

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 July 2022

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 information from the Metropolitan Police Service (the "MPS") about why a case was not pursued. The MPS relied on sections 30(1) (Investigations and proceedings), 31(1) (Law enforcement), 40(2) (Personal information) and 42(1) (Legal professional privilege) of FOIA to forego disclosure.
2. The Commissioner's decision is that section 42 was properly engaged with respect to all of the withheld information. No steps are required.

Request and response

3. On 16 June 2021, the complainant wrote to the MPS and requested information in the following terms:

"Provide all information relating to the reason not to arrest/prosecute Forever Family Force for s1 Public Order Act 1936 offence (wearing a political uniform) during the Afrikan Emancipation Day Reparations March, Brixton, London, 1 August 2020".
4. On 7 July 2021, the MPS responded. It advised that it had "decided to disclose the located information to [the complainant] in full". However, it then added that it would not disclose either Crown Prosecution Service (CPS) advice or the rationale involved as both "involved" legal privilege and data protection concerns. It did not cite any exemptions.

5. The complainant requested an internal review on 11 July 2021.
6. The MPS provided an internal review on 5 August 2021 in which it revised its position, citing reliance on section 30(1)(a)(i) (Investigations and proceedings) of FOIA to withhold the requested information.
7. During the Commissioner's investigation, the MPS again revised its position. It added reliance on sections 31 (Law enforcement), 40 (Personal information) and 42 (Legal professional privilege) of FOIA.
8. The Commissioner has viewed the withheld information in this case. It consists of two documents, namely a completed MG3A form¹ and Counsel advice.

Scope of the case

9. The complainant contacted the Commissioner on 5 August 2021 to complain about the way his request for information had been handled. He asked the Commissioner to consider the application of exemptions to the request.
10. The Commissioner will consider the application of exemptions to the withheld information below.

Reasons for decision

Section 42 – Legal professional privilege

11. This exemption has been applied to the withheld information in its entirety.
12. Section 42(1) of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings.
13. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/891370/Manual-of-guidance-MG-forms-v11ext.pdf

Bellamy v The Information Commissioner and the DTI (EA/2005/0023)
("Bellamy") as:

"... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communications or exchanges come into being for the purposes of preparing for litigation".

14. There are two categories of LPP, litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but where legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice. In this case, the MPS considers legal advice privilege applies.
15. Having inspected the withheld information the Commissioner is satisfied that it comprises communications that, at the time they were made, were confidential; made between a client and professional legal adviser acting in their professional capacity; and made for the sole or dominant purpose of obtaining legal advice. He is therefore satisfied that the information is of a type, and was communicated in circumstances, which attract LPP. He has gone on to consider whether there has been a previous disclosure to the world at large such that the information can no longer be considered to be confidential. If that is the case, then LPP will have been lost.
16. The MPS has confirmed to the Commissioner that:

"MG3 is used to communicate between CPS lawyers and their clients, in this case the Police. They contain opinion and as such go further than merely stating the case facts. They are completed in the expectation that they are confidential allowing safe space for the CPS and police to share sensitive information. It would be a very serious step to reveal an MG3 to any third party who is not part of the investigation or judicial process, and would seriously undermine that process.

The MG3A records further police investigations and advice from the CPS".

17. The Commissioner has seen no evidence to suggest that the information was publicly known at the time of the request and there is therefore no

suggestion that privilege has been lost in this case. Consequently he finds that the exemption at section 42(1) of FOIA is engaged in respect of all of the withheld information.

18. As the Commissioner is satisfied that the withheld information is subject to LPP, he has concluded that section 42 of the FOIA is engaged. He will now go on to consider the public interest test.

Public interest arguments in favour of disclosure

19. The complainant argued that: "There is a legitimate interest in understanding why two white people were prosecuted (and convicted) on a number of occasions, but black people in full Nazi-style military uniform were not". And: "I suspect MPS/CPS did not prosecute on grounds of race".

20. In further correspondence to the Commissioner, he added (his emphasis):

"I want to know why the MPS did not prosecute, it seems the CPS issued a charging decision. It is clearly in the public interest to know why **white** people get prosecuted and **black** people do not. This is due to the concept of the rule of law. I am sure the ICO knows what that means. As you can see from the picture below [not reproduced], there is a *prima facie* case that [Forever Family Force] were guilty of the offence of wearing a political uniform in a public place".

21. The MPS has acknowledged the interests of transparency and the public interest in disclosure of the legal advice, which would enable the public to better understand the basis of its decision and rationale.

22. It also accepted that:

"The provisions [sic] of information held, which is captured by legal professional privilege would show the MPS to be fully accountable for their actions, decisions and that officers concerned within this investigation acted within the remit of the law".

Public interest arguments in favour of maintaining the exemption

23. The MPS advised that it had taken into account that the general public interest inherent in the exemption will: "... always be strong due to the importance of the principle behind LPP, which safeguards openness in all communications between client and lawyer to ensure access to full and frank legal advice. This in turn is fundamental to the administration of justice".

24. It added that disclosure of the advice would reveal the basis of its position, disclosure of which could affect its role as law enforcer.
25. The MPS said that it is reliant on being able to maintain the confidence relating to all communications, where the predominant purpose of those communications relates to litigation, saying:

“The MPS is reliant upon the provision of impartial legal advice to inform and guide its decision making. The public release of the legal advice held and other privilege [sic] material contained with the requested material, would impede the free and frank channels of communication that exists between the MPS and legal advisors. This is because, overtime [sic], those seeking legal advice on behalf of the MPS and/or providing advice to employees of the MPS, would be less likely to be candid in future communication owing to the risk of future release. This would affect the quality of advice provided by legal advisors to the MPS and the ability of the MPS to obtain open, informed and unbiased legal advice.

The client-legal professional privilege is a principal [sic] enshrined in history that must be respected. Releasing the requested information would impede that relationship by deterring the complete free and frank flow of communication that exists between the MPS and legal advisors. Should the relationship be less candid ... the MPS risk the reduction of the quality of advice received on various matters. In turn this would negatively affect the ability of the service to make more effective and efficient informed decisions.

It would therefore not be in the public interest to negatively impede on the ability of the MPS to communicate in an open and candid manner in regard to investigations”.

26. It added:

“It is not in the interest of the police service (who are fully funded by public money) to be put at an operational and legal disadvantage when conducting investigations, which could directly affect the way public functions and processes are carried out. To ensure that the police are free to continue to carry out their public functions, without fear of exposure there remains a strong public interest in non-disclosure of the current legal advice”.

27. The MPS also explained that LPP protects its ability to consider the strengths and weaknesses of a position and that LPP evolved to make sure communications between a lawyer and their client remain confidential.

Balance of the public interest test

28. In summing up its position, the MPS argued:

"The strongest reason favouring disclosure is the public interest in understanding legal advice behind any decision made by the MPS. The strongest reason favouring non-disclosure of the requested information is considering the negative impact disclosure could have on the relationship between the MPS and legal advisors.

The MPS should be able to obtain independent free and frank legal advice without the fear that the position adopted and considered (based on legal advice) will be disclosed through the Freedom of Information Act.

In balancing the opposing public interest factors under section 42, the MPS considers it necessary to take into account the in-built public interest in this exemption, that is, the public interest in the maintenance of LPP. The general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP, safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. In the MPS's view this principle is fundamental to the administration of justice and disclosing any legally privileged information threatens that principle.

On weighing up the competing interests, I find the public interest in non-disclosure outweighs the public interest in disclosure. The decision is based on the understanding that the public interest is not what interests the public, but what would be of greater good to the community, as whole, if disclosed".

29. The Commissioner's published guidance² on section 42(1) states:

"As a general rule there is no inherent public interest in class based exemptions. However, there is an inherent public interest in section 42, which exempts legally privileged information. This is because of the importance of the principle of legal privilege; disclosing any legally privileged information threatens that principle. The general public interest inherent in this exemption will always be strong due

² https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice”.

30. In balancing the opposing public interest factors under section 42, the Commissioner considers it necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of LPP. The general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP. A weakening of the confidence that parties have that legal advice will remain confidential undermines the ability of parties to seek advice and conduct litigation appropriately and thus erodes the rule of law and the individual rights it guarantees.
31. It is well established that where section 42(1) of FOIA is engaged, the public interest in maintaining the exemption carries strong, in-built weight, such that very strong countervailing factors are required for disclosure to be appropriate. The Commissioner notes the decision in *Council v Information Commissioner and Gavin Aitchison* (GIA 4281 2012) where, at paragraph 58, Upper Tribunal Judge Williams said: “...it is also, in my view, difficult to imagine anything other than the rarest case where legal professional privilege should be waived in favour of public disclosure without the consent of the two parties to it”.
32. The Commissioner understands the crux of the complainant’s case to be that disclosure is required in order to ensure that the advice given is fair and unbiased. The Commissioner accepts that there is a legitimate public interest in ensuring that public authorities are transparent in their actions. He also accepts that there is a legitimate public interest in disclosure of the withheld information to assist the public in understanding the background and legality of any decisions made in relation to the incident which is the subject of the request.
33. However, the Commissioner considers that there is a very strong public interest in the MPS being able to obtain full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions without fear that this legal advice may be disclosed into the public domain. The Commissioner considers that disclosure may have a negative impact upon the frankness of legal advice provided and may even have an impact upon the extent that legal advice is sought. This would not be in the public interest.
34. The Commissioner has had due regard to the content of the withheld information. He cannot describe it in detail since to do so would undermine the confidentiality provided for by application of the exemptions engaged.

35. The Commissioner is mindful that, while the inbuilt weight in favour of the maintenance of LPP is a significant factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is equalled or outweighed by the factors favouring disclosure. Parliament decided that the exemption at sections 42(1) should be qualified because it considered that there would be some cases, however exceptional, where information should be disclosed in the public interest, despite engaging the exemptions.
36. In weighing up the public interest in this case, whilst the Commissioner accepts that there are arguments in favour of disclosure, he does not consider that the weight of those arguments is enough to outweigh the public interest arguments in favour of maintaining the exemption. The Commissioner considers that the balance of public interest lies in withholding the information and protecting the MPS' ability to obtain free, frank and high quality legal advice without the fear of premature disclosure. The evidence presented is not sufficient to outweigh or override the inbuilt public interest in the information remaining protected by LPP.
37. In conclusion, the Commissioner finds that the public interest in maintaining the exemption at section 42(1) clearly outweighs the legitimate public interest in disclosure of the withheld information.
38. As the Commissioner has found that section 42 is properly engaged he has not found it necessary to consider the other exemptions cited.

Other matters

39. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

Refusal notice

40. The complainant did not refer to the quality of the initial refusal notice in this case so it has not been considered in the main part of this notice. However, the Commissioner finds it to be both contradictory and inadequate. It states: "I have today decided to disclose the located information to you in full" but then goes on to say "We would not disclose the CPS advice or the rationale involved as both would involve legal privilege and DPA".
41. Clearly the information was not disclosed "in full". Furthermore, no FOIA exemptions were cited by the MPS, despite it advising the complainant that some information would not be disclosed.

42. The Commissioner considers this to be a poor response which does not comply with section 17 of FOIA. This will be noted in case there are further examples of poor compliance in the future.
43. The Commissioner will use intelligence gathered from individual cases to inform his insight and compliance function. This will align with the goal in his draft Openness by Design strategy³ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our Regulatory Action Policy⁴.

³ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁴ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

44. 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

45. 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.
46. 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

Carolyn Howes
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