their contracts, therefore disclosure of the withheld information into the public domain would reveal to the BBC's competitor's confidential information about the way in which it negotiates and frames its documentary/programme making agreements with the MPS/third parties. It would also provide the necessary information for BBC's broadcasting rivals to potentially replicate and compete against this specific specialist format, and, as a result, impinge upon its public service broadcasting obligations and market share. As a direct result it would be likely to lose some of its competitive edge and be prejudiced in its ability to make public service programming in the future".

21. Regarding the likelihood of prejudice occurring the MPS advised:

"In this case, the withheld information relates to the production of the television programme by the BBC, 'The Met' and covers agreed terms for filming (not including but not limited to timescales of filming, warranties, insurance, indemnities, copy right, confidentiality, consents to filming, conduct of filming, sale, licensing etc.

Disclosure of the information 'would be likely' to prejudice the commercial interests of the BBC/BBCSPL and the MPS".

22. Firstly, the Commissioner is satisfied that the harm the MPS envisages relates to the commercial interests of both the BBC/BBCSPL and itself.
23. Secondly, the Commissioner is satisfied that the MPS has shown that a causal link exists between disclosure of the withheld information and prejudice (or harm) to these commercial interests. He considers it likely that the withheld information would be of interest to competitors wanting to gauge the necessary structure behind the making of programmes of this type. He also finds it credible that concerns about the potential disclosure of commercially sensitive information could deter other suppliers from working with the MPS, thereby limiting its options.
24. Thirdly, the Commissioner accepts the MPS' position that the envisioned prejudice 'would be likely' to occur (ie it is more than a remote, hypothetical possibility).

Public interest test

25. Section 43 is subject to the public interest test, as set out in section 2 of FOIA. This means that although section 43 is engaged, the requested information must be disclosed unless the public interest in maintaining the exemption is stronger than the public interest in disclosure.

Public interest arguments in favour of disclosure

26. Within his grounds of complaint the complainant argued:

"I believe the public interest would lie in seeing as much of the contract as possible so I ask the ICO to review the contract to see if any more details can be disclosed. I don't think the commercial interests of either the BBC or the MPS are likely to be impacted in a meaningful way from further disclosure as there are numerous factual programs made about the emergency services each year by UK broadcasters this is unlikely to change if more details surrounding this contract are made public".

And:

"The public deserve to know if taxpayer money was spent making a documentary (as the MPS claims) or a public relations exercise on behalf of the MPS. Both the BBC and the MPS are public bodies so public can and should expect them to be transparent in their dealings".

(The Commissioner would like to note here that the legal agreements do not contain any actual costs.)

27. The MPS has argued:

“As a public authority the MPS have a responsibility to show transparency and accountability to promote public understanding and the spending of public funds. This transparency would demonstrate the MPS are getting best value for money in terms of its contracts and its obligations under any commercial legal agreements”.

Public interest arguments in favour of maintaining the exemption

28. The MPS has argued:

“There is a strong public interest in ensuring that the commercial interests of the BBC/BBCSPL and the MPS are not damaged or undermined by disclosure of information which is not in the public domain, and which could adversely impact on future business”.

29. It has further argued:

“Under Schedule 1, Part VI of FOIA provides that the BBC is a public authority for the purposes of FOIA but only has to deal with requests for information in some circumstances and isn't obliged to comply with part 1 to V of the Act where it holds information for 'purpose other than those of journalism, art or literature'⁴. This means that the Act does not apply to material held for the purposes of creating the BBC's output (TV, radio, online) or material which supports and is closed [sic] associate with these creative activities.

If this request had been made directly to the BBC, the information would be subject to the journalism derogation and therefore would not be disclosed however as the request has been made to the MPS we are unable to claim this exemption for the same information. The information (contracts/agreements) are held with the inbuilt expectation of confidentiality between the BBC and the MPS therefore to disclose the requested information without the consent of the BBC we believe there is a real possibility that a breach of confidence could be actionable by the BBC especially as the same information would not be disclosed by them under the Act therefore it would not be in the public interest to disclose any further information especially without the consent of the BBC.

If under the Act members of the public find they are unable to gain information from the BBC due to their journalism derogation and instead regularly seek that information from the linked public

⁴<https://www.bbc.co.uk/foi/publication-scheme/excluded/>

authority this would completely undermine the purpose of the exclusion the BBC have under the Act which would not be of public interest but would also set a precedent which would not be fair on the BBC”.

And:

“We believe there is very limited general public interest in the specific information requested and a strong public interest to run value for money documentaries without compromising future documentaries especially so as these documentaries not only highlight the challenges of policing the capital but more importantly assist the MPS with building back much needed trust and confidence with members of the public.

Disclosure of the held information would not contribute to any public debate, nor will it aid public understanding of the documentaries in question however we believe there is a weighty public interest in withholding the information in order to avoid unwarranted reputational damage for the MPS and damaging our relationships with the BBC and other public and private companies in the future of risking our ability to make further documentaries or obtain contracts.

The BBC or any company would have an expectation that whilst working with the MPS some information could be disclosed, however they would not have an expectation that the MPS would disclose information that would be damaging to their commercial interests.

We believe the limited public interest here has been met with the release of the content of the contracts/agreements during the internal review stage and now at appeal stage which largely satisfies the public interest in relation to understanding the terms of the agreements”.

Balance of the public interest

30. When balancing the opposing public interests in a case, the Commissioner will decide whether it serves the public interest better to disclose the withheld information, or to withhold it, because of the interests protected by the relevant exemption. If the public interest in maintaining the exemption does not outweigh the public interest in disclosure, the information must be disclosed.
31. The Commissioner accepts that there is a presumption running through FOIA that openness is, in itself, to be regarded as something which is in the public interest. He also recognises the need for transparency and accountability on the part of public authorities.

32. More specific to this case, the Commissioner recognises that the remaining withheld information would be covered by derogation, were the complainant to request the information directly from the BBC. Being able to circumvent this by asking for it from the MPS seems to undermine the purpose of the derogation itself, which the Commissioner does not consider to be in the public interest.
33. The Commissioner acknowledges the complainant's position that there is a public interest in disclosing information about the making of this type of TV programme. However, it must be noted that very little of the withheld information refers to any monetary / cost matters, rather, it centres on the specific methodologies around the production this type of program.
34. The Commissioner has had regard to the public interest in ensuring that disclosure under FOIA does not adversely impact the commercial interests of those who do business with public authorities, without good reason. There is a public interest in ensuring that the commercial interests of suppliers are not damaged or undermined by the disclosure of information which is not in the public domain and which could adversely impact their future business. Having accepted in this case that the disclosures would be likely to be damaging to BBC/BBCSPL's commercial interests, the Commissioner can see no arguments for disclosure capable of justifying that potential for damage.
35. The Commissioner also recognises the necessity of the MPS protecting its own commercial interests - there is a public interest in public authorities not being commercially disadvantaged by their FOIA obligations. To that end, there is a public interest in the MPS being regarded as a trusted party and potential suppliers having confidence in sharing confidential commercial information with it.
36. Having had regard to all the above, on balance, the Commissioner considers that the public interest in protecting the MPS's commercial interests, and those of BBC/BBCSPL, outweighs the limited benefit that would flow from disclosure in this case. His decision is therefore that the MPS was entitled to rely on section 43 of FOIA to withhold the remaining information.

Right of appeal

37. 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

38. 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.
39. 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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