

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 June 2019

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 a copy of a Senior Investigating Officer (SIO)'s report written in connection with a case concerning alleged misconduct in public office from the Metropolitan Police Service (the "MPS"). The MPS refused to provide the requested information citing the exemptions at 30(1)(a) (investigations and proceedings) and 40(2) (personal information) of the FOIA. The Commissioner's decision is that the MPS was entitled to rely on section 30(1)(a) to withhold the information. No steps are required.

Background

2. The MPS has advised:

"In October 2008, the MPS launched an investigation into a series of government leaks from the Home Office. This was partly based on the potential risk that highly sensitive material relating to national security might be disclosed. This led to the arrest of civil servant Christopher Galley and MP Damion Green for conspiracy to commit misconduct in public office. In April 2009 The Director of Public Prosecutions, Keir Starmer, QC decided no charges should be brought against either man".

3. There is a considerable amount of information about the matter in the public domain^{1,2}. This includes a "Review of the lessons learned from the Metropolitan Police Service's investigation of Home Office leaks"³.

Request and response

4. On 5 December 2017 the complainant wrote to the MPS and made a request for the following information:

"The report of the Senior Investigating Officer relating to the investigation in 2008/09 into Christopher Galley and alleged misconduct in public office".

5. In compliance with a decision notice⁴, on 21 September 2018 the MPS responded. It refused to provide the requested information. It cited the following exemptions as its basis for doing so: section 30(1) (law enforcement) and 40(2) (personal information) of the FOIA.
6. Following an internal review, the MPS wrote to the complainant on 12 December 2018. It maintained its position.

Scope of the case

7. The complainant contacted the Commissioner on 8 January 2019 to complain about the way his request for information had been handled.
8. The complainant asked the Commissioner to consider the application of exemptions to the request, saying the following:

"I stand by the argument that I made in my internal review request where I told the Met "Your response has failed to take into account the public and constitutional importance of this case, which involved the arrest of an MP and the searching of parliamentary offices before the CPS decided not to bring charges. This greatly strengthens the public interest in full transparency and

¹ http://news.bbc.co.uk/1/hi/uk_politics/8003886.stm

² <https://publications.parliament.uk/pa/cm200910/cmselect/cmmisspriv/62/6206.htm>

³ <https://www.justiceinspectorates.gov.uk/hmicfrs/our-work/article/review-of-the-lessons-learned-from-the-metropolitan-police-services-investigation-of-home-office-leaks/>

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2259340/fs50743351.pdf>

accountability, and also the basis for disclosure being fair and legitimate under the Data Protection Act."

The entire affair was incredibly divisive at the time and represents an extremely important constitutional question of the rights of whistle-blowers, the rights of elected officials, and the actions of law enforcement officers in relation to those rights. I believe that the specifics of this case and its huge constitutional implications mean that the balance of the public interest lie in favour of disclosure".

9. The Commissioner has had full access to the withheld information relating to the investigation concerned, *in situ*. The only item which could possibly be construed as being what the complainant has requested is entitled: "Report 3 to Crown Prosecution Service". This is a bulky file which consists solely of advice files, witness statements and interviews. There is no "SIO report" within the file, rather it is the MPS's full submission to the CPS.

10. The Commissioner contacted the complainant about this in an attempt to informally resolve the case, advising that there is no actual SIO's report *per se*, only the submission prepared for the CPS. She told the complainant that she had had full access to all the information held and asked him what he had hoped the MPS would hold.

11. The complainant responded as follows:

"What I am after is the final full report of the investigation, whether it was undertaken by an individual or a group. I asked for the report of the senior investigating officer but if this was not undertaken by that specific individual then it is the report itself that I am most interested in".

12. The Commissioner explained to him:

"The only item which would loosely fall within your description was a bulky folder entitled "Report 3 to Crown Prosecution Service". However, this wasn't an actual "Report" per se but the full submission to the CPS. It consisted purely of advice files, witness statements and interviews – which, in my view, would not be suitable for disclosure. There is no full and final report just this submission to the CPS".

13. The complainant responded expressing some confusion as the MPS had clearly told him that it had located the information and conducted a public interest test at both the refusal and internal review stages. He asked whether or not the documents described were the same as those referred to in these responses.

14. The Commissioner wrote to the complainant again explaining that from what she had seen, the SIO did not produce a final report into the investigation. She added that the decision on whether or not to proceed with an investigation is for the CPS to make so it was unlikely that the SIO would provide any sort of summing up or opinion in respect of the evidence when the case was submitted. The Commissioner suggested that the complainant may wish to liaise further with the MPS.

15. In his response, the complainant said:

"Can I ask for an ICO ruling on the disclosure of the report you have described in your last two emails? That is the 'Report 3 to Crown Prosecution Service'? As this is what the MPS have been arguing that I cannot see I would like a decision from the ICO based on our arguments for this document".

16. The Commissioner will therefore consider the application of exemptions to the "Report 3 to Crown Prosecution Service" file below.

Reasons for decision

Section 30 – investigations and proceedings

17. Section 30(1)(a)(i) of the FOIA states:

"Information held by a public authority is exempt information if it has at any time been held by the authority for the purpose 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..."

18. The Commissioner considers that the phrase "at any time" means that information can be exempt under section 30(1)(a) of the FOIA if it relates to a specific ongoing, closed or abandoned investigation.

19. Consideration of section 30(1)(a) is a two-stage process. First, the exemption must be shown to be engaged. Secondly, as section 30 is a qualified exemption, it is subject to the public interest test. This involves determining whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Is the exemption engaged?

20. The first step is to address whether the requested information falls within the class specified in section 30(1)(a) of the FOIA.

21. The Commissioner has issued guidance on section 30⁵ which states that section 30(1)(a) can only be claimed by public authorities that have a duty to investigate whether someone should be charged with an offence.
22. The Commissioner's guidance describes the circumstances in which the subsections of section 30(1) might apply. With respect to section 30(1)(a), the guidance says:

"The exemption applies to both investigations leading up to the decision whether to charge someone and investigations that take place after someone has been charged.

Any investigation must be, or have been, conducted with a view to ascertaining whether a person should be charged with an offence, or if they have been charged, whether they are guilty of it.

It is not necessary that the investigation leads to someone being charged with, or being convicted of an offence...."

23. The MPS has further explained:

"In this instance, the alleged offence is one of misconduct in public office. Police have the power to investigate the common law offence of 'misconduct in in a public office'. Misconduct in public office is an offence at common law triable only on indictment. It is an offence confined to those who are public office holders and is committed when the office holder acts (or fails to act) in a way that constitutes a breach of the duties of that office.

The MPS, as a law enforcement agency, has a legal duty to conduct a criminal investigation with a view to it being ascertained whether person(s) should be arrested. On the basis of there being reasonable suspicion that an offence has been committed, and then to investigate that offence to obtain credible evidence for the CPS to assess whether person(s) should be charged".

24. As a police force, the MPS has a duty to investigate allegations of criminal offences by virtue of its core function of law enforcement. The Commissioner is therefore satisfied that it has the power to carry out investigations of the type described in section 30(1)(a).
25. Referring to the wording of the request, the arguments provided by the MPS, and having viewed the withheld information, the Commissioner is

⁵ <https://ico.org.uk/media/for-organisations/documents/1205/investigations-and-proceedings-foi-section-30.pdf>

satisfied that it was held in relation to an investigation conducted by the MPS of the type described in section 30(1)(a). She is therefore satisfied that the exemption provided by section 30(1)(a) is engaged.

The public interest test

26. Section 30(1)(a) is subject to a public interest test. This means that even though the exemption is engaged, the information may only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
27. In accordance with her guidance, when considering the public interest in maintaining exemptions, the Commissioner considers that it is necessary to be clear what they are designed to protect.
28. The purpose of section 30 is to preserve the ability of the police (and other applicable public authorities) to carry out effective investigations. Key to the balance of the public interest in cases where this exemption is found to be engaged, is whether the disclosure of the requested information could have a harmful impact on the ability of the police to carry out effective investigations. Clearly, it is not in the public interest to jeopardise the ability of the police to investigate crime effectively.
29. It is again noted that the withheld information in this case consists solely of a bulky file containing advice files, witness statements and interviews.

Public interest arguments in favour of disclosure

30. The MPS has acknowledged the public interest in promoting transparency, accountability and openness, particularly when it relates to the integrity of elected officials and civil servants involved in the leaking of government information. On this basis it has accepted that:

"Disclosure of the report would therefore satisfy the public that the investigation was conducted properly and professionally. It would further demonstrate the decisions and actions taken and police handling of the investigation was proportionate and lawful. This would demonstrate the MPS to be transparent and accountable".

31. The MPS has also recognised that the public interest is particularly strong in relation to both the subject matter of alleged leaks and the high profile nature of this case

Public interest arguments in favour of maintaining the exemption

32. The MPS has argued that the exemption provided by section 30 is designed to protect the integrity of investigations conducted by public

authorities. It has also advised that it remains the case that the information in question is held for the purpose of an investigation with a view to it being ascertained whether a person(s) should be charged with an offence.

33. It has explained that the withheld information is not available in the public domain and includes information that has been supplied to the MPS in the context of an investigation.
34. It advised the Commissioner that whilst it recognised the public interest in disclosure, it considered this was met at the time, in 2008/2009, when the matter was widely reported. The MPS also believes the public interest has been met by the publication of the independent reviews, MPS press releases and media reports^{6, 7, 8}.
35. The MPS also provided the following arguments against disclosure:

"Given the extent of time elapsed since the investigation (11 years) with no charges or trial, it is difficult to envisage the usefulness of scrutiny of events. To the extent, that prospective media attention would entail a re-visitation of the case, which could amount to a re-trial by media, which would not be in the public interest. The disclosure of the report would likely to cause distress to Christopher Galley and MP Damion Green and/or family members, friends, colleagues and witnesses who have since moved on. Given that, disclosure would serve little or no useful purpose, the need to avoid unnecessary distress sometime after the incident amounts to a public interest for maintaining the exemption.

In addition to the arguments above, it is also pertinent to note that even when investigations and proceedings appear to have been concluded or closed, there is often a realistic possibility of an investigations [sic] being reopened in order to investigate new lines of enquiry or review existing evidence. The scope of an investigation being broadened or narrowed but more importantly in this case new investigations being carried out that relate to, or overlap with earlier enquiries.

⁶ <https://www.justiceinspectorates.gov.uk/hmicfrs/media/lessons-learned-report-20091001.pdf>

⁷ <https://www.justiceinspectorates.gov.uk/hmicfrs/news/releases/release-006-2009/>

⁸ <https://publications.parliament.uk/pa/cm200809/cmselect/cmhaff/157/157.pdf>

Government leaks raise matters of genuine public interest however, it can also discourage others to report leaks. Disclosure under the Act would be likely to inhibit our ability to prevent and detect crime, as individuals may well be less inclined to come forward, or co-operate with the police especially if they were aware that the information they provide would likely to be disclosed to the world in circumstances siting [sic] outside of the criminal justice process. For this reason, the MPS believes that disclosure of the report could restrict the flow of information to the MPS in future, as potential sources of information (whistle blowers) may be discouraged from coming forward if they anticipate that the information they provided could later be disclosed publicly in response to requests made under the Act. This would also include witness statements.

Our ability to gather information to perform our public service functions is paramount. Releasing information would therefore have a negative impact on the relationships we work hard to build, to enable us to conduct our roles fully. Like any other high profile case, the MPS are rightly expected to act with integrity and sensitivity.

Although all requests are treated on a case-by-case basis, it is rare that full details of investigations will be disclosed, as to do so would disclose personal information which relates to the personal affairs of individuals, including those with profiles in the public domain.

Due to the high profile nature of this request and media interest at the time, it could be considered there is an increased public interest in disclosure. The MPS is aware however, that media interest does not automatically or necessarily equate to a public interest. I believe the information in the public domain surrounding this case is limited and a window of opportunity therefore disclosure at this point under FOIA would be unfair. Once information is in the public domain, it may be difficult to reverse a disclosure decision, as the MPS would no longer have control on the information disclosed. Harm of this affect could have an incremental effect.

The MPS in general do not disclose information relating to investigations expect [sic] through our Directorate of Media and Communications (DMC) in a careful and managed way. This is so potential victims and witnesses are not discouraged to come forward and provide statements in relations to allegations of crime. It is not in the public interest to disclose any information held regarding any investigations under FOIA. It is important the MPS protect the integrity of any investigations and information is only released through DMC.

Disclosure of the report although would [sic] possibly enable accurate debate on sufficiency of the police investigation into leaks could cause potential issues to investigate matters of this nature in the future. Because disclosure would indeed highlight how robust our interview and investigations techniques were, it would enable those with ill-intentions to 'prepare' for future interviews that they may be subjected to.

The MPS appreciates the public's frustration when it appears, rightly or wrongly, that more could have been done or the investigations appear not to have been conducted correctly. However, there are mechanisms in place to deal with any cases that police believe to have failed their public duty. Disclosing sensitive personal information about an investigation under the Act is not an appropriate way to deal with such concerns".

Balance of the public interest

36. In reaching a conclusion on the balance of the public interest, the Commissioner has considered the public interest in the MPS disclosing the requested information. The Commissioner has also considered whether disclosure would be likely to harm any investigation, which would be counter to the public interest, and what weight to give to these competing public interest factors.
37. As set out above, the purpose of section 30 is to protect the effective investigation and prosecution of offences. Clearly, it is not in the public interest to jeopardise the ability of the police to investigate crime effectively.
38. Set against this, the Commissioner recognises the importance of the public having confidence in public authorities that are tasked with upholding the law. Confidence will be increased by allowing scrutiny of their performance and this may involve examining the decisions taken in particular cases.
39. The MPS itself has concluded that the strongest reason favouring disclosure is that it would reinforce public confidence that the MPS handled the investigation thoroughly and professionally, which would in turn enhance transparency and accountability. Against disclosure, it found that the strongest reason was the negative impact on future investigations and its core function of law enforcement.
40. The Commissioner recognises the public interest in transparency and accountability with regard to the conduct of public officials who are subject to allegations, and in the public being able to reach an informed view as to whether such matters are being investigated appropriately by the police. However, the information which is under consideration here

includes detailed witness statements and interview details which the providers would have no expectation would be released at this stage, particularly in view of the passage of time. The case did not go to court and the subjects would not expect them to now be disclosed to the general public under the FOIA, as they would consider the matter to be formally closed.

41. As well as potentially having repercussions for the witnesses in this investigation, disclosing such information could create a perception among the wider public that witness statements and interviews may be disclosed to the world at large, even where the evidence has not resulted in a prosecution. This may deter people from coming forward and cooperating with prosecuting authorities, particularly where criminal offences have been alleged. There is a very significant public interest in avoiding that outcome and it is a factor of some weight in favour of maintenance of the exemption in this case.
42. The Commissioner also notes that the MPS's actions were scrutinised at the time and that the subsequent independent reviews have been disclosed to the public to satisfy the public interest in the matter.
43. Having given due consideration to the arguments put forward by both parties, the Commissioner is satisfied that section 30(1)(a) has been applied appropriately in this case and that the public interest in maintaining the exemption outweighs the public interest in disclosure.
44. As the Commissioner has concluded that this exemption is properly engaged in respect of all the withheld information she has not considered the other exemption cited.

Right of appeal

45. 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:

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

46. 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.

47. 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

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