

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 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 costing information about an appeal, from the Metropolitan Police Service (the "MPS"). The MPS advised that some information was not held and it refused to provide the remainder, citing sections 40(2) (Personal information) and 43(2) (Commercial interests) of FOIA.
2. The Commissioner's decision is that the MPS does not hold some of the requested information. He also finds that, in respect of the information that is held, section 40(2) is properly engaged. No steps are required.

Background

3. The appeal referred to in the request relates to a previous ICO decision which was resolved by way of a consent order¹.
 4. The MPS has explained:
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¹<https://icosearch.ico.org.uk/s/search.html?query=EA%2F2023%2F0340&collection=ico-meta&profile=default>

"This complaint relates to costs incurred by the MPS in relation to bringing First-tier Tribunal EA/2023/0340. It relates to ICO reference IC-217782-T5Q5 where the ICO required the MPS to disclose the report other than information which was exempt under section 40(2).

The MPS appealed the ICO's Decision to First-tier Tribunal however settled the issue of redactions with the ICO, therefore the appeal did not proceed to Tribunal.

...In this instance it is not possible to disclose the costs held for First-tier Tribunal EA/2023/0340, as we do not hold the total costs for the Tribunal. We do hold counsel's fees however this information is exempt under Section 40 Personal Information and Section 43 Commercial interests. With regards to MPS in-house costs, we do not hold these costs in a granular form to disclose".

Request and response

5. On 22 March 2024, the complainant wrote to the MPS and requested the following information:

"Please provide the cost to the Met Police of bringing First Tier Tribunal appeal EA/2023/0340".

6. On 16 May 2024, the MPS responded. It advised that it did not hold some of the information (its own costs) and refused to provide the remainder (Counsel costs) citing sections 40(2) and 43(2) of FOIA.
7. The complainant requested an internal review on 16 May 2024. He included the following:

"The costs will involve more than just the payments to an individual barrister, and even if they were, would not reflect the amount they actually received, given they must pay fees to chambers etc.

Even in that case, fees are very clearly not sensitive personal information, and public authorities often publish the cost of legal fees in relation to individual cases. Please find attached an example from The Cabinet Office in relation to FTT [First-tier Tribunal] cases (letter provided as evidence which disclosed individual overall costs for a number of appeals).

In relation to section 43, the hours spent on the case will not be disclosed, and as such the barristers fee rate would not be disclosed. There would be no prejudice to the barrister, and as above, the costs would not just include barristers fees.

Finally, given that the Met took this case to tribunal at public expense, before providing most of the information at the 11th hour, this was clearly a waste of public funds. There is a clear public interest in holding the Met accountable for this, which outweighs any potential prejudice”.

8. The MPS provided an internal review on 31 July 2024 in which it maintained its position.

Scope of the case

9. The complainant contacted the Commissioner on 31 July 2024 to complain about the way his request for information had been handled. His grounds of complaint included the following points:

“The Met Police claims that it holds information for the hours spent by its in-house legal team on the appeal, but it cannot from this information calculate an estimate of the cost of this time, claiming any attempt to do this would be the creation of new information.

It further argues that the only other cost information it holds is the fee provided to an external barrister to represent them in this case, and this information is exempt as it is personal information and that revealing it would be commercially sensitive.

... The Met Police, for basic business management and budgeting purposes must hold the average cost of staff in its legal department per hour.

If not held as an isolated figure, this could be extracted from records held on legal team pay. This would be simple manipulation of internal pay data held by the Met.

Multiplying the two figures together, another simple manipulation of information already held, would give the cost, in a manner which would not constitute the creation of new information.

... Providing this information, combined with the cost of the barrister, would remove then remove police force’s section 40 and 43 concerns about providing the earnings of the barrister on its own”.

10. He argued that the disclosure of any personal data was, in any event, both necessary and lawful and added that the MPS could have sought consent from the barrister concerned. There were further arguments which the Commissioner will also take into consideration below.

11. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of FOIA. FOIA is concerned with transparency and provides for the disclosure of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held by public authorities. FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.

Reasons for decision

Section 1 – General right of access

12. This is being considered in respect of any information which the MPS holds regarding costs connected to its own staff when dealing with the specified appeal.
13. It is initially noted that the complainant asked for the actual 'costs' rather than an 'estimate' of the First-tier Tribunal.
14. Section 1 of FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds that information and, if so, to have that information communicated to them.
15. In this case, the complainant thinks that the MPS holds the necessary information to respond to his request by way of manipulating information held and providing an estimate. The MPS's position is that it does not hold the information requested and that any information it could provide would need to be created.
16. The Commissioner's guidance on extracting and compiling information² says that whilst a public authority may not physically possess the requested information, it would probably still hold it where it can compile or extract it from raw data that it holds. It adds:

"If you have the 'building blocks' necessary to produce a particular type of information, it is likely that you would hold that information

² <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/determining-whether-we-hold-information/>

unless it requires particular skills or expertise to put the building blocks together”.

17. Therefore, the Commissioner has sought to determine whether the MPS holds the requested information in a recorded format or whether it would require creation of new information.
18. The Commissioner initially finds that an estimate would clearly not have been held at the time of the request as there would have been no business need for the MPS to have created one.
19. As to whether it held the 'building blocks' the MPS has previously explained to the complainant:

“The MPS only record costs paid to external counsel and the time that the DLS [Directorate of Legal Services] in-house fee earners (lawyers and paralegals) spend on cases. It is therefore not possible to disclose the costs of bringing this appeal, as the only costs that are 'held' by the MPS are external counsel fees, which are subject to the Personal Information exemption. To explain further, the DLS budget is broken down into categories by how money is spent, for example, pay, overtime, supplies, and services. These in-house staff and facilities costs cannot be broken down further into a level of granular detail that can attribute costs to individual cases. Furthermore, in-house staff do not have hourly rates like external lawyers. Whilst DLS fee earners record the amount of time they spend on individual cases, and the police staff pay costs of the DLS fee earners who worked on the appeal could be calculated using a ready reckoner, any figure created for the purpose of responding to your request would not be accurate. This is because pay costs set out in the ready reckoner are average pay costs and the figure would not reflect any changes to pay band/costs for the duration of the case. The figure would also exclude any other staff who may have worked on the case, e.g. administrative assistants”.

20. The MPS also explained to the Commissioner:

“Even if the MPS were to create an 'estimated' cost response as a gesture of goodwill we would be setting a precedent that DLS staff costs could be created to answer FOI requests. Under the Act the creation of data to answer requests is not required as FOIA covers all recorded information held by a public authority.

Unlike the Cabinet Office the MPS do not have cross charging hence why the Cabinet Office are able to say exactly how much a case cost. The key point is that as an in-house department there is no 'cost' to the MPS. DLS delivers a wide range of legal services to

many business areas within the MPS. DLS do not cross charge clients, there is no business need to de-aggregate the overall cost to 'costs per case'.

Whilst we appreciate the complainant's views and his frustration however if the total costs are not recorded in a way which allows them to be aligned to a particular case, we are unable to provide that information. The MPS system are based on policing needs and our own business needs which may not necessary reflect what someone wishes to know by way of a FOI request".

21. Having considered the explanation provided, the Commissioner accepts that, in order to respond to this element of the request, the MPS would have to create information, ie it is not already held. Were it to attempt to do so, any information that it may be able to estimate would also be both inaccurate and incomplete. This is because it has no business need to record the detail that the complainant has requested.
22. While appreciating the complainant's frustration that the MPS does not hold information within this element of the request, the Commissioner is mindful of the comments made by the Information Tribunal in the case of Johnson / MoJ (EA2006/0085)³ which explained that FOIA:

"... does not extend to what information the public authority should be collecting nor how they should be using the technical tools at their disposal, but rather it is concerned with the disclosure of the information they do hold".
23. Based on the information provided the Commissioner is satisfied that the MPS does not hold the necessary 'building blocks' to comply with this element of the request. He is therefore satisfied that the MPS has complied with the requirements of section 1 of FOIA.

Section 40 – Personal information

24. 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.
25. In this case the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the

³<http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i90/Johnson.pdf>

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

26. 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.
27. 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?

28. Section 3(2) of the DPA defines personal data as: "any information relating to an identified or identifiable living individual".
29. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
30. 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.
31. 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.
32. The MPS holds information on fees paid to an external barrister. Although the barrister is not named in the request, the Commissioner is advised by the MPS that they are known to the complainant because their name appears on its court documents, of which the complainant is aware.
33. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the known barrister, who is self-employed. He is satisfied that this information relates to them as an identifiable individual and the fee that they personally received from the MPS. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
34. 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.

35. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

36. 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".

37. In the case of an 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.

38. 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.

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"⁴.

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;

⁴ 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 (disapplying the legitimate interests gateway in relation to public authorities) were omitted".

- 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. The complainant has a clear personal interest in the costs attributed to the case he is enquiring about. Whilst this is a personal interest, the Commissioner accepts that there is a wider general interest in transparency surrounding the actual costs to public authorities of dealing with appeals to the FTT, irrespective of whether these progress to appeal stage or are dealt with by way of a Consent Order, as in this case.
45. The MPS also recognised:
- "The complainant is seeking to ascertain costs to the MPS of a legal appeal to First-tier Tribunal, the MPS accepts there could be general public interest and a legitimate interest in the disclose [sic] of the costs incurred for the public to access whether the MPS is delivering value for money to the public and for the purposes of openness and accountability".

Is disclosure necessary?

46. '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.

47. The MPS has argued:

“We do not believe disclosure is necessary and believe there are other ways to assessing whether the MPS is delivering value for money than a snapshot on one counsel spend in a single case, for example by considering global counsel spend, total damages paid out, by assessing statistics. The overriding objective not only by Information Tribunals but also the ICO is for all parties to keep their positions under review and where possible settle matters rather than take matters to a full hearing. Tribunal case law also stipulates that a public authority may change its position, which has happened in this case. Ultimately the cost of settling the case prior to the hearing is far less than the cost of fighting the case to a full hearing.

We do not believe there is a social pressing need for the disclosure of the information. Disclosure under FOIA is disclosure to the world at large and not just to the requester. It is the equivalent to the MPS publishing the withheld information on the MPS website for all to see i.e. the counsels [sic] name and fees paid to them.

Within our internal review response, we demonstrated alternative measures⁵ regarding statistical data relating to legal cost claims by way of disclosure on the MPS publication Scheme. We therefore do not believe disclosure is necessary to meet the legitimate interests due to information already in the public domain”.

48. Whilst the Commissioner understands the MPS’ rationale, the request here relates to a single case rather than expenditure in general. As there is no other way that the complainant could access this information, the Commissioner accepts that disclosure under FOIA is the only option available to the complainant; disclosure is therefore necessary to meet his legitimate aim.

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

49. 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

⁵ <https://www.met.police.uk/foi-ai/metropolitan-police/d/november-2022/legal-fees-2016-2021/>

the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

50. 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.

51. 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.

52. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

53. In its correspondence with the complainant, the MPS explained:

"Your request essentially covers the personal data of a third-party living individual who is 'identifiable' for the purposes of the DPA. Whilst the wording of your request is for 'all costs' associated with FTT appeal EA/2023/0340, the only costs physically held, are those that relate to an individual barrister's pay. Whilst 'legal costs' more generally may not be considered sensitive personal data, what distinguishes this case from other requests for 'legal costs' is that the 'other legal costs' incurred by this appeal are not recorded and are therefore 'held' [sic] for FOIA purposes.

Therefore, to the extent that the requested information relates to an individual's negotiated pay for a particular piece of work they have undertaken, any related disclosure would be a significant intrusion into the privacy of the individual concerned, such that there would be a reasonable likelihood of distress being caused. It is likely that the published legal costs that you reference are presented in aggregated format or in a way that does not identify an individual's pay.

... Whilst your request does not cover salary data, and the data subject is not a public sector employee, the amount paid to a barrister in relation to a single financial transaction is sufficiently similar to salary data for these purposes and is arguably more detailed or exact than more generalised annual salary data. This is relevant to the data subject's reasonable expectation of privacy, as

the disclosure of their fees for a particular piece of work would in comparison, be more privacy intrusive, as they would have been subject to individual negotiation between the barrister and the MPS. The individual would not reasonably expect the MPS to process their data or disclose 'new' information to those with only partial knowledge in circumstances such as these, i.e. to simply satisfy the curiosity of the public under the auspices of the FOIA, without a law enforcement purpose".

54. The MPS has further argued to the Commissioner:

"It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. Therefore, the MPS have considered the impact of disclosure. We believe the individual concerned would have a reasonable expectation that their information would not be disclosed under FOIA as they would have a general expectation of privacy for the purpose of which the information is held. Barristers are self-employed and therefore their fees are their individual payments for cases. Counsel would not reasonably expect their personal financial information i.e. fees that they individually negotiated and charged to be disclosed to the public at large in response to a FOIA request. Such a disclosure would also cause harm and distress to the data subject as they would not expect information which would lead to their identification into the public domain as the release and publication of this personal information would be unexpected, unfair, and unlawful.

The MPS have not consulted counsel for their views regarding disclosure as we do not feel it would be appropriate.

We do not believe the legitimate interest overrides counsels individual rights to privacy especially as counsel are not public officials therefore, they have a reasonable expectation of privacy especially as the information relates to their fees and could also prejudice their commercial interests.

The MPS do not believe there is sufficient wider public interest to justify the overriding of the established protection of the counsel's personal information therefore disclosure of the information would not be lawful for fair".

55. The Commissioner accepts that there is some limited legitimate interest in disclosure of the barrister's costs in the case specified, as providing details of expenditure of public funds is always of some interest to the general public. However, such a disclosure would be of very little real value in that it would only provide a fraction of the real cost of defending the case specified and it would not be known whether the fee

was, for example, just a consultation, an hour's work, a week's work, or something else. As such, this greatly reduces its value as the amount is unquantifiable in isolation.

56. Conversely, the Commissioner accepts that the barrister concerned would have no realistic expectation that their fee would be disclosed to the general public by way of an FOIA request. Consequently, the Commissioner accepts that disclosure would be likely to cause them some personal distress and concern.
57. 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.
58. 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

59. The Commissioner has therefore decided that the MPS was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).
60. In light of this the Commissioner has not found it necessary to consider the citing of section 43(2) of FOIA.

Right of appeal

61. 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

62. 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.
63. 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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