

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 December 2023

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 legal advice from the Metropolitan Police Service (the "MPS"). The MPS refused to provide the requested information, citing sections 42(1) (Legal professional privilege) and 40(2) (Personal information) of FOIA.
2. The Commissioner's decision is that section 42(1) is engaged and that the public interest favours maintaining the exemption.
3. The Commissioner does not require any steps.

Background

4. The MPS has explained to the Commissioner:

"The request relates specifically to a High Court injunction¹ which banned protests² around the M25. The protests received much publicity at the time³".

Request and response

5. On 25 July 2023, the complainant wrote to the MPS and requested the following information:

"Copies of any advice issued by the MPS legal team between 21-28 September 2021 regarding the police's role in enforcing an injunction obtained by National Highways in relation to protests on and around the M25 – including the sharing of information with enforcement officers".

6. On 10 August 2023, the MPS responded. It confirmed holding information but refused to disclose it, citing section 42(1) of FOIA.
7. The complainant requested an internal review on 30 August 2023. He said:

"I accept that Section 42 applies to the requested information but I believe the public interest lies in disclosure.

The requested information relates to the police's role in enforcing injunctions obtained by National Highways against protests taking place on the M25 – injunctions that have been described by one national newspaper columnist as "an attack on the democratic right to protest in which our freedoms are rooted" (see: <https://shorturl.at/dklt7>). Disclosure of the requested information would therefore contribute to a better informed public debate over a matter of considerable importance.

Police incident logs relating to the M25 protests, disclosed by other police forces in response to FOI requests, show the police shared information about protestors with High Court enforcement officers – after receiving the requested legal advice. Disclosure of the requested information would therefore either expose misconduct or

¹ <https://nationalhighways.co.uk/media/wcufrac5/national-highways-limited-v-persons-unknown-approved-order-21-09-21.pdf>

² <https://www.bbc.co.uk/news/uk-england-beds-bucks-herts-58649286>

³ <https://www.bbc.co.uk/news/uk-england-london-58704508>

serve to reassure the public that legal advice was obtained and followed in the proper manner.

I also contend that the considerations favouring non-disclosure have been overestimated. The refusal notice states that disclosure “would provide persons intent on disrupting the work of MPS, with information that would assist them in this endeavour”. However, the legal advice relates specifically to the MPS’s role in enforcing a private sector High Court injunction, mitigating any potential impact that disclosure may have on the MPS’s ability to conduct its statutory duties”.

8. The MPS provided an internal review on 10 October 2023 in which it maintained its position.
9. In correspondence with the Commissioner, the MPS later relied on section 40(2) (Personal information) in respect of the names of any parties within the withheld information.

Scope of the case

10. The complainant contacted the Commissioner on 11 October 2023 to complain about the way his request for information had been handled. His grounds of complaint were as follows:

“The Met Police has refused to disclose the requested information, citing section 42(1). While I accept that this section has been correctly applied, I believe the public interest test lies in disclosure. Documents released under FOI by other police forces show that the police shared information about protestors with High Court enforcement officers after receiving the legal advice that is the subject of this request. Disclosure is therefore necessary to address legitimate public concerns about the police's role in enforcing a private sector injunction and to provide the public with a full picture of events rather than the partial picture provided by previous FOI disclosures. Depending on the nature of the requested legal advice, disclosure will also serve to either correct inaccurate or misleading information that is already in the public domain or expose wrongdoing (i.e. correcting the belief or exposing the fact that the police ignored legal advice regarding the sharing of information about protestors)”.

11. The Commissioner will consider the citing of section 42(1) of FOIA below; he has not found it necessary to consider section 40(2) of FOIA. He has viewed the withheld information.

Reasons for decision

Section 42 - Legal professional privilege

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. LPP protects the confidentiality of communications between a lawyer and client.
13. Section 42 is a class based exemption, that is, the requested information only has to fall within the class of information described by the exemption for it to be exempt. This means that the information simply has to be capable of attracting LPP for it to be exempt. There is no need to consider the harm that would arise by disclosing the information.
14. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Tribunal in the case of '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."
15. 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 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.
16. The requested information in this case relates to legal advice relating to an injunction against protests taking place on the M25 (see Background, above).
17. The MPS has advised the Commissioner:

"In this particular instance legal advice privilege would apply. The substance of this advice has not been made public. The Client being

the MPS and the Legal Adviser, the Directorate of Legal Services (DLS)".

18. The MPS also explained:

"LPP is intended to provide confidentiality between professional legal advisers and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal advice, including potential perceived weaknesses and counter-arguments. This in turn ensures the administration of justice. LPP belongs to the client, and material protected by LPP cannot ordinarily be revealed without the consent of the client, even to a court.

Legal advice privilege applies to the information being requested as it covers confidential communications between client and the lawyer made for the dominant purpose of seeking/giving legal advice. This is clearly a question of fact, as the advice itself concerns legal rights and relates to a legal context. Additionally the lawyer providing the advice would be acting in a professional capacity".

19. From the evidence he has seen, the Commissioner is satisfied that the withheld information falls within the definition of LPP. It is further noted that the complainant accepts that the exemption is properly engaged.

Public interest test

20. Section 42 is a qualified exemption and the Commissioner has therefore considered the balance of the public interest to determine whether it favours the disclosure of the information, or favours the exemption being maintained.

Public interest arguments in favour of disclosure

21. The complainant's views are in paragraph (10) above.

22. The MPS argued that it had taken into account the general public interest in disclosure that is built into FOIA. It said that it is accountable to the general public and that disclosure of the advice would demonstrate transparency.

23. It also argued:

"The MPS appreciates a consideration favouring disclosure of the legal advice is that a significant number of people were affected by the advice received. This is because the advice was obtained in relation, specifically to a High Court injunction which banned protests around the M25. The information contained therein clearly affects members of the public.

The MPS appreciates there is public interest in disclosure of the legal advice in consideration of the High Court decision which resulted in favour of the injunction in the interests of openness and transparency, I understand there is an increased public interest in disclosure of the legal advice received by the MPS. This advice would enable the public to better understand the basis of MPS's decisions and rational due to potential risks from the motivated protests.

The provisions of information held, which is captured by legal professional privilege would show the MPS to be fully accountable and transparent for its decisions and actions relating to the High Court Injunction".

Public interest arguments in favour of maintaining the exemption

24. In favour of withholding the advice, the MPS has argued that the public interest is particularly strong as the advice is still live. It explained:

"It is still advice being relied upon or relevant to litigation which has/is being taken place. To disclose legal advice where litigation on the relevant issues has taken place which relates to the injunction would be irresponsible at this time. The legal advice would reveal the MPS's position, disclosure of which may affect our role as law enforcer.

The National Highways and the Government continue to address issues⁴ relating to protests and protestors on the M25⁵, the M25 feeder roads and major roads in Kent and around the Port of Dover as it remains a contentious issue, as such any legal advice would be prejudicial.

The advice held was sought to clarify the MPS's position".

25. It also argued:

"The client-legal professional privilege is a principal 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

⁴ <https://nationalhighways.co.uk/media/kdppc2xb/sealed-qb-2021-003576-revised-nha-order-03-october-2023.pdf>

⁵ <https://nationalhighways.co.uk/about-us/high-court-injunctions-for-motorways-and-major-a-roads/>

the MPS and legal advisors. Should the relationship be less candid in future communication due to the continued release of legal communications under FOIA requests, 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 law enforcement matters and investigations.

Although each request is treated on a case-by-case basis, disclosure is likely to prejudice the ability of the MPS to obtain unbiased advice in connection with any future investigations. This would be the case should the MPS continually publish advice sought in connection with any high profile matters/investigations.

...LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Tribunal in the case of *Bellamy v The Information Commissioner and the DTI (EA/2005/0023) (Bellamy)*⁶ 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.'

...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 litigation, 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 to litigation in which other parties would have an unfair advantage, there remains a strong public interest in non-disclosure of the current legal advice".

Balance of the public interest

26. In balancing the opposing public interest factors under section 42(1), the Commissioner considers that it is necessary to take into account the

⁶ <https://www.casemine.com/judgement/uk/5a8ff78460d03e7f57eae14e>

in-built public interest in this exemption: that is, the public interest in the maintenance of legal professional privilege.

27. 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, which in turn is fundamental to the administration of justice.
28. The Tribunal explained the balance of factors to consider when assessing the public interest test in Bellamy:

"There is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest".
29. The Commissioner acknowledges the complainant's argument that disclosure is necessary "to address legitimate public concerns about the police's role in enforcing a private sector injunction". He also recognises that this is a controversial matter.
30. However, he must also take into account that there is a public interest in the maintenance of a system of law which includes legal professional privilege as one of its tenets.
31. In reaching his decision in this case, the Commissioner has considered the prior findings of the Commissioner and the Information Tribunal in relation to legal professional privilege. He has also had regard to the content of the withheld information, which remains 'live', and balanced this against information which has already been disclosed in order to keep the public informed, without the need to disclose the advice itself.
32. The Commissioner is mindful that, while the inbuilt weight in favour of the maintenance of legal professional privilege 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.
33. However, in all the circumstances of this case, the Commissioner is not satisfied, from the evidence he has seen, that there are factors present that would equal or outweigh the strong public interest inherent in this exemption.
34. The Commissioner has therefore concluded that the public interest in maintaining the exemption at section 42(1) outweighs the public interest in disclosure. It follows that the MPS correctly applied section 42(1) in this case.

35. As he has found this exemption applies to all of the withheld information, the Commissioner has not found it necessary to consider the application of section 40 to the same information.

Right of appeal

36. 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

37. 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.
38. 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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Information Commissioner's Office
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