

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

### **Decision notice**

**Date:** 22 June 2015

**Public Authority:** Chief Constable of West Midlands Police  
**Address:** Police Headquarters  
Lloyd House  
Colmore Circus  
Birmingham  
B4 6NQ

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

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1. The complainant requested a list of 168 court exhibits relating to the 1974 Birmingham Pub Bombings, with details of which of these are missing. West Midlands Police disclosed a list of the exhibits, but with some of the content of this redacted. It refused to disclose details of which exhibits are missing. In relation to the withheld information, it relied on the exemptions provided by the following sections of the FOIA:  
  
30(1)(a) (information held for the purposes of an investigation)  
  
38(1)(a) (endangerment to health)  
  
40(2) (personal information)
2. The Commissioner's decision is that WMP correctly withheld the information in relation to which sections 30(1)(a) and 40(2) were cited. Section 38(1)(a) was cited correctly in relation to some of the redactions, but the Commissioner finds that this exemption was not engaged in relation to other redactions and WMP is now required to disclose that content.
3. The Commissioner requires WMP to take the following steps to ensure compliance with the legislation.
  - Disclose the following redacted content, in relation to which the Commissioner has found that section 38(1)(a) was not engaged:

Exhibit numbers: 1 to 21, 43, 105B, 116, 124.

4. WMP must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

## Background

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5. The request relates to the Birmingham pub bombings of 21 November 1974. The two bombs killed 21 people and injured a further 222.
6. On 15 August 1975 six men were convicted of murder in relation to the bombings and sentenced to life imprisonment. On 14 March 1991 the Court of Appeal quashed the convictions of the "Birmingham Six".
7. Following this, a reinvestigation of the bombings was carried out in 1991 to 1994, which did not result in proceedings against any person. During that reinvestigation, it was discovered that 35 of the 168 exhibits from the 1975 trial were missing<sup>1</sup>.

## Request and response

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8. On 11 April 2014 the complainant wrote to West Midlands Police and requested information in the following terms:

*"Please could you provide me with the full list of the 168 court exhibits that were used in the investigation into the Birmingham pub bombings of 1974 and held by West Midlands Police.*

*I would also like you to identify the 35 items that have been disposed on that list. The 35 items were, according to Chief Constable Chris Sims, disposed of at some point in the 1980s."*

9. WMP responded substantively on 27 June 2014. It stated that the request was refused and cited the exemption provided by section 30(1)(a) (information held for the purpose of an investigation) of the FOIA.

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<sup>1</sup> <http://www.west-midlands.police.uk/docs/latest-news/2014-07-04-birmingham-pub-bombings-presentation.pdf>

10. The complainant responded on the same date and requested an internal review. WMP responded with the outcome of the internal review on 21 October 2014. At this stage it amended its stance. Whilst it maintained that it would not disclose details of which were the missing exhibits, it did now disclose a schedule listing all 168 court exhibits, but with some of the content of this schedule redacted. In relation to those redactions, it now cited sections 38(1)(a) (endangerment to health) and 40(2) (personal information), as well as section 30(1)(a).

## **Scope of the case**

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11. The complainant contacted the Commissioner on 21 October 2014 to complain about the part refusal of his information request. The complainant indicated at this stage that his complaint concerned the refusal by WMP to disclose some of the information he had requested and the delay by WMP in responding to the request initially and in providing the outcome of the internal review.
12. The scope of this case covers the exemptions cited by the Home Office, as well as the delays in responding to the request initially and in providing the outcome of the internal review. The delay in providing the initial response is covered in the analysis below, with the delay at internal review remarked on in the "Other matters" section.
13. During the investigation of this case, WMP clarified where each of the cited exemptions was believed to apply. In relation to the details of which exhibits were missing and to some of the redactions from the disclosed version of the schedule of exhibits, WMP cited section 30(1)(a). The other redactions from the disclosed version of the schedule were made under section 38(1)(a), or 40(2).

## **Reasons for decision**

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### **Section 10 and 17**

14. Where a public authority has found that an exemption qualified by the public interest is engaged in relation to information requested, it may extend the usual 20 working day time limit for the provision of a response in order to consider the balance of the public interest. Compliance is then required within such time as is reasonable in the circumstances. The approach of the Commissioner is that an extension should normally be for no more than a further 20 working days, meaning that a request should be responded to within a maximum of 40

working days, unless there are specific circumstances justifying a longer period.

15. In this case WMP took approximately 50 working days to respond to the request. The Commissioner is unaware of any circumstances justifying an extension of more than 20 working days. The Commissioner's view is that the delay was therefore unreasonable and, in failing to respond to the request more promptly, WMP breached sections 10 and 17(3) of the FOIA.

### **Section 30**

16. WMP cited section 30(1)(a), which provides an exemption for information that has been held at any time for the purposes of an investigation which the public authority has a duty to conduct with a view to it being ascertained whether a person should be charged with an offence, or whether a person charged with an offence is guilty of it.
17. WMP cited this exemption in relation to some of the redacted content from the disclosed version of the schedule. This exemption was also cited in relation to information that identified which of the exhibits were missing.
18. This is a class based exemption, which means that if the withheld information falls within the class specified in the exemption, the exemption is engaged. This exemption is also qualified by the public interest, which means that if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information must be disclosed.
19. Covering first whether the exemption is engaged, the information in question here was held for the purposes of WMP's investigation of the 1974 Birmingham pub bombings. As section 30(1)(a) is specific that information held *at any time* for a relevant purpose is covered by this exemption, the current status of that investigation is not relevant. The Commissioner considers it clear that the schedule of exhibits, including details of which of these are missing, is information that was held for the purposes of an investigation relevant to section 30(1)(a) and so this exemption is engaged.
20. Having found that this exemption is engaged, the next step is to consider the balance of the public interest. In forming a conclusion here, the Commissioner has taken into account the public interest in preserving the ability of the police to carry out effective investigations, which is the process that this exemption is designed to protect. He has also considered what factors there are in favour of disclosure of the

information and weighed these against the public interest in the maintenance of the exemption.

21. Covering first factors in favour of disclosure of the information, the subject matter of the request indicates that there is very strong and legitimate public interest in the disclosure of this information. The Birmingham pub bombings were a crime of utmost seriousness and to date the perpetrators have not been found. This crime also led to a notorious miscarriage of justice.
22. That a crime of this magnitude remains unsolved means that there is a degree of public interest in disclosure of all the information held by WMP about this investigation, in order to assist public knowledge and understanding about the investigation and why this has not led to convictions. That the early years of this investigation culminated in infamously unsafe convictions adds to that public interest as disclosure might well contribute to public understanding of how that erroneous attribution of responsibility came about.
23. Given this background, the Commissioner's view is that there is public interest of very significant weight in disclosure of the information as to which of the exhibits are missing. That the whereabouts of some exhibits is no longer known raises questions about the conduct of this investigation, which strengthens the public interest in this information.
24. The public interest in the information redacted from the disclosed schedule of exhibits is less acute. Whilst the information falls within the class described in section 30(1)(a), it does not provide insight into the conduct of the investigation in the way that details of which exhibits are missing does. However, whilst less acute, the public interest in the disclosure of this information does, owing to its subject matter, remain valid in relation to the redactions from the schedule.
25. Turning to the public interest in the maintenance of the exemption, as mentioned above, section 30(1)(a) exists in order to protect the ability of relevant public authorities to carry out effective investigations. Clearly it is in the public interest for the police to be able to carry out their function effectively, but the weight that this carries as a public interest factor will depend on the circumstances in each case.
26. Of great significance in this case is that this investigation is unresolved. The footnote to paragraph 7 of this notice references a statement by WMP that a review carried out in recent years reached a conclusion that did not conflict with the 1991 to 1994 reinvestigation of the bombings. That reinvestigation concluded that there was insufficient evidence for proceedings against any person and that there were no further reasonable lines of enquiry that could have been usefully pursued.

27. This could be taken as evidence that the investigation is no longer ongoing and so the public interest in protecting it is reduced. Where an investigation is complete, the Commissioner will generally be of the view that the public interest in maintaining the exemption will be reduced. This would be the case especially where an investigation has culminated in a conviction and no doubts have been raised about the safety of that conviction.
28. The situation in this case, however, is clearly different. The Birmingham pub bombings remain unsolved. There is potential for new evidence to come to light and for this to lead to further investigation. In its representations to the ICO WMP emphasised that this remains an open case. It also advanced specific arguments about how disclosure of the information in question, both the details of which exhibits are missing and the redactions from the disclosed schedule, could be harmful to any future investigation. The Commissioner has not set these arguments out here as they were given in confidence, but he accepts that they are valid.
29. In conclusion, the Commissioner has recognised that there is very significant public interest in disclosure of this information given its subject matter. However, his view is that the public interest in preserving the confidentiality of this information is of exceptional weight. The Commissioner's view is that the public interest in protecting the ability of WMP to carry out an investigation that may yet bring to justice those responsible for a crime of such magnitude clearly tips the balance in this case. His finding is, therefore, that the public interest in the maintenance of the exemption outweighs the public interest in disclosure and so WMP was not obliged to disclose the information in relation to which section 30(1)(a) is engaged.
30. The above conclusion covers all the information withheld under section 30(1)(a). The following analysis relates to redactions from the schedule made under sections 38(1)(a) or 40(2), but not also under section 30(1)(a).

### **Section 38**

31. WMP has cited section 38(1)(a), which provides an exemption for information the disclosure of which would, or would be likely to, endanger the physical or mental health of any individual. As with section 30(1)(a) there are two stages to considering this exemption. First, the exemption must be engaged, in this case by demonstrating that endangerment to health would be at least likely to occur. Secondly, the exemption, if engaged, is qualified by the public interest.

32. WMP should note that in relation to the two redacted addresses numbered 103 and 114 in the schedule the Commissioner has exercised his discretion to proactively consider section 40(2), as he considers this to be a more appropriate exemption for those redactions. In relation to the remaining redacted address, as this redaction is not of a specific address it is not personal data and so section 40(2) cannot apply to it, hence this redaction is included here in the section 38 analysis.
33. As to whether this exemption is engaged, the approach of the Commissioner is that there must be a real and significant likelihood of endangerment to health occurring, rather than it being of remote likelihood. The question here is, therefore, whether disclosure of the redacted content in question would, or would be likely to, endanger the physical or mental health of any individual.
34. The first category of information here is redactions of names of victims of the pub bombings. WMP argued that disclosure of this information would be distressing to family and friends of the victims to the point that it would be likely to endanger their mental health.
35. The redactions relate to photographs of the victims. For example, in the version of the schedule disclosed to the complainant, the short description of exhibit number 1 states "*Photographs of body No. 1*", with the name of the individual redacted.
36. If it was the case that disclosure of the actual photographs was under consideration, it is highly likely that the Commissioner would conclude that section 38(1)(a) did apply. They are not, however. Instead, the withheld information consists only of the names of the victims, which are already in the public domain.
37. The question here is whether disclosure of this information would be likely to result in any *further* distress to the family and friends of the victims. To be relevant, that distress must result through disclosure of the specific information in question; the continuation of any existing or ongoing distress arising from the bombings does not engage the exemption.
38. The view of the Commissioner is that disclosure of this information is unlikely to result in further distress to the family and friends of the victims of such severity that it would be likely to endanger the mental health of those individuals. The identity of the victims is already in the public domain and has been for four decades; disclosure of this information would add nothing to that publicly available information.
39. Three other redactions are of the name of an individual who it is thought was killed in an attempt to plant a third explosive device. WMP argued



that as this individual was not convicted of any offence, his surviving family should be protected. In relation to section 38(1)(a), the Commissioner assumes that the position of WMP is that disclosure that associates the named individual with the attempt to plant a third device would be distressing to the family members of that individual to the point that this would be likely to endanger their mental health.

40. However, information is already in the public domain that identifies the individual in question as being responsible for attempting to plant a third device and as having been killed in the attempt. Amongst the plentiful information in the public domain that associates that individual with this act is a presentation slide on the WMP website<sup>2</sup>, which states in definitive terms that this individual was killed whilst planting an explosive device.
41. As the disclosure of these three redactions would add nothing to information that is already in the public domain, and the content of some of which has already been disclosed by WMP itself, the Commissioner does not accept that disclosure of this redacted content would be likely to endanger the mental health of any individual.
42. As stated above at paragraph 32 the Commissioner has considered one redaction here that was withheld on the basis that it was an address and WMP believed that disclosure would be likely to endanger the health of the residents of that address. This redacted information is not a specific address, however. Instead, it is a street name. The argument of WMP is not, therefore, valid in relation to this information.
43. In relation to the redactions covered above, the conclusion of the Commissioner is that the exemption provided by section 38(1)(a) is not engaged. The step at paragraph 3 sets out the specific redacted content that WMP is now required to disclose.
44. In relation to one redaction, the Commissioner is of the view that section 38(1)(a) does apply. This relates to the individual mentioned above who was killed attempting to plant a third device. It is in more graphic terms than any of the other section 38(1)(a) redactions and, as a result, the Commissioner accepts that its disclosure could endanger the mental health of surviving family and friends of that individual. In relation to that one redaction, it is necessary to go on to consider the balance of the public interest.

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<sup>2</sup> <http://www.west-midlands.police.uk/docs/latest-news/2014-07-04-birmingham-pub-bombings-presentation.pdf>



45. The Commissioner takes into account here the same public interest in all information relating to this subject matter that is covered above in the section 30(1)(a) analysis. However, in relation to the specific information in question, he does not consider that this public interest carries great weight. This is a single minor redaction, the disclosure of which would add nothing of note to public knowledge or understanding about these events.
46. On the other side of the balance is the public interest in avoiding endangerment to the health of any individual, which will carry significant weight in any case where section 38(1)(a) is engaged. In this case, the conclusion of the Commissioner is that, owing to the very limited public interest in the disclosure of this information, the public interest in the maintenance of the exemption outweighs the public interest in disclosure and so WMP is not required to disclose this content (exhibit number 44).

## **Section 40**

47. WMP has cited section 40(2). This section provides an exemption for information that is the personal data of an individual other than the requester, where the disclosure of that personal data would be in breach of any of the data protection principles.
48. This analysis covers two categories of withheld information in this case: first, names of police officers, and secondly, as mentioned above, two redacted addresses in relation to which WMP cited section 38(1)(a), but for which the Commissioner has exercised his discretion and considered section 40(2). In relation to both of these categories of information, it is necessary to establish whether the withheld information constitutes personal data and, if so, whether disclosure of it would be in breach of any of the data protection principles.
49. The definition of personal data is given in section 1(1) of the Data Protection Act 1998 (DPA):  
  
*"personal data' means 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".*
50. Covering the names of police officers first, clearly this information both relates to and identifies those individuals and so is their personal data according to the definition in section 1(1) of the DPA.

51. As to whether disclosure of that personal data would be in breach of any of the data protection principles, the Commissioner has focussed here on the first data protection principle, which states that personal data shall be processed fairly and lawfully and in particular on whether disclosure would be, in general, fair. In forming a conclusion here the Commissioner has taken into account the reasonable expectations of the data subjects and any consequences that disclosure may have upon them. He has also considered whether there is any legitimate public interest in the disclosure of this personal data.
52. On the issue of the reasonable expectations of these individuals, if their names have not been disclosed into the public domain in the approximately four decades since they were recorded in this context, and the refusal by WMP to disclose them suggests that they have not, the data subjects are likely to hold a reasonable expectation that they would not now be disclosed.
53. As to any consequences of disclosure upon those individuals, disclosure would associate them with an investigation that remains a matter of considerable sensitivity. The Commissioner is of the view that this would be counter to their reasonable expectation of confidentiality and would be likely to be distressing to those individuals.
54. As to whether there is any legitimate public interest in the disclosure of this personal data the Commissioner is of the view that there is, on the basis of understanding more about a police investigation into a very serious crime for which no one has yet been brought to justice and which in fact led to a particularly widely known miscarriage of justice.
55. However, in relation to the specific redacted information in question here, the Commissioner is of the view that this public interest would not be served by disclosure to any significant extent. Certainly the weight to be attached in the context of this withheld information is not sufficient to outweigh the factors against disclosure covered above.
56. Whilst the general approach of the Commissioner is that it will be far less likely for disclosure of information that relates to a data subject's professional life to be unfair than would be the case for information about private life, in this case he recognises that, whilst this personal data concerns professional life, it also relates to a particularly sensitive matter. For these reasons, his conclusion is that disclosure of this personal data would be unfair and in breach of the first data protection principle. He also considers that there is no condition for processing under Schedule 2 DPA, as would also be required for compliance with the first data protection principle, which applies in this case.

57. Turning to the addresses, these are addresses of specific individual properties. The approach of the Commissioner is that addresses are the personal data of the occupiers. These redactions are, therefore, personal data according to the definition in section 1(1) of the DPA.
58. As to whether disclosure of that personal data would be unfair and in breach of the first data protection principle, the Commissioner's view is that it is likely that the occupiers of these addresses will be unaware of any link of their address to the Birmingham pub bombings and so would also be unaware that their personal data is held by WMP. It follows from this that they would not expect that this personal data would be disclosed. The Commissioner believes that disclosure that publicly associates their address with the bombings would be distressing to the occupiers, as data subjects, and would amount to an unwarranted intrusion into their private lives.
59. On the issue of whether there is legitimate public interest in the disclosure of this information, the Commissioner's view here is similar to that set out above in relation to the police officers' names. Whilst there is a strong public interest in information generally on this subject, the Commissioner does not consider that disclosure of the specific information in question here is necessary in order to satisfy that public interest. The factors against disclosure covered above are not, therefore, outweighed by any legitimate public interest in disclosure and disclosure of this personal data would be unfair and in breach of the first data protection principle. In addition, again, no Schedule 2 condition is applicable.
60. In relation to both the police officers' names and the addresses, the conclusion of the Commissioner is that the exemption provided by section 40(2) is engaged. WMP was not, therefore, obliged to disclose this content.

## **Other matters**

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61. The Commissioner's approach to internal reviews is that these should be completed within a maximum of 40 working days. In this case WMP compounded the delay in responding to the request by failing to respond promptly with the internal review outcome.
62. A record has been made of the delays that occurred in WMP's handling of the complainant's request. WMP and the ICO have been in communication over issues concerning the ability of WMP to respond to requests within appropriate time scales. WMP has improved its performance in this regard and must continue to do so.

## Right of appeal

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63. 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: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

64. 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.
65. 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 .....**

**Graham Smith  
Deputy Commissioner  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**