

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 30 August 2022

**Public Authority:** Greater Manchester Combined Authority

**Address:** Tootal Buildings  
56 Oxford Street  
Manchester  
M1 6EU

#### **Decision (including any steps ordered)**

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1. The complainant has requested copies of correspondence regarding individuals in relation to Sexual Harm Prevention Orders.
2. The Commissioner's decision is that the Greater Manchester Combined Authority was entitled to withhold the information on the basis of section 36(2) of the FOIA.
3. The Commissioner does not require any steps.

## Request and response

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4. On 26 April 2021 the complainant requested information from the Greater Manchester Combined Authority ("the Authority") in the following terms:

### "BACKGROUND

Now the Home Secretary and local MP Chris Clarkson have questioned why Sexual Harm Prevention Orders – which can ban individuals from an area to stop them from running into their victims. Ms Patel wrote to the mayor last year, but claims to have never received a response on that issue. Sources close to Mr Burnham said they did respond and accused the Home Secretary of politicising the victims of these horrendous crimes.

### REQUEST

Disclose the letter(s) from Priti Patel and Mayor's reply(s) regarding [name redacted] and [name redacted]."

5. The Authority initially responded on 13 May 2021 advising that it needed a further 20 days to consider the public interest case for disclosure.
6. The Authority responded on 5 July 2021. It refused to provide the requested information. It cited the following exemptions as its basis for doing so: sections 36(2)(b)(i), 36(2)(c) (prejudice to effective conduct of public affairs); and section 40(2) (personal information) of the FOIA.
7. The complainant requested an internal review on 5 July 2021
8. The Authority wrote to the complainant with the outcome of an internal review on 5 August 2021. It upheld its original position on the original request of 26 April 2021.

## Scope of the case

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9. The complainant contacted the Commissioner on 5 August 2021 to complain about the way the request for information had been handled. Specifically whether the Authority is entitled to withhold information in scope of the original request of 26 April 2021, on the basis of section 36(2) and section 40(2) of the FOIA.
10. The scope of this case is to determine whether the Authority was correct to withhold the requested information on the basis of sections 36(2) and 40(2).

## Reasons for decision

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### Section 36 prejudice to effective conduct of public affairs

11. Sections 36(2)(b) and 36(2)(c) of the FOIA state that:

“2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person (“QP”), disclosure of the information under this Act –

(b) would, or would be likely to inhibit-

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs”.

12. Section 36 operates in a slightly different way to the other prejudice based exemptions in the FOIA. It is engaged only if, in the reasonable opinion of a QP, disclosure of the information in question would, or would be likely to, result in inhibition or prejudice relevant to any of the activities set out in the sub-sections of 36(2).

13. Section 36 is unique in that its application depends on the opinion of the QP that the inhibition or prejudice envisaged would, or would be likely to occur. To determine whether the exemption was correctly engaged by the Authority, the Commissioner is required to consider the QP’s opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:

- ascertain who the QP is;
- establish that they gave an opinion;
- ascertain when the opinion was given; and
- consider whether the opinion was reasonable.

14. The QP, in this case, is the Monitoring Officer for the Authority. The Authority has advised the Commissioner that the QP’s opinion was sought at the time of the initial request, and that the withheld information was shared with them for their opinion.

15. The Commissioner is satisfied that the Authority’s Monitoring Officer is a QP for the purposes of section 36(5) of the FOIA.

16. The Commissioner asked the Authority to provide him with evidence that the QP considered the application of section 36 personally. The Authority provided the Commissioner a copy of the document which records the QP's opinion and is attributed to them.
17. In view of the document evidencing the QP's opinion, the Commissioner is satisfied that the QP did provide their opinion that the information in question was exempt under sections 36(2)(b) and 36(2)(c).
18. The Commissioner must consider whether this opinion is a reasonable one to hold. The Commissioner will consider the plain meaning of reasonable, that being: in accordance with reason, not irrational or absurd. If it is an opinion that a reasonable person could hold, then it is reasonable for these purposes. This is not the same as saying that it is the only reasonable opinion that could be held on the matter. The QP's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. Neither is it the case that it has to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
19. The Commissioner has also been guided by the Tribunal's indication, in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC1*<sup>1</sup>, that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus "does not necessarily imply any particular view as to the severity or extent of such inhibition (or prejudice) or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant" (paragraph 91). Therefore, when assessing the reasonableness of an opinion the Commissioner is restricted to focussing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.
20. With regard to the degrees of likelihood of prejudice the Commissioner has been guided on the interpretation of the phrase "would, or would be likely to" by a number of Information Tribunal decisions. In terms of "likely to" prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner*<sup>2</sup> confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk" (paragraph 15). With

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<sup>1</sup> Appeal numbers EA/2006/0011 & EA/2006/0013

<sup>2</sup> Appeal number EA/2005/0005

regard to the alternative limb of "would prejudice", the Tribunal in *Hogan v Oxford City Council & The Information Commissioner*<sup>3</sup> commented that "clearly this second limb of the test places a stronger evidential burden on the public authority to discharge" (paragraph 36).

21. The record of the QP's opinion confirms that in reaching their decision they had full view of the information in scope of the request. It is their opinion that sections 36(2)(b) and 36(2)(c) apply to all of the information, this being the requested letters between the Home Secretary and the Mayor.
22. For subsections 36(2)(b) and 36(2)(c) the QP's opinion is that the claimed inhibition and prejudice would be "likely to" occur if the information was disclosed. Therefore the Commissioner considers it appropriate to apply the first evidential test for "likely to" prejudice.
23. The council confirmed that the QP considered that release of the information:
  - may hinder the full and frank sharing of information and the receipt of detailed advice;
  - may put health and safety of a group or individual at risk;
  - may result in unfairness to others;
  - will inhibit the effective delivery of services and/or undermine the Authority's ability to fulfil its role.
24. The Authority confirmed that the QP had been briefed on counter arguments for disclosure of the information. These being that it would further the understanding of and participation in the debate of current issues and promote openness and honesty.
25. The QP considered the series of letters exchanged between the Mayor and the Home Secretary regarding delays to the planned deportation of offenders convicted of CSE offences in Rochdale following media reports about victims meeting their abusers in local shops.
26. The QP states that the Mayor in his role of the Police Crime Commissioner ("PCC") has duties relating to victims of crime. The Mayor must therefore be able to advocate on behalf of victims in Greater Manchester on a confidential basis.

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<sup>3</sup> Appeal number EA/2005/0026 & 0030

27. The QP's opinion is that release of the withheld information may hinder the full and frank sharing of information, and the receipt of detailed advice, and this would be unfair to victims.
28. The QP considers that an ongoing public discourse about the progress in these cases is likely to cause further upset and distress to the victims without warning and without police or organisations providing additional support or information.
29. The QP considers that release of the letters will inhibit the effective delivery of services and undermine the Authority's ability to fulfil its role. It may also put the health and safety of a group or individual at risk.
30. The council further clarified that releasing the letters would contravene the confidential arrangements between the Mayor, Deputy Mayor and victims in this particular case, and may also be detrimental to any future incidents where these officials need to support victims.

### **Is the exemption engaged? – the Commissioner's conclusion**

31. The Commissioner considers that the exemption at section 36(2)(b) concerns processes that may be inhibited at the time of the request and in the future, not necessarily inhibition arising from the content or subject matter of the requested information itself. The key issue in this case is whether disclosure could inhibit the process of providing advice or recommendations, in order to advocate on behalf of the victims and to progress decisions about the offenders of CSE crimes.
32. Arguments under section 36(2)(b) are usually based on the concept of a "chilling effect". The chilling effect argument is that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making. If the issue in question is still live, arguments about a chilling effect on those ongoing discussions are likely to be most convincing.
33. Having reviewed the withheld information, the Commissioner considers that the parties involved (both the senior officials and the victims) will have expected the information to be held in confidence so it is logical that disclosure would inhibit the processes of providing advice or exchanging views in any future debate.
34. The Commissioner notes that the deportation issue remains live, being reported in the press in July 2022. The legal processes concerning deportation are ongoing, as is the related political debate.

35. The Commissioner has therefore come to a conclusion based on the nature of the withheld information, and the current status of the debate regarding the deportation of those convicted of CSE crimes.
36. The Commissioner is satisfied that the opinion given by the QP, being that inhibition relevant to section 36(2)(b) would be likely to occur, was a reasonable one. Therefore he finds that the exemption at section 36(2)(b) was engaged.

### **Public interest test**

37. Having found that section 36(2)(b) was engaged, the next step is to consider the balance of the public interest. The public interest test is separate from the QP's opinion.
38. Even where the QP has identified that disclosure of information would be likely to cause prejudice, the public authority must still disclose that information unless it can demonstrate that the public interest favours maintaining the exemption.

### **Public interest arguments in favour of disclosure**

39. The Authority acknowledged that there is a public interest in promoting openness, transparency and honesty regarding how public authorities operate and make decisions.
40. The complainant raises that the public interest is weighted in favour of disclosure, because the withheld information relates to matters of child protection.
41. The Commissioner agrees that information regarding issues of child protection carry a strong public interest in disclosure. Especially when the issues are the subject of live debate, such as in this case.
42. The Commissioner also considers that the letters shared between such senior officials as the Mayor and the Secretary of State, on a sensitive matter which has been widely reported in the national press, would carry a high degree of public interest.

### **Public interest arguments in favour of maintaining the exemption**

43. The Authority considered the same factors as considered in finding section 36(2)(b) engaged to be applicable to the public interest test.
44. Release of the information may hinder the sharing of information, and the receipt of detailed advice in the future. This is both between officials, and between the officials and the victims of crimes for whom they advocate

45. Release of the information would be unfair to victims, or the families of victims, some of whom are identifiable in the information, or may be distressed about an ongoing public discourse on the matter.
46. The disclosures could put the health and safety of individuals or groups at risk. Police or other organisations may be required to provide additional support.
47. The Commissioner additionally considers that senior officials, such as the Mayor and the Secretary of State, need a safe space to debate the issues, free from external influences. Premature public or media involvement could prevent or hinder their free and frank exchange of views. This need for a safe space is an especially strong argument whilst the issue is still live.

### **The balance of the public interest**

48. When considering complaints regarding the application of the exemptions at section 36(2), where the Commissioner finds that the QP's opinion was reasonable he will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would be likely to occur. However, he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test favours disclosure.
49. The Commissioner considers that this case carries a great deal of weight in terms of achieving accountability and transparency through the disclosure of information. This was a matter of great concern to many and how public bodies handled the issue of CSE is highly controversial, so there is a strong public interest in disclosure. The subject matter is particularly sensitive and is still widely reported in the press. Disclosure in this case would allow the public to scrutinise the basis of the claims that appropriate actions have not been taken to exclude individuals from areas using powers provided by "Sexual Harm Prevention Orders."
50. The Commissioner has considered the severity of disclosure. The subject matter of the request is both high profile with the public, and political in nature. He considers that disclosure could have a significant chilling effect on future frank deliberations between senior office holders. The Commissioner considers that it is important to preserve a safe space for frank deliberations on such an important issue, being the abuse of children.
51. The Commissioner has considered the content of the withheld information. Whilst the subject of the withheld information is regarding



the convicted offenders, it also contains frank exchanges regarding the victims of crime, potential risks, operations underway in Greater Manchester, investigations and cases. The extent of the impact of disclosure is potentially very wide, including on the victims, their families and the support agencies.

52. The Commissioner considers it important that the Mayor is able to intervene effectively in a situation as sensitive as this. Whilst the situation is not likely to be very frequent, the negative effect of disclosure on the victims could be potentially very high.
53. The Commissioner considers that there is a strong public interest in disclosure of the information for the reasons already set out above. However taking account of the QP's opinion, the sensitivity of the withheld information, the potential impact on victims, and the need for a safe space to deliberate such issues, the Commissioner has concluded that the public interest is narrowly balanced in favour of maintaining the exemption.
54. The Commissioner's decision is that the public interest in maintaining the exemption outweighs disclosure of the withheld information in this case. The Authority was not, therefore, obliged to disclose the requested information.
55. As the Commissioner has concluded that section 36(2)(b) applied, it has not been necessary to also consider the application of sections 36(2)(c) or 40(2) to the withheld information.

## Right of appeal

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56. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

57. 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.
58. 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 .....**

**Janet Wyles**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**