

Freedom of Information Act 2000

Decision notice

Date: 1 October 2013

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested information relating to the murder of a private investigator. The Home Office withheld the information under section 36(2)(b)(i) of the Freedom of Information Act (the Act) as disclosure would be likely to inhibit the free and frank provision of advice. The Commissioner's decision is that the Home Office has correctly applied the exemption. However, the Home Office did breach sections 10 and 17 of the Act by not providing its response within the stipulated timeframe. No further action is required.

Background to decision

2. Daniel Morgan was a private investigator who was killed in south-east London in 1987. There have been five police investigations, but to date no one has been successfully prosecuted. Home Secretary Theresa May recently stated that the investigations "were dogged by serious allegations of police corruption"¹ and the Metropolitan Police Service has admitted that in the original case police corruption was a "debilitating factor"².

¹ <https://www.gov.uk/government/news/independent-panel-to-review-death-of-daniel-morgan>

² <http://www.bbc.co.uk/news/uk-22477002>

3. On 10 May 2013 Mrs May announced that an independent panel chaired by Sir Stanley Burnton, a retired Lord Justice of the Court of Appeal, was to conduct an inquiry into the circumstances behind Mr Morgan's murder and the subsequent police investigations.

Request and response

4. On 22 February 2013, the complainant wrote to the Home Office and requested information in the following terms (numbers added by the Commissioner for reference):

"Please disclose to me;

1. *the date on which the Judicial Inquiry into this crime, and associated police corruption, shall commence*
2. *in the alternative, which independent police force will conduct an investigation into the murder, and which QC will oversee that investigation*

Please could you also disclose

3. *Any briefing paper/options paper given to the Home Secretary detailing the background to the Daniel Morgan case, and the various options she it is claimed [sic] that she is presently considering"*

5. The Home Office acknowledged the request on the same date. The complainant wrote again to the Home Office on 22 March 2013 to chase its response.
6. The complainant contacted the Commissioner on 26 March 2013 to complain that the Home Office had taken longer than the stipulated time allowed of 20 working days to respond to his request. He also drew the Commissioner's attention to a previous decision where the Home Office had not provided information relating to Daniel Morgan within the limits of section 10 of the Act.³
7. On 27 March 2013 the Home Office wrote to the complainant stating that information he requested was exempt under section 36(2)(b)(i) and

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http://www.ico.org.uk/~media/documents/decisionnotices/2012/fs_50462964.ashx

it would require another 20 working days to consider the public interest arguments.

8. The Home Office issued its response on 22 May 2013, which stated that information relating to items 1 and 2 were exempt under section 21 of the Act (information accessible by other means), and that the information relating to item 3 was exempt under section 36(2)(b)(i).
9. The complainant asked for an internal review relating to the information for item 3. He considered that the public interest favoured the information being disclosed.
10. On 24 June 2013 the Home Office issued the outcome of its internal review, which upheld the original decision in every aspect. The complainant was dissatisfied with the outcome of the review and appealed to the Commissioner for a decision.

Scope of the case

11. The Commissioner has not concerned his investigation with the Home Office's response to items 1 and 2 of the request. This information is freely available through various media outlets.⁴
12. The Commissioner confirmed this approach to the complainant, and has instead focussed his investigation on whether the Home Office has correctly applied section 36(2)(b)(i).

⁴ <http://www.bbc.co.uk/news/uk-22477002>

Reasons for decision

Section 10 and 17

13. Section 10 of the Act states that a public authority must respond to a request promptly or “not later than the twentieth working day following the date of receipt”. Whilst section 17 of the Act it makes provision for an extension of time to consider the public interest test, the public authority must inform the complainant of any exemption being relied upon within the time limit in order to meet its obligations under the Act.
14. As the Home Office issued its refusal notice after 20 working days it has breached section 17 of the Act. It also breached section 10 of the Act for not confirming within 20 working days that it held information relevant to the request.

Section 36(2)(b)(i)

15. Information to which section 36(2)(b)(i) applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act would, or would be likely to, inhibit the free and frank provision of advice.
16. Consideration of this exemption is a two-stage process. First, the exemption must be engaged, and secondly, the exemption is qualified by the public interest. This means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
17. For a public authority to cite section 36 the qualified person must give their reasonable opinion that the exemption is engaged. For the Commissioner to determine that the exemption is engaged it must be demonstrated that the designated qualified person has given their opinion, and that the opinion is reasonable.
18. The qualified person for the Home Office is the Minister of the Crown, and in this instance it is the Home Secretary, Teresa May MP. The Home Office has provided evidence that Mrs May has acted as the qualified person and has given her opinion that section 36(2)(b)(i) applies.
19. The Commissioner accepts that the exemption is cited by the appropriate qualified person. Next, he must determine whether the opinion given is reasonable. This is not determined by whether the Commissioner agrees with the opinion provided, but whether the opinion is in accordance with reason. The Commissioner has been provided with a copy of the withheld information as well as the submissions given to the qualified person to assist them in reaching a reasonable opinion.

20. The withheld information is a briefing to the Home Secretary which focusses on the background to the situation and the options that could be considered by the Home Office of how to conduct an inquiry into the death of Daniel Morgan and the subsequent investigations. In the Commissioner's view the advice given is noticeably free and frank, and the material is clearly not intended to be circulated to the wider public.
21. The Commissioner considers that the submissions provided to the qualified person relate to the withheld information. They argue that the advice provided to the Minister must be free and frank if it is of value, and that the disclosure of the withheld information would inhibit future advice provided. It also mentions that the process of setting up the inquiry panel was at a critical stage and if the information was disclosed it would be likely to inhibit proceedings as not every party was privy to all of the details contained in withheld information. The submissions argue that this would similarly inhibit the future provision of advice.
22. Based on this the Commissioner has decided that it is reasonable for the qualified person to conclude that disclosure of the withheld information would inhibit the free and frank provision of advice. Therefore he has gone on to consider the public interest test.

Public Interest Test – Arguments for disclosing the withheld information

23. The Commissioner notes that there is a strong public interest in the matters surrounding Daniel Morgan's death. As has been alluded to previously, there is a strong suggestion that the police have failed in at least its initial investigation due to corrupt practices, and it follows that there is a public interest revealing what considerations the Home Office took into account when deciding how to address these failings.
24. Given that there have been allegations of corruption it would also be in the public interest to have greater transparency around the future investigation of Daniel Morgan's death. This would include the Home Office's briefing paper on how to create a thorough investigation which could effectively resolve the underlying issues relating to this matter.

Public Interest Test – Arguments for maintaining the exemption

25. The Commissioner will give due weight to the reasonable opinion of the Home Secretary that disclosure would inhibit free and frank discussions; however he will also consider the severity of the inhibition that would be caused through disclosure. To do so he has considered both the withheld information itself and the arguments put forward by the Home Office. The Commissioner considers that the issues surrounding Daniel Morgan's murder and the subsequent investigations to be serious and sensitive matters, and that it is in the public interest for Home Office staff be able to give free and frank advice in order to allow the Home

Secretary to reach an informed and reasonable opinion. Due to the severity of the subject matter the Commissioner considers that the inhibition would be significant and that this adds weight to the argument to maintain the exemption.

26. The Home Office has argued that it is essential for Ministers, officials and partners to be able to provide rigorous and candid assessments to assist the Home Secretary in making a decision. This would be inhibited by the disclosure of information, as the persons involved would be reluctant to be as candid if the information was to end up in the public domain, which is not in the public interest. With this argument the Commissioner has considered the timing of the request, and notes that the request was made within weeks of the withheld information being created. This shows that the issue was live at the time and that the impact of disclosure would be heightened. As such, the Commissioner considers that this point does carry significant weight in this public interest test.
27. The Commissioner has also considered the impact that disclosure would have on the inquiry itself. The request was made when the deliberations for how to proceed were being discussed between the various parties involved. The Commissioner considers that if the Home Secretary's internal briefing paper on the various options for the inquiry were disclosed at that stage it would be likely to impact upon whatever inquiry was eventually established. If the full details of the Home Office's considerations were in the public domain then the Commissioner considers it would be likely that the inquiry would face questions based on the details of those considerations. This would distract it from its primary purpose; the Commissioner considers that this is not deemed to be in the public interest and would add further weight to the arguments for maintaining the exemption.
28. Further, whilst the Commissioner usually only considers disputed information in relation to the circumstances at the time of the request, he considers that it is not realistic to be overly prescriptive on that point in this case. The inquiry is currently conducting its investigation and it is apparent that to disclose information showing the other considerations put before the Home Secretary would be likely to some extent to prejudice the work of the inquiry.

Balance of the Public Interest Test

29. In making his decision the Commissioner acknowledges the strong public interest argument for transparency given the long-standing history of the case. However, the Commissioner accepts the qualified person's opinion that inhibition would occur through disclosure, and notes that disclosure would be likely to impact upon the on-going inquiry. The Commissioner considers that the public interest is best

served by the information being withheld, and therefore his decision is that the arguments for maintaining the exemption outweigh those for disclosure.

Right of appeal

30. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

31. 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.
32. 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

Alexander Ganotis
Group Manager – Complaints Resolution
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