

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 October 2015

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

Decision (including any steps ordered)

1. The complainant requested a report written and submitted to the Home Secretary by a former member of the Daniel Morgan Independent Panel about the operation of that Panel. The Home Office withheld this information under the exemptions provided by sections 36(2)(b)(ii) (inhibition to the free and frank provision of advice), 36(2)(c) (other prejudice to the effective conduct of public affairs) and 40(2) (personal information) of the FOIA.
2. The Commissioner's decision is that the Home Office cited section 36(2)(b)(ii) correctly and so it was not obliged to disclose the requested information.

Background

3. The request refers to the Daniel Morgan Independent Panel (DMIP). The DMIP website gives the following description:

"Daniel Morgan, a private investigator, was murdered in south-east London on 10 March 1987. Despite five criminal investigations focusing on the murder nobody has been successfully prosecuted. This led to calls for an inquiry from Daniel Morgan's family, who have waged a long campaign for those responsible for his murder to be brought to justice.

On 10 May 2013, in a written statement to Parliament, the Home Secretary, the Rt. Hon. Theresa May MP, announced that the

Government was setting up the Daniel Morgan Independent Panel (DMIP) to review police handling of the murder investigation.

The remit of the Panel is to shine a light on the circumstances of Daniel Morgan's murder, its background and the handling of the case over the period since 1987. In so doing the Panel is seeking to address questions arising, in particular those relating to:

- police involvement in Daniel Morgan's murder;*
 - the role played by police corruption in protecting those responsible for the murder from being brought to justice and the failure to confront that corruption; and*
 - the incidence of connections between private investigators, police officers and journalists at the News of the World and other parts of the media, and alleged corruption involved in the linkages between them."*
4. The individual named in the request was previously a member of the DMIP, but had ceased to hold this position prior to the date of the request.

Request and response

5. On 21 January 2015 the complainant wrote to the Home Office and requested information in the following terms:

"A copy of the letter that Graham Smith sent to Theresa May when he resigned from the Daniel Morgan Independent Panel. It is mentioned in this article. <http://www.exaronews.com/articles/5456/daniel-morgan-inquiry-panel-poleaxed-by-row-over-police-files>"

6. The Home Office responded on 10 February 2015. It stated that the request was refused with the exemption provided by section 40(2) (personal information) of the FOIA cited.
7. The complainant responded on 11 February 2015 and requested an internal review. After a lengthy delay, the Home Office responded with the outcome of the review on 10 June 2015. At this stage, whilst the refusal to disclose the requested information was upheld, the Home Office withdrew the citing of section 40(2) and instead relied on the exemptions provided by sections 36(2)(b)(ii) (inhibition to the free and frank exchange of views) and 36(2)(c) (other prejudice to the effective conduct of public affairs) of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner initially on 7 May 2015 to complain at that stage about the failure of the Home Office to carry out the internal review promptly. Following completion of the review, the complainant contacted the ICO again on 10 June 2015 to complain about the refusal by the Home Office to disclose the information he had requested.
9. The complainant specified his grounds for complaint as the delay in the completion of the internal review and the reliance by the Home Office on sections 36(2)(b)(ii) and 36(2)(c). The complainant argued that it was invalid for those exemptions to be cited for the first time at internal review.
10. In correspondence with the ICO, the Home Office identified the information within scope as a report submitted by the individual named in the request to the Home Secretary, under a short covering letter, on 15 March 2014. The Home Office stated that this was the information referred to in the news story cited in the request and the Commissioner accepts that the Home Office has accurately identified the information it holds that is within the scope of the request.
11. In his correspondence to the Commissioner the complainant suggested that the author of the withheld information did not object to its disclosure. However, the Commissioner is not aware of any suggestion that the author has made that information available. He has proceeded on the basis that this information was provided in confidence to the Home Secretary and the Morgan family, and that the author has not made it available to a wider audience.
12. Having initially cited section 40(2) and then withdrawn reliance on this exemption at internal review, the Home Office stated in its correspondence with the ICO that it was again relying on this exemption. This means that the final position of the Home Office was that it relied on sections 36(2)(b)(ii), 36(2)(c) and 40(2).

Reasons for decision

Section 36

13. The Home Office has cited sections 36(2)(b)(ii) and 36(2)(c). Section 36(2)(b)(ii) provides an exemption where disclosure would, or would be likely to, inhibit the free and frank exchange of views. Section 36(2)(c) exempts information the disclosure of which would, or would be likely

to, otherwise prejudice the effective conduct of public affairs. The Commissioner's approach is that section 36(2)(c) should be cited only where the prejudice identified would not be covered by any other subsection from section 36, or any of the other exemptions in Part II of the FOIA.

14. These exemptions can only be cited on the basis of a reasonable opinion from a specified qualified person (QP). In the case of government departments, the QP is any Minister of the Crown. The task for the Commissioner when deciding whether these exemptions are engaged is to reach a conclusion on whether the opinion of the QP was reasonable. These exemptions are also qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemptions does not outweigh the public interest in disclosure.
15. The Commissioner has focussed on section 36(2)(b)(ii). Covering first whether the exemption is engaged, the questions here are whether an opinion was given by a Minister and whether that opinion was reasonable. The Home Office has stated that Mike Penning, Minister for Criminal Information, acted as QP and that he gave an opinion on 8 June 2015. The Home Office supplied to the ICO a copy of a submission provided to the QP to assist in the formation of their opinion and an email confirming the opinion. Given this evidence the Commissioner accepts that this exemption was cited on the basis of an opinion from a Minister.
16. As to whether the opinion was reasonable, the Commissioner's approach here is that an opinion must simply be objectively reasonable. This means that it must be an opinion that a reasonable person could hold, which will not necessarily be the most or only reasonable opinion that could be held.
17. The reasoning for the opinion of the QP was set out in the aforementioned submission and in correspondence from the Home Office. In its correspondence with the ICO the Home Office specified that the opinion of the QP was that disclosure *would* result in inhibition, rather than *would be likely* to result. That the QP's opinion was that inhibition *would* result is borne out by the content of the submission.
18. When applying other prejudice based exemptions, the Commissioner takes the approach that in order for him to conclude that prejudice would result, it must be more probable than not that the predicted outcome would occur. Applying that test in this case, the question here is whether it was objectively reasonable for the QP to hold the opinion that inhibition to the free and frank exchange of views would be more probable than not to result through disclosure.

19. The submission records that the concern of the QP was about how openly panel members would share their views with the Home Office in future. The suggestion of the submission was that disclosure of the information in question, which had been provided to the Home Secretary and the Morgan family in confidence, would have the result of causing other panel members to question whether their exchanges with the Home Office would remain confidential, thus inhibiting those exchanges.
20. The Commissioner has reviewed the content of the information and notes that this is of a free and frank nature. Whilst it is not necessary for the information in question to itself be a record of a free and frank exchange for this exemption to apply, this is a relevant factor to take into account when considering how disclosure of this information may influence other panel members. The view of the Commissioner in light of this content is that it is reasonable to believe that disclosure of this information would have an inhibitory effect on future panel members in their communications with the Home Office.
21. For these reasons the Commissioner accepts that it was objectively reasonable for the QP to hold the opinion that disclosure would result in inhibition relevant to section 36(2)(b)(ii). His conclusion is, therefore, that this exemption is engaged.
22. The next step is to consider the balance of the public interests. Having accepted that the opinion of the QP that prejudice would result was reasonable, the role of the Commissioner here is not to challenge or reconsider his conclusion of the reasonableness of that opinion. Instead, his role is to consider whether the public interest in disclosure equals or outweighs the concerns identified by the QP. In forming a view on the balance of the public interests, the Commissioner has taken into account the general public interest in the openness and transparency of the Home Office, as well as those factors that apply in relation to the specific information in question here.
23. Covering first factors in favour of maintenance of the exemption, having found that the QP's opinion was reasonable, appropriate weight must be given to that here. It would not be in the public interest to harm the independent panel process by inhibiting panel members. As to how much weight this should carry in the balance of the public interests, the question here is what the severity, extent and frequency would be of the prejudice identified by the QP.
24. In correspondence with the ICO, the Home Office referred to the impact of disclosure in this case going beyond only the DMIP to other panels. The Commissioner accepts that inhibition identified by the QP would apply to members of different panels. This means that the extent and

frequency of the inhibition that the QP believed would occur would extend beyond just the DMIP.

25. As to the severity of that inhibition, the Commissioner recognises that the importance to the independent panel process of panel members being able to communicate their views on the panel with the relevant department without inhibition. He also recognises that the impact on the independent panel process of panel members being unable to communicate with departments could be severe if, for example, problems that had arisen in the operation of a panel were not brought to light and addressed.
26. The Commissioner's view is, therefore, that the severity, extent and frequency of the outcome envisaged by the QP could be considerable. The public interest in avoiding the outcome that the QP believes would occur as a result of disclosure of the information in question is, therefore, a factor in favour of maintenance of the exemption of very significant weight.
27. Turning to factors in favour of disclosure, the Commissioner recognises that there is a strong public interest in this information given its subject matter. The murder of Daniel Morgan and the failure to secure a conviction in relation to this, and the related suspicions of police corruption, are a matter of significant and legitimate public interest.
28. That the DMIP operates appropriately and successfully is also a matter of public interest. The information in question is directly relevant to this issue in that, as reported in the article referred to in the request, the withheld information records the named panel member's concerns with the panel during his membership of it.
29. The Commissioner notes, however, that the period covered in the withheld information is earlier than the date of the request. The withheld information is dated March 2014 and the named individual notes that his active participation on the panel ended in December 2013. The Commissioner also notes that changes to the panel – a new chair and new members – had been made since the period covered in the withheld information. The Home Office reports that the DMIP is "*now working well*".
30. The view of the Commissioner is that there is public interest in disclosure of this information of considerable weight. However, that public interest would have been stronger had the withheld information related to the current state of the DMIP. That many of the concerns recorded within this information appear to have been addressed means that the weight of the public interest in favour of disclosure is reduced from the level it otherwise may have reached.

31. In conclusion, the Commissioner has recognised significant public interest in favour of disclosure of this information owing to its subject matter and content. However, having accepted that it was reasonable for the QP hold the opinion that inhibition would be more likely than not to result, he must give weight to the very strong public interest in avoiding that outcome. The chief public interest here is in the effective operation of the DMIP and the Commissioner believes that this would be best served through non-disclosure of this information. His conclusion is, therefore, that the public interest in the maintenance of the exemption outweighs the public interest in disclosure and so the Home Office was not obliged to disclose this information.
32. Having reached this conclusion, it has not been necessary to go on to also consider sections 36(2)(c) or 40(2).

Other matters

33. As the Home Office is aware, the Commissioner's approach on internal reviews is that these should be completed within a maximum of 40 working days. In this case, the Home Office exceeded this timescale by a considerable margin. The Commissioner is particularly concerned to note that the QP was not approached for an opinion until 15 May 2015, over three months after the internal review was requested.
34. Whilst the Home Office can introduce new exemptions at internal review stage, it should ensure that it does so promptly. A record has been made of the internal review delay in this case and this issue may be revisited should evidence from other cases suggest that this is necessary.

Right of appeal

35. 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

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

36. 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.
37. 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

Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF