

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 November 2018

Public Authority: Commissioner of the Metropolitan Police Service

Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant has requested information about a death in custody from the Metropolitan Police Service (the "MPS"). The MPS confirmed that it held some information but refused to disclose it, citing the exemptions at sections 30(1) (investigations and proceedings), 38(1) (health and safety) and 40(2) (personal information) of the FOIA.
2. The Commissioner's decision is that section 38(1) is engaged and that the public interest favours maintaining the exemption. No steps are required.

Request and response

3. On 18 December 2017 the complainant wrote to the MPS and requested information in the following terms:

"I am interested in a case from August 1986, in which a young man named [name removed] died in custody in [location details removed] for several days, as a result of natural causes aggravated by lack of care due to sickle cell disease. I understand that an investigation was conducted by the Complaints Investigation Bureau of the Metropolitan Police, as evidenced in letters between Douglas Hogg at the Home Office and the Director of the Runnymede Trust in 1987 (which I have accessed at the Black Cultural Archive). I would be grateful if you could provide me with a

copy of the report and any additional memoranda held by your department that is also relevant to the case.

If you no longer hold these historic files, I would be grateful if you could tell me what has happened to them, whether they have been destroyed or deposited in the National Archives. I would also be grateful if you could tell me whether your records show any previous freedom of information requests for the same documents, and, if appropriate, what the outcome of these previous requests were”.

4. On 21 March 2018 the MPS responded. It confirmed that it held information but refused to provide it. It cited the following exemptions as its basis for doing so: 40 (personal information) and 30 (investigations and proceedings). It advised that no other requests on this subject matter had been received.
5. Following an internal review, the MPS wrote to the complainant on 1 May 2018. It added reliance on section 38(1) and revised its position regarding section 40 by no longer saying that it considered it was “sensitive” personal data. It maintained its position in respect of section 30.
6. During the Commissioner’s investigation some press cuttings which were within the withheld information were disclosed to the complainant.

Scope of the case

7. The complainant initially contacted the Commissioner on 3 July 2018 to complain about the way her request for information had been handled. The Commissioner required further information from her, which was provided on 19 July 2018.
8. The complainant asked the Commissioner to consider the application of exemptions to the request. The Commissioner will consider these below.

Reasons for decision

9. The information held by the MPS has been described as follows:

“The MPS hold one file which compromises various witness statements and reports. It is around 286 pages and it was last updated in June 1996. The contents are:

- *Extracts of evidence given by two officers at the inquest.*

- *A doctor's report with a detailed description of the body.*
 - *Photographs of the body and location.*
 - *Record of interview with the two Police Officers involved.*
 - *Witness statements from various police officers, prison officers, hospital officers, pathologist, medical officers, photographer, solicitor, doctors and probation officers.*
 - *Forms including copy of lab report, copy of commitment warrant, copy of form 618, copy of form B10/9, copy messages and list of prison staff".*
10. The Commissioner has viewed a sample of the information in this case, namely the doctor's report referred to above and two reports written by police Inspectors.
11. Sections 30 and 38 have been applied to the withheld information in its entirety.

Section 38 – Health and Safety

12. The MPS has cited section 38(1)(a) of the FOIA. This provides that:

*"Information is exempt information if its disclosure under this Act would, or would be likely to –
(a) endanger the physical or mental health of any individual".*

13. For the exemption to be engaged it must be at least likely that the endangerment identified would occur. Even if the exemption is engaged, the information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
14. The Commissioner considers that the term 'endanger' in section 38(1) should be interpreted in the same way as the term 'prejudice' in other FOIA exemptions. In order to accept that the exemption is engaged, the Commissioner must be persuaded that the nature of the endangerment and the likelihood of it occurring as a result of disclosure of the information in question is "*real, actual and of substance*", rather than trivial or insignificant. As part of this, she must be satisfied that some causal relationship exists between the potential disclosure and the stated endangerment.
15. This means that three conditions must be satisfied for the exemption to be engaged. First, the harm that it is envisaged would, or would be likely to occur, should relate to the applicable interest described in the exemption. Secondly, there is a causal relationship between the

potential disclosure of the withheld information and the prejudice that the exemption is designed to protect against. Third, there is a real risk of the prejudice, or more precisely the endangerment, arising through disclosure. In this regard, a public authority is required to demonstrate that either disclosure 'would be likely' to result in prejudice or that disclosure 'would' result in prejudice - 'would' imposing a stronger evidential burden than the lower threshold of 'would be likely'.

16. The Commissioner considers an individual's mental wellbeing to fall within the scope of section 38. In this she includes emotional and psychological wellbeing, including the likelihood of causing significant upset or distress.

17. The MPS has advised:

"Disclosure of the requested information in the MPS view, "would be likely" to cause distress in particular to members of [name removed]'s family but also to those individuals connected..."

18. As the requested information relates to the circumstances regarding the death of a man in police custody, and the possible effect that disclosure could have on his surviving family and others, the Commissioner is satisfied that it relates to the applicable interest cited.

19. The Commissioner has therefore gone on to consider the next stage of the prejudice test; that is, whether there is a causal link between disclosure and the harm referred to by MPS. In her guidance on the prejudice test, the Commissioner acknowledges that it will not usually be possible for a public authority to provide concrete proof that the prejudice would or would be likely to result. This is because the test relates to something that may happen in the future. However, the Commissioner considers that the engagement of an exemption cannot be based on mere assertion or belief but must reflect a logical connection between the disclosure and the prejudice.

20. The Commissioner acknowledges that the physical or mental health of family members, and other members of the public, need to be considered when disclosure "to the world at large" is being made under the FOIA. In this case, the Commissioner believes it to be evident that the consequences of the disclosure of this information into the public domain is such that it would be likely to cause significant distress to surviving family members and any friends of the victim, as well as those parties who gave witness statements on the matter. The matter was investigated at the time and no criminal charges were brought against any person. She therefore considers that none of the parties would have an expectation that this type of information, which includes photographs of the deceased and a detailed post mortem report, would be made publically available, particularly after this length of time.

21. In the Commissioner's view, for family members to discover that witness statements and photographs of the deceased have been released into the public domain could have a significant impact on their physical and mental health. Not least, this could be caused by their belief that the case is considered to be 'closed', and has been for some time.
22. The Commissioner is satisfied that the level and nature of the prejudice identified would be likely to go beyond stress or worry and constitute an endangerment to the physical or mental health of the parties identified above.
23. The Commissioner is therefore satisfied that section 38(1)(a) of the FOIA is engaged in relation to the requested information. As this is a qualified exemption, the Commissioner also needs to consider the public interest test.
24. The complainant did not specify any reasons for disagreeing with this exemption in her correspondence to the Commissioner and, as it was only introduced at internal review stage, she did not offer any arguments to the MPS when asking for an internal review. However, the Commissioner notes that some of the arguments she gave for the other exemptions cited are also pertinent to this exemption so she has considered them here.

Public interest factors in favour of disclosure

25. The MPS has argued:

"... disclosure may assist individuals who are connected to the deceased and wish to establish further details concerning his death. Furthermore disclosure may help raise awareness of issues concerning this death which could improve understanding of these matters".

26. The complainant has argued:

"There is a very specific public interest in transparency and accountably concerning deaths in police custody and police internal investigations of these deaths, particularly during the period in question. Indeed, given the history of institutionalised racism within the MPS - acknowledged in the Macpherson Report in 1999 - the importance of both these points are compounded when the subject is black. Moreover, at the time of [name removed]'s death his family, along with the advocacy organisations the Sickle Cell Society, the Hackney Legal Defence Committee and the Runnymede Trust all lobbied the Home Office for an inquiry into the circumstances of his death. This demonstrates a specific public

interest not only in transparency about deaths in police custody when the subject is black, but also in this particular case”.

Public interest factors in favour of maintaining the exemption

27. The MPS has argued:

“The MPS has a duty of care to the communities served. The information contained in the requested information contains personal information about the deceased. The disclosure of details pertaining to [name removed]’s death, personal life, medical records and photos of the deceased is likely to cause distress to his family. Given the length of time that has elapsed since his death, the family of the deceased would be under no expectation that the MPS would disclose information which may ignite painful, distressing memories of events which led to the death of their loved one”.

28. The MPS has also added:

“The events surrounding the death of [name removed] have been investigated by the MPS, heard at Coroners Court and supervised by the Police Complaints Authority, these processes the MPS contends; satisfy the public interest in this case. In this case, the inquest jury returned a verdict of death by natural causes aggravated by lack of care. No criminal charges were brought against any person therefore the MPS believes there is little public benefit in disclosure especially when [name removed]’s tragic death is now over 31 years ago”.

Balance of the public interest test

29. The Commissioner will invariably place significant weight on protecting individuals from risk to their physical and mental well-being. The natural consequence of this is that disclosure will only be justified where a compelling reason can be provided to support the decision.

30. In explaining its position regarding the decision to disclose information about the Blair Peach case referred to by the complainant above, the MPS advised the complainant that, whilst it treats the investigation of any death with the utmost seriousness, the circumstances and investigation into the death of Blair Peach were not comparable to this case. It explained that the Peach investigation had been on a very large scale, taking in excess of 30,000 of hours, adding that the resulting 130 page report, which was published in 2010, *“reasonably concluded that a police officer struck the fatal blow”*. It therefore advised the complainant:

"A precedent has not been set by disclosure of redacted information related to the Blair Peach case as it was an extraordinary case with unprecedented public interest. The level of information in the public domain concerning the death of [name redacted] is minimal in comparison".

31. The MPS further confirmed that it published information on its website regarding the Blair Peach investigation because of the considerable public interest in that case and not as the result of a request made under the FOIA.
32. The Commissioner also recognises the complainant's concerns regarding the findings of the Macpherson Report in 1999. However, as mentioned above, it is noted that this case was heard at Coroners' Court and an investigation into the circumstances of the death was supervised by the Police Complaints Authority. No blame was apportioned to any person, with the death being found to have been as a result of natural causes, aggravated by lack of care. Having read the report of the doctor who undertook the post mortem, the Commissioner can confirm that this was the case.
33. Although the complainant may have genuine concerns about the circumstances of the death, the Commissioner can find no evidence to support any such concerns. Whilst she recognises that giving access to the withheld information may give interested parties some important insight into the circumstances surrounding the death, she does not consider that an unfettered disclosure to the world at large via the FOIA would be an appropriate action to take. It is obvious that when a person dies their family will be distressed for a considerable period of time. When that death is the result of a tragic circumstances, such as in this case, then the distress felt can be even more severe, and in some cases family members may never be able to come to terms with it.
34. On this occasion, the Commissioner considers that the strength of the arguments favouring disclosure is clearly outweighed by the public interest in maintaining the exemption in order to safeguard the mental health of the deceased's surviving relatives. Therefore, in all the circumstances, the Commissioner has decided that the balance of the public interest favours maintaining the exemption at section 38(1)(a) of the FOIA.
35. As this exemption applies to all of the withheld information it has not been necessary for the Commissioner to consider the other exemptions cited.

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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.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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