

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 02 September 2013

Public Authority: The Commissioner for the Metropolitan Police
Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant requested copies of two specific documents, namely a Tactical Plan and PowerPoint presentation, regarding the Metropolitan Police Service's (MPS') policing of the Ecuadorian Embassy following Julian Assange's decision to seek refuge in the Embassy from his proposed extradition. The MPS provided the complainant with redacted copies of the two documents with the redacted information being withheld on the basis of sections 31(1)(a) and (b) (law enforcement); 40(2) (personal data); and 27(1)(a) (international relations) of FOIA. It also sought to neither confirm nor deny whether it held any further information on the basis of sections 23(5) (security services exemption) and 24(2) (national security) of FOIA. The Commissioner has concluded that the redacted information is exempt from disclosure on the basis of sections 31(1)(a) and (b) and 40(2). However, he has also concluded that sections 23(5) and 24(2) cannot be relied on in this case.

Request and response

2. On 2 November 2012 the complainant wrote to the MPS and requested information about the MPS' policing of the Ecuadorian Embassy in London where Julian Assange had sought refuge from his proposed extradition. The request specifically sought:

'[1] Please release all the police pocket notebook notes taken during the meeting about 23-24 August.

I do refer to notes taken on the same occasion as the notes accidentally revealed when photo of police officer holding the clipboard was taken - please refer to this Guardian article:

<http://www.guardian.co.uk/media/2012/aug...>

[2] Please also reveal the schedule of the meeting and any other notes (minutes for example) taken during the meeting.

[3] Please confirm if Police was intending [sic] to breach the immunity of the diplomatic bag in case Assange would try to escape in one.'

3. The MPS responded on 6 November 2012 and explained that in relation to requests 1 and 2 it needed the complainant to provide further information in order to identify the information he was seeking. In relation to request 3, the MPS explained that as this was framed as a question around a topic, rather than as a request for recorded information, it did not consider it to be a valid freedom of information request. The MPS therefore asked the complainant to be more specific as to the information he intended request 3 to be seeking.
4. The complainant contacted the MPS on the same day and explained why he considered requests 1 and 2 to be sufficiently clear. He also re-phrased request 3 as follows:

*'Did the Police give the instruction to the officers to arrest Asange [sic] in case he attempts to escape inside of the diplomatic bag?
If the answer is yes, were the legal implications of of [sic] such move (i.e. breaching diplomatic immunity) considered?'*

5. After a further exchange of correspondence, the MPS informed the complainant on 20 December 2012 that although it held information falling within the scope of his requests it considered it to be exempt from disclosure on the basis of sections 31(1)(a) and (b) and section 40(2) of FOIA.
6. The complainant subsequently complained to the Commissioner about its decision to rely on these exemptions. During the course of the Commissioner's subsequent investigation the MPS explained that it had now determined that to comply with the request would actually exceed the appropriate cost limit and thus it now sought to rely on section 12(1) of FOIA to refuse this request. The Commissioner used his discretion to allow the MPS to rely on section 12(1) at this late stage. Having done so, the Commissioner reached the provisional conclusion that section 12 had been cited correctly. He therefore invited the complainant to withdraw his complaint and submit a refined request to the MPS which could be answered within the cost limit. With regard to such a refined request, the Commissioner, with the permission of the MPS, explained to the complainant that two particular documents had been located which fell within the scope of his original requests and

which could be provided within the cost limit, namely a 'Tactical Plan' and a 'PowerPoint briefing'.

7. The complainant subsequently agreed to withdraw his initial complaint to the Commissioner and submitted the following request to the MPS on 11 June 2013:

'I am referring [sic] to your correspondence with ICO (ICO ref FS50480757) regarding my previous request (your ref 2012110000330).

Please release two documents (Tactical Plan and Powerpoint briefing) found when processing previous request.'

8. The MPS responded on 12 July 2013 and provided the complainant with a redacted version of the PowerPoint briefing. However, it explained that the remaining parts of this document, and the entirety of the Tactical Plan, were exempt from disclosure on the basis of sections 31(1)(a) and (b) of FOIA. The MPS also explained that some information had also been withheld on the basis of section 40(2).
9. The complainant contacted the MPS on 15 July 2013 and asked it to conduct an internal review of this decision. However, in light of the fact that the MPS had already considered the application of sections 31 and 40 when handling the complainant's earlier request, the MPS, following discussions with the Commissioner, decided that it did not wish to conduct an internal review in relation to this request.
10. The MPS contacted the complainant again on 16 August 2013 and provided a further redacted version of the PowerPoint presentation and also a redacted version of the Tactical Plan. It also explained that the exemptions being relied on to withhold the redacted information were those contained at sections 31(1)(a) and (b), 40(2) and 27(1)(a). The MPS also explained that it was seeking to rely on sections 23(5) and 24(2) on the basis of 'a partial neither confirm nor deny' position.

Scope of the case

11. The complainant contacted the Commissioner on 18 July 2013 in order to complain about the MPS' handling of his refined request of 11 June. He argued that the public interest favoured disclosure of unredacted versions of both documents he had requested. The Commissioner has referred to these arguments below.

Reasons for decision

Section 31 – law enforcement

12. The vast majority of the information redacted from the two documents was withheld on the basis of sections 31(1)(a) and (b) of FOIA. These exemptions state that :

'Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

- (a) the prevention or detection of crime,*
- (b) the apprehension or prosecution of offenders.*

13. In order for a prejudice based exemption, such as section 31, to be engaged the Commissioner believes that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.

The MPS' position

14. The MPS argued that disclosure of an unredacted version of the Tactical Plan and PowerPoint briefing would be likely to prejudice a live/ongoing police operation. This is because the full Tactical Plan outlines in some detail the various tactical options open to the MPS dependent upon the actions of Mr Assange or any other individual/organisation protesting at the Ecuadorian Embassy. The PowerPoint briefing includes a summary of these options, including the various methods and type of potential action which could be taken by the MPS. The MPS also argued that disclosure of unredacted versions of these two documents could prejudice policing operations of a similar nature in the future. In order to support its position the MPS provided the Commissioner with submissions which referenced specific parts of the redacted information and explained in further detail how disclosure of such material would be likely to result in the prejudice it envisaged. Clearly, in order to protect the content of the redacted material, the Commissioner has not replicated this aspect of the MPS' submissions in this notice.
15. The MPS noted that the incident that prompted the complainant's original request in November 2012 was a press article showing a uniformed police officer holding what appeared to be a MPS decision log, on which hand written notes were made that related directly to the policing of the Ecuadorian Embassy. The MPS stated that the placing of information into the public domain at that time was clearly accidental and not a proactive, managed disclosure.

The Commissioner's position

16. With regard to the first criterion of the three limb test described above, the Commissioner accepts that potential prejudice to an ongoing police operation (and similar operations in the future) clearly relates to the interests which the exemptions contained at sections 31(1)(a) and 31(1)(b) are designed to protect.
17. With regard to the second criterion, having considered the content of the withheld information the Commissioner is satisfied that its disclosure clearly has the potential to harm the ongoing policing operation at the Ecuadorian Embassy but also similar policing operations in the future. The Commissioner therefore accepts that there is a causal link between disclosure of the information and the interests which the exemptions contained at sections 31(1)(a) and (b) are designed to protect. Moreover, given the potential consequences of disclosing the redacted information, the Commissioner is satisfied that the resultant prejudice which the MPS believes would be likely to occur is one that can be correctly categorised as real and of substance.

18. In relation to the third criterion, the Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Tribunal decisions. He believes that for the lower level of likelihood, i.e. 'likely', to be met the chance of prejudice occurring should be more than a hypothetical possibility; there must have been a real and significant risk. With regard to the alternative limb of 'would prejudice' the Commissioner believes that this places a stronger evidential burden on the public authority to discharge. The Commissioner understands that the MPS is relying on the lower limb that prejudice would be likely to occur.
19. Having had the benefit of examining the redacted the information the Commissioner is satisfied that because this contains very detailed discussions as to the MPS' potential tactics in relation to a particular operation, which was ongoing at the time of the request, then disclosure of such information would clearly represent a real and significant risk to that operation. Furthermore, given the level of detail contained within the redacted information the Commissioner is also satisfied that disclosure of this information could also undermine the effectiveness of similar operations in the future. The Commissioner is therefore satisfied that the exemptions contained at sections 31(1)(a) and (b) are engaged.
20. In reaching this conclusion the Commissioner has taken into account the information that was already in the public domain regarding this operation by virtue of the press photographs referred to above. The Commissioner notes that the information contained in these photographs is very limited both in terms of volume and detail when compared to the information that has been redacted from the Tactical Plan and PowerPoint presentation. Consequently, the Commissioner does not believe that the MPS' position regarding sections 31(1)(a) and (b) is undermined such information was in the public domain at the time of the request.

Public interest test

21. Section 31 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemptions contained at sections 31(1)(a) and (b) outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

22. The MPS argued that it was clearly not in the public interest to disclose information that would be likely to prejudice the policing operations be it the live operation at the Ecuadorian Embassy or similar operations in the future.

Public interest arguments in favour of disclosing the redacted information

23. The MPS accepted that the release of the redacted information would provide an insight into the police service and enable the public to have a better understanding of the effectiveness of the police.
24. Furthermore, it noted that release of the information could allow the public to make informed decisions about police procedures and the money spent in this business area. This would greatly assist in the quality and accuracy of public debate, which would otherwise likely be steeped in rumour and speculation.
25. In his submissions the complainant referred to the relevant press articles and directed the Commissioner to this particular extract:

'Plans to seize Julian Assange "under all circumstances" the moment he leaves the Ecuadorean embassy in London have accidentally been revealed by a police officer displaying restricted documents outside the embassy.

The document, pictured under the officer's arm by a Press Association photographer, appears to advocate arresting the WikiLeaks founder whether he leaves the building in a diplomatic bag or in a diplomatic car.

The handwritten plan was recorded at a police briefing and only partially covered by the officer's arm as he arrived at the embassy in Knightsbridge on Friday.

The brief begins: "BRIEF – EQ. Embassy brief – Summary of current position Re Assange. Action required – Assange to be arrested under all circumstances." It then makes reference to a "dip bag" and a "dip vehicle".¹

26. The complainant suggested that it therefore appeared that the MPS' intention was to break the law by breaching the immunity of the Ecuadorean diplomatic post. He argued that it was 'strongly in public interest to reveal all the information which may either confirm or deny such accusations and, if confirmed, to prosecute the person who gave such orders.'

¹ <http://www.theguardian.com/media/2012/aug/24/julian-assange-ecuador-embassy-police-arrest-plan>

Balance of the public interest arguments

27. The Commissioner accepts that in light of the press reports referred to by the complainant there is some public interest in disclosing the redacted information in order to provide clarity as to the nature of the MPS' proposed tactics in relation to this operation. Disclosure of the redacted information might clarify, as the complainant suggests, whether or not the MPS intended, in his words, 'to break the law by breaching [the] immunity of the Ecuadorean diplomatic post'. This public interest argument should not be dismissed lightly.
28. However, the Commissioner believes that there is stronger public interest in ensuring that the overall effectiveness of the ongoing policing operation at the Ecuadorian Embassy is not undermined. This is not to dismiss the public interest in clarifying the MPS' proposed tactics; simply that it is not in the public interest for such clarification to come at the expense of undermining the effectiveness of the ongoing operation itself. In reaching the conclusion the Commissioner recognises the detailed nature of the withheld information and the clear insight disclosure would provide, not least to anyone intent on disrupting the MPS' operation at the Ecuadorian Embassy. The Commissioner notes that the need for such clarification arises simply because the partial notes of one officer had been inadvertently been exposed to public view. The situation would be different if clarification were needed because of an incomplete or partial statement deliberately published. In addition, the Commissioner considers that the public interest in avoiding the risk of undermining the effectiveness of any similar operations in the future is significant.
29. The Commissioner has therefore concluded that in these circumstances the public interest in maintaining the exemptions at sections 31(1)(a) and (b) outweighs the public interest in disclosing the redacted information.

Section 40 – personal data

30. The MPS has also withheld a small amount of information on the basis of section 40(2) of FOIA. Section 40(2) of FOIA states that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the Data Protection Act (the DPA).
31. The MPS argued that the information withheld on the basis of section 40(2) was Julian Assange's personal data, and in some parts, his sensitive personal data, and that its disclosure would be unfair and thus breach the first data protection principle which states:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

- (a) at least one of the conditions in Schedule 2 is met, and*
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'*

32. Clearly then for section 40(2) to be engaged the information being withheld has to constitute 'personal data' which is defined by the DPA as:

'...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'

33. With sensitive personal data being further defined by the DPA as:

'personal data consisting of information as to –

(a) the racial or ethnic origin of the data subject,

(b) his political opinions,

(c) his religious beliefs or other beliefs of a similar nature,

(d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),

(e) his physical or mental health or condition,

(f) his sexual life,

(g) the commission or alleged commission by him of any offence, or

(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.'

34. The Commissioner has examined the information redacted on the basis of section 40(2) and is satisfied that it is Julian Assange's personal data given that it consists of various personal details about him. Furthermore, the Commissioner is satisfied that certain parts of the redacted information can be correctly classified as Mr Assange's sensitive personal data.
35. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:
- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights;
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - particular circumstances of the case, e.g. established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
 - The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
36. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.

37. In considering 'legitimate interests' in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.
38. Having considered the nature of the personal data that has been withheld, the Commissioner is satisfied that Mr Assange would not have any expectation that this information would be disclosed under FOIA. This is particularly the case with regard to the information that consists of his sensitive personal data. Furthermore, the Commissioner does not believe that there is any particularly compelling reason for the minimal information withheld on the basis of section 40(2) to be disclosed. (The Commissioner specifically notes that disclosure of the information withheld on the basis of section 40(2) does not focus on the MPS tactics regarding this operation and thus its disclosure would not serve the complainant's particular public interest argument). The Commissioner is therefore satisfied that disclosure of the information redacted on the basis of section 40(2) would be unfair and thus breach the first data protection principle.
39. In light of his findings in relation to sections 31(1)(a) and (b) and section 40(2), the Commissioner has not gone on to consider whether the redacted information is also exempt from disclosure on the basis of section 27(1)(a).

Section 23 – Information supplied by or relating to the security bodies

Section 24 – National Security

40. Before addressing the MPS' reliance on sections 23 and 24 of FOIA, the Commissioner wishes to clarify that the right of access under FOIA which is set out in section 1(1) of the legislation, is in two parts.
41. Firstly, section 1(1)(a) provides requesters with the right to be told whether the information that they have requested is held. Secondly, section 1(1)(b) provides requesters with the right to be provided with that information (assuming of course that the requested information is held). Both rights of access are subject to the application of exemptions.
42. In the circumstances of this case the MPS explained to the Commissioner that it was also seeking to rely on sections 23(5) and 24(2) in order to adopt a '*partial neither confirm nor deny as to whether*

or not the MPS has **any further information** in connection with this request' (emphasis added).

43. Section 23(5) states that:

'The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3).'

44. Section 24(2) states that:

'The duty to confirm or deny does not arise if, or to the extent that, exemption from 1(1)(a) is required for the purposes of safeguarding national security.'

45. In the Commissioner view determining whether a public authority can correctly adopt a neither confirm nor deny (NCND) position requires careful consideration of the wording of the request. In his guidance on these exemptions the Commissioner recognises that there may be scenarios where a public authority is prepared to confirm that it holds information captured by the request but wishes to NCND whether **additional** information is held on the basis of sections 23(5) and section 24(2).²

46. However, in the particular circumstances of this case the complainant submitted a request for two specific documents. He has now been provided with redacted copies of both documents and thus the existence of each has been confirmed under FOIA. Therefore, given the specific wording of this request, it is illogical for the MPS to adopt a NCND position in relation to any 'further information' simply because the complainant has not actually requested any further information. Rather he had simply asked for two named documents which the MPS has confirmed that it holds. Consequently, given that sections 23(5) and 24(2) simply remove the obligation to confirm or deny whether the requested information is held, and in this case such confirmation has already been given, then there is no basis for the MPS to now seek to adopt a NCND position, even on a 'partial' basis in relation to this request.

² [How sections 23 and 24 interact](#) – see paras 41 and 42.

Right of appeal

47. 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

48. 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.
49. 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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