

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 November 2019

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Greater London Authority (GLA) seeking information as to whether the Mayor, Sadiq Khan, had an official car and if so the costs of providing this. The GLA refused to confirm or deny whether it held any information falling within the scope of the request on the basis of sections 31(3) (law enforcement) and 38(2) (health and safety) of FOIA. The Commissioner has concluded that section 38(2) is engaged and that the public interest favours maintaining this exemption.
2. The Commissioner does not require any steps to be taken.

Request and response

3. The complainant submitted the following request to the GLA on 13 January 2019:

*'Can you tell me who approved the car that Mayor Sadiq Khan has?
Boris Johnson and Ken Livingstone did not have cars.*

How much is this costing Londoners?'

4. The GLA responded to the request on 4 February 2019 and refused to confirm or deny whether it held any information falling within the scope of the request on the basis of section 31(3) by virtue of section 31(1)(a) (law enforcement), and section 38(2) by virtue of sections 38(1)(a) and (b) (health and safety) of FOIA.

5. The complainant contacted the GLA on the same day and asked it to conduct an internal review of this decision.
6. The GLA informed him of the outcome of the internal review on 10 April 2019. The internal review upheld the decision to refuse to confirm or deny whether any information was held on the basis of sections 31(3) and 38(2) of FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 10 April 2019 in order to complain about the GLA's refusal to provide him with the information he had requested.
8. In relation to this complaint it is important to note that the right of access provided by FOIA is set out in section 1(1) and is separated into two parts: section 1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant the right to be provided with the requested information, if it is held. Both rights are subject to the application of exemptions.
9. As explained above, the GLA is seeking to rely on sections 31(3) and 38(2) to refuse to confirm or deny whether it holds information falling within the scope of the request. Therefore, this notice only considers whether the GLA is entitled, on the basis of these exemptions, to refuse to confirm or deny whether it holds the requested information. The Commissioner has not considered whether the requested information – if held – should be disclosed.

Reasons for decision

Section 38 – health and safety

10. Section 38(1)(b) of FOIA states that:

'Information is exempt information if its disclosure under this Act would, or would be likely to—

...(b) endanger the safety of any individual.'

11. Section 38(2) removes the duty to confirm or deny:

'if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).'

12. In section 38 the word 'endanger' is used rather than the word 'prejudice' which is the term used in other similar exemptions in FOIA. However, in the Commissioner's view the term endanger equates to prejudice.
13. In order for a prejudice based exemption, such as section 38(1) to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the public authority confirmed whether or not it withheld information has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the confirmation or denial of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, confirmation or denial 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

The GLA's position

14. In its responses to the complainant the GLA argued that confirming or denying whether or not it does, or does not, hold information relating to this request would imply whether or not any vehicle is, or is not, used by the Mayor of London or any other member of staff. It argued that such a statement would therefore provide useful information to potential criminals about the steps the GLA takes to protect its premises, property, staff and guests. This would allow them to take steps to avoid these measures, thereby prejudicing its ability to prevent, detect and deter criminal acts.
15. The GLA argued that because the request specifically refers to information about vehicles allegedly used by the Mayor of London, any confirmation or denial about whether or not this is indeed the case would identify what measures are, or are not, in place. Such a statement could then be used by determined individuals to locate and potentially

target any vehicles which may or may not be used by the Mayor, or any other member of staff, and thereby endanger his wellbeing and physical safety.

16. The GLA explained that the potential health and safety risk to the Mayor of London posed by releasing details of his movements, meetings and travel arrangements is a long established position acknowledged by the Commissioner, firstly acknowledged in a 2012 Decision Notice relating to the release of information from the Mayor's Diary, noting:

*'..taking into account the extent to which the remaining withheld information, if disclosed, would be likely to be publicised and scrutinised, in the Commissioner's view disclosure of that information would expose information that could conceivably be used to predict the future whereabouts of the Mayor to a wider audience. Clearly the disclosure of such information could make it easier for individuals or groups to target an attack, for example by enabling a profile of his regular movements to be established.'*¹

17. Furthermore, the GLA explained that a key factor behind its reliance on section 38(2), and indeed section 31(3), was the importance of maintaining a consistent position over time, as acknowledged in Commissioner's guidance on the neither confirm nor deny (NCND) principle:

*'There are situations where a public authority will need to use the neither confirm nor deny response consistently over a series of separate requests, regardless of whether it holds the requested information. This is to prevent refusing to confirm or deny being taken as an indication of whether information is held.'*²

18. In other words, the GLA argued that if it were to confirm that information was held in relation to this initial request (if indeed that were the case), regardless of whether or not it was able to release it, such a statement would reveal information about the Mayor's travel arrangements. If the GLA received a similar request at a later date, and it then replied by confirming that information was not held, this would indicate there had been a change in the Mayor's travel arrangements.

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2012/735982/fs_50431334.pdf

² https://ico.org.uk/media/for-organisations/documents/1166/when_to_refuse_to_confirm_or_deny_section_1_foia.pdf

The GLA argued that this would have the prejudicial effects described under the provisions of section 38 of FOIA.

19. In its submissions to the Commissioner the GLA explained that its rationale for relying on section 38(2) remained that as set out in its responses to the complainant. Namely, that any statement confirming or denying whether the requested information was held would itself be confirmation or denial about whether to not the Mayor uses a vehicle.
20. The GLA argued that when it comes to a request for information that relates to the transport arrangements involving a high-profile political figure – regardless of their nature, complexity or even whether any formal arrangements exist – there will always be the potential for any statement in relation to those arrangements to potentially impact on the effectiveness of those arrangements to keep that individual safe.
21. The GLA noted that in an interview in *The Times* in May 2019, Sadiq Khan announced that he had been forced to have 24 police protection after receiving hundreds of threats on social media, including threats to his life. However, the GLA explained that it had never publicly commented on any specific security arrangements which may or may not be in place. Rather, it had maintained a consistent NCND position in response to all FOIA requests which requested information about any security or transport arrangements. It also argued that it was not aware of any information in the public domain which undermined its NCND position.
22. Furthermore, the GLA argued that a response under FOIA which confirms, denies or infers the existence of information would be a potentially valuable piece of information in the puzzle of those looking to understand what the Mayor's security arrangements are and then used by those determined to attack the Mayor or otherwise cause him harm.

The complainant's position

23. The complainant argued that it is well known the Mayor of London has a car. He also argued that it was not plausible to refuse his request on the basis of security reasons as Theresa May (the Prime Minister at the point he submitted his request) has a car and the government has not denied this.

The Commissioner's position

24. With regard to the first limb, the Commissioner is satisfied that this is clearly met given that the nature of prejudice envisaged by the GLA, namely harm to the safety of the Mayor, is clearly one that falls within the scope of the exemption contained at section 38(1)(b).

25. Furthermore, the Commissioner is satisfied that there is a causal link between confirming whether or not the GLA holds the requested information and harm occurring to the Mayor's safety. This is because the Commissioner accepts a statement confirming or denying whether the requested information was held is likely to be taken to imply whether or not the Mayor uses a vehicle. Moreover, the Commissioner agrees with the GLA's argument that any such information would be a potentially valuable piece of intelligence to those looking to harm the Mayor. With regard to third criterion, the Commissioner notes that the threats to the Mayor are clearly ones that are actual and real. In her view, given the potential insight complying with section 1(1)(a) of FOIA would provide to any would be attackers, the Commissioner accepts that the risk of harm occurring is clearly one that is more than hypothetical. Furthermore, the Commissioner agrees with the GLA that it is necessary to adopt a consistent NCND approach given the wording of this request.
26. In reaching this conclusion, the Commissioner appreciates that the complainant has argued that it is well known that the Mayor has a car. Furthermore, she also accepts that *The Times* article highlighted by the GLA includes some information relating to the Mayor's security arrangements. Nevertheless, the Commissioner is not aware of any information in the public domain that would undermine the GLA's position in respect of this request. Moreover, to the extent that there is some information in the public domain about the Mayor's security arrangements, for the purposes of assessing the validity of an FOI exemption, the Commissioner considers it important to draw a distinction between an official confirmation as to whether such information is held or not, and any other sources of potential information.
27. The Commissioner has therefore concluded that section 38(2) is engaged.

Public interest test

28. Section 38(2) is a qualified exemption. Therefore, the Commissioner must consider the public interest test contained at section 2 of FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in confirming whether or not the requested information is held.
29. The GLA acknowledged that there is a legitimate interest in it being transparent and accountable.
30. However, it argued that there is a strong public interest in not making any public statement that confirms or denies the existence of information that would be likely to endanger the health and safety of any individual. In this case, it argued that the exclusion of the duty to

confirm or deny outweighs the public interest in confirming or denying whether the requested information is held.

31. The Commissioner agrees that there is a public interest in the GLA confirming whether or not it holds information in order to ensure that it is transparent about the procedures it has in place in order to protect the Mayor. However, in the Commissioner's view there is a very strong public interest in ensuring the safety of individuals. In the circumstances of this case, given the real and present threat to the safety of the Mayor she is firmly of the view that the balance of the public interest favours maintaining the exemption contained at section 38(2).
32. In light of this finding, the Commissioner has not gone on to consider the GLA's reliance on section 31(3).

Right of appeal

33. 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: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

34. 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.
35. 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

Jonathan Slee
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