

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 June 2012

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

Decision (including any steps ordered)

1. The complainant requested correspondence exchanged between the Home Office and the Metropolitan Police Service (MPS) regarding the MPS' review of the Madeleine McCann case. The Home Office disclosed one document but explained that the remaining six documents that it held were exempt from disclosure on the basis of a number of exemptions in the Freedom of Information Act, including section 36 (the effective conduct of public affairs exemption) and section 27 (the international relations exemption). The Commissioner is satisfied that the documents withheld by the Home Office are exempt from disclosure on the basis of these exemptions and in all the circumstances of the case the public interest favours maintaining each of the exemptions.

Request and response

2. On 8 September 2011 the complainant wrote to the Home Office and requested information in the following terms:

'Please provide all correspondence, including letters, emails or notes of telephone calls, between Home Secretary Theresa May or officials acting on her behalf and the Metropolitan Police, including former Commissioner Sir Paul Stephenson, in relation

to the Metropolitan Police review of the Madeleine McCann case, including any guarantees made regarding funding of the review.¹

3. After issuing two public interest extension letters, the Home Office provided the complainant with a substantive response on 1 December 2011. In this response the Home Office explained that it held seven documents falling within the scope of his request. It provided the complainant with one of the documents noting that it had already been released into the public domain by the Metropolitan Police Service (MPS). The Home Office explained that it considered the remaining six documents to be exempt on the basis of the exemptions contained at sections 31(1)(b) – the law enforcement exemption, 36(2)(b)(i), 36(2)(b)(ii), 36(2)(c) – the effective conduct to public affairs exemptions, 27(1)(a) – international relations exemption and 40(2) – personal data exemption of FOIA.
4. The complainant contacted the Home Office on 2 December 2011 and asked for an internal review of this decision.
5. The Home Office informed him of the outcome of the review on 5 January 2012. The review upheld the application of the exemptions as set out in the refusal notice.

Scope of the case

6. The complainant contacted the Commissioner to complain about the Home Office's decision to withhold the remaining six documents falling within the scope of his request. The complainant provided a number of arguments to support his position that this information should be disclosed and the Commissioner has referred to these arguments in his analysis below.

¹ On 12 May 2011 the Metropolitan Police Service announced that, at the request of the Home Secretary, it had agreed to bring its expertise to the Madeleine McCann case. Details of the remit of 'Operation Grange' as the Metropolitan Police Service review was titled are available here: <http://content.met.police.uk/Article/Operation-Grange/1400005508791/35434>

Reasons for decision

Section 36 – effective conduct to public affairs

7. In this case the Home Office has relied upon the exemptions contained at 36(2)(b)(i), 36(2)(b)(ii), 36(2)(c) to withhold four of the six documents in question. (These are the documents numbered 1, 2, 3 and 5 in the bundle of documents provided to the Commissioner by the Home Office).

8. Section 36(2) states that:

'Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-...

...(b) would, or would be likely to, inhibit-

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.'

9. The qualified person who gave their opinion, the Home Secretary, argued that all three of the exemptions were engaged at the lower threshold, i.e. that disclosure would be likely to result in the prejudicial consequences the exemptions were designed to protect.

10. In determining whether these exemptions are engaged the Commissioner must determine whether he accepts that the Home Secretary's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:

- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
- The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
- The qualified person's knowledge of, or involvement in, the issue.

11. Further in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The Home Secretary's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the Home Secretary's position could hold. The Home Secretary's opinion does not even have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
12. With regard to the sections 36(2)(b)(i) and (ii), the Home Secretary argued that Ministers and officials should be free to explore, and as necessary discard or amend opinions, views, policy ideas and ideas for action. The possibility that any discussion or private views could be open to public scrutiny would be likely to stifle discussion, leading to less well considered decisions. If information of this nature was routinely released, this could result in important details being omitted from email discussions and submissions, potentially resulting in a civil service incapable of effectively handling sensitive situations. The Home Secretary noted that these arguments attracted particular weight in the context of this case because of the significant public and media interest in the Madeleine McCann case and the sensitive nature of the matters discussed in the withheld information.
13. With regard to whether this opinion is a reasonable one, the Commissioner notes that the Home Office's arguments encompass two concepts: Firstly the need for a 'safe space' to discuss live issues and reach decisions without being hindered by external comment and/or media involvement. (Once a decision about a particular issue has been reached, the safe space arguments cannot apply because the issue can no longer be said to be live.) Secondly the concept of the 'chilling effect', i.e. that disclosure would inhibit the frankness and candour with which views are exchanged and advice given.
14. Although these two concepts are related, the Commissioner's believes that they can be distinguished from each other: whilst part of the reason for needing a 'safe space' is to allow free and frank debate away from external comment, the need for a 'safe space' exists regardless of any impact on the candour of debate of involved parties, which might result from a disclosure of information under FOIA. In contrast, chilling effect arguments are directly concerned with the argued loss of frankness and candour in debate/advice which is said would result from disclosure of information under FOIA.

15. In the circumstances of this case, the Commissioner accepts that the safe space argument is relevant because at the time of the request the decision making around the implementation and scope of Operation Grange remained live. Although it was announced on 12 May 2011 that the MPS has agreed to bring its expertise to the Madeleine McCann case, it is evident from the content of the withheld information that decision making in respect of the scope and implementation of Operation Grange was ongoing for several months after this initial decision. Furthermore given the significant public and media interest in Madeleine McCann's disappearance, the Commissioner is satisfied that it was reasonable for the Home Secretary to conclude that at the time of the request the Home Office needed a safe space in which to discuss issues relating to the MPS' review of the case away from external comment.
16. The Commissioner has generally been quite sceptical of the chilling effect arguments, albeit acknowledging that such concerns should not be dismissed out of hand. In the circumstances of this case given the wider sensitivities associated with MPS' review of the Madeleine McCann case, and the candid nature of the language used in the documents that have been withheld, the Commissioner accepts that it is not unreasonable to assume that some sort of chilling effect could occur if the information was disclosed. That is to say the officials involved in the decision making associated with Operation Grange would be likely to alter the tone and nature of their communications in future if the withheld information was disclosed. In the Commissioner's opinion this provides further support for concluding that the Home Secretary's view that disclosure of the withheld information would be likely to result in the prejudicial outcomes described at sections 36(2)(b)(i) and (ii) was a reasonable one. The Commissioner is therefore satisfied that both of these exemptions are engaged.

Public interest test

17. Section 36 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 36(2)(b)(i) and (ii) outweigh the public interest in disclosing the information. Although these are two separate exemptions, given the similarity of the public interest arguments relevant to each exemption he has considered the public interest arguments together.

Public interest arguments in favour of disclosing the requested information

18. The Home Office acknowledged that there was a general public interest in openness and transparency in policy and decision making which can lead to increased trust and engagement between the public and the

government. In the particular circumstances of this case the Home Office accepted that the public will want to be reassured that decision making in respect of the granting of financial assistance to the MPS in relation to its review of the Madeleine McCann case was based upon the best advice and options available.

19. The complainant argued that there was a very clear public interest in the processes and procedures of the Home Office and MPS being open to proper scrutiny to ensure that they are being properly applied. The complainant argued that because cases of other missing persons, including children, had not received MPS assistance on the request of the Home Secretary, in the interests of transparency it was important for the public to understand the methods and processes used in determining the reasons for a review in this case. The complainant noted that there had been no explanation offered as to why this case constituted a set of exceptional circumstances. The complainant highlighted the fact that the MPS' review had raised serious questions over the relationship between political decisions and policing decisions. The complainant suggested that it was particularly important for the public to understand the decision making process given the fact that police budgets were being cut and there were genuine concerns that policing would suffer as a result of these cuts.

Public interest arguments in favour of maintaining the exemptions

20. In its submissions to the Commissioner the Home Office set out why it believed that the public interest favoured maintaining these two exemptions, emphasising the concepts of safe space and chilling effect discussed above. The Home Office's submissions on these points were detailed and made direct reference to the content of the withheld information. Therefore, the Commissioner cannot reproduce these submissions in detail in this notice as to do so would reveal the content of the withheld information but he has summarised them as follows:
21. The Home Office argued that the public interest in maintaining the exemptions stemmed from the fact that the Madeleine McCann case, including the MPS' review of it, was a sensitive and high profile issue not least because of the need for liaison with Portuguese officials. The Home Office emphasised that the information withheld under these exemptions contained a candid, robust and direct dialogue between the Home Office and MPS officials about a number of sensitive issues directly related to the MPS' review of this case. A discussion of this nature was vital to ensure that decision making on this subject was effective. The Home Office argued that if the frankness of such communications was toned down then there was a significant danger that import of the message was diluted and intention not fully communicated. It was clearly against the public interest that effective decision making on such a case would

be undermined by either the safe space being impinged or because of a chilling effect on future contributions to discussions on this issue.

Balance of public interest test

22. In the circumstances of this case the Commissioner believes that the safe space arguments should be given significant weight in light of the public interest in the Madeleine McCann case to date, particularly the widespread media coverage. In the Commissioner's opinion it is clear that disclosure of the withheld information - which he accepts clearly reflects a candid discussion surrounding the MPS' review - would be very likely to result in a level of external comment that would interfere with the ability of Home Office and the MPS to freely and frankly discuss various issues associated with the review. The Commissioner, in line with findings of previous Information Tribunal decisions, believes that there is very strong public interest in public authorities being able to debate and discuss live issues without the threat of lurid headlines encroaching on the need for a private thinking space.
23. As suggested above at paragraph 16 the Commissioner is generally sceptical of the chilling effect arguments often advanced by public authorities. In his view in order for such arguments to attract any notable weight, a public authority would have to provide convincing arguments and evidence which demonstrates how disclosure would result in some sort of chilling effect. In the circumstances of this case the Commissioner is satisfied that if withheld information was disclosed then those officials involved in discussing the implementation and scope of Operation Grange would be likely to alter the manner and way in which they exchanged correspondence on this matter. This is because of the two factors discussed above in relation to the need for a safe space, namely the candid nature of the information itself and the broader sensitivities associated with the Madeleine McCann case. The Commissioner accepts that such a change in the nature of such correspondence would undermine the efficacy of communications on this subject which would in turn undermine the ability of the Home Office and MPS to make effective decisions. The Commissioner is satisfied that such a consequence is clearly not in the public interest.
24. The Commissioner agrees that there is a notable and weighty public interest in disclosure of information which would inform the public as to how decisions were reached in relation to the remit and funding of Operation Grange. This is because of the significant use of public funds in the operation and also because of the issues highlighted by the complainant, i.e. the perceived lack of clarity as to why the MPS were asked to offer their assistance in this particular case and perceptions – whether correct or not – that political considerations had impacted on policing decisions. However, the Commissioner believes that the extent

to which disclosure of the four documents withheld under sections 36(2)(b)(i) and (ii) would actually inform the public about these issues is somewhat limited. (The Commissioner is not able to elaborate on this point without discussing the content of the information itself).

25. Therefore, given the very significant weight that should be attributed to the safe space arguments and notable, albeit less weight, that should be attributed to the chilling effect arguments, the Commissioner finds that the public interest in maintaining the exemptions contained at 36(2)(b)(i) and (ii) outweighs the public interest in disclosing the four documents that have been withheld under these exemptions.

Section 27 – international relations

26. The Home Office has relied upon the exemption at section 27(1)(a) to withhold the documents numbered 1, 3, 4, and 6. As the Commissioner also already concluded that documents 1 and 3 are exempt from disclosure on the basis of sections 36(2)(b)(i) and (ii), he has only considered whether the documents numbered 4 and 6 are in fact exempt from disclosure on the basis of section 27(1)(a).

27. This section states that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(a) relations between the United Kingdom and any other State'

28. In order for a prejudice based exemption, such as section 27(1), 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. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.

29. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that, in the context of section 27(1), prejudice can be real and of substance 'if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary'.²
30. In submissions to the Commissioner the Home Office explained that the documents withheld under this exemption all included sensitive information regarding engagement between UK and Portuguese officials regarding the Madeleine McCann investigation. The Home Office argued that disclosure of this information would (i.e. not just be likely to) prejudice the UK's international relations. This prejudice would occur in two ways different ways:
 31. Firstly, there would be a specific detriment to the UK's relationship with Portugal which would impact on the co-operation between these two states regarding the ongoing investigation in to the disappearance of Madeleine McCann. This is because the documents contained information provided to the UK in confidence by Portuguese officials and internal discussions between the Home Office and MPS of such information. Secondly, disclosure would prejudice the UK's relations with the wider international community because it would create the perception that the UK was unwilling to respect the wishes of international partners who had provided information to it. Such partners would, as a consequence, be unwilling to assist the UK or share information with it in similar circumstances in the future. In order to support its position the Home Office provided the Commissioner with submissions which explained in detail why the content of this specific information would, in the context of the ongoing discussions between UK and Portuguese officials result in the prejudicial effects it envisaged. Again, the Commissioner is not able to reference these submissions in any detail here without compromising the content of the withheld information itself.
 32. With regard to the first criterion of the test set out at paragraph 28, the Commissioner accepts that the type of harm that the Home Office believes would occur if the information was disclosed is applicable to the exemption contained at section 27(1)(a).
 33. With regard to the second criterion, having examined the withheld information the Commissioner is satisfied that it clearly contains sensitive information provided to it in confidence by the Portuguese authorities and internal discussions of this information. The

² [Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence \(EA/2006/0040\)](#), paragraph 81.

Commissioner is satisfied that disclosure of such information has the potential to harm the UK's relationship with Portugal, and indeed more broadly have a potentially negative impact on relations with other nations.

34. The Commissioner is therefore satisfied that there is a causal relationship between the potential disclosure of the withheld information and the interests which section 27(1)(a) is designed to protect. Moreover, the Commissioner is satisfied that the resultant prejudice which the Home Office believes would occur is one that can be correctly categorised, in light of the Tribunal's comments above, as real and of substance. In other words, subject to meeting the likelihood test at the third criterion, disclosure could result in making relations more difficult and/or demand a particular diplomatic response.
35. 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.
36. Having considered the content of the withheld information, and taking into account the sensitivities surrounding the Madeleine McCann case, including the UK's relations with relevant officials in Portugal, the Commissioner is satisfied that the higher threshold of prejudice is obviously met. That is to say it is clear to the Commissioner that disclosure of the information would, beyond any reasonable doubt, make relations with Portugal in relation to the Madeleine McCann case more difficult. Furthermore, the Commissioner believes that the Home Office's argument that disclosure would also prejudice relations with other countries to be a compelling one and this lends further weight to his finding that prejudice is not just likely to occur, but would occur.
37. The Commissioner notes that in his request for an internal review the complainant argued that the Home Office had failed to demonstrate why disclosure of the information would result in prejudice to the UK's international relations. The Commissioner wishes to reassure the complainant that in its submissions to him the Home Office made a clear and compelling case as to how this prejudice would occur.

Public interest test

38. Section 27 is also a qualified exemption and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

39. The Commissioner believes that the public interest arguments in favour of disclosure are effectively the same as those set out above in relation to section 36 and therefore he has not replicated them here.

Public interest arguments in favour of maintaining the exemption

40. The Home Office argued that it was clearly not in the public interest to release information that would prejudice the UK's relations with another country. This is because such prejudice would undermine the UK's ability to work with other countries, in serving the public interest, in matters of trade, defence, the environment, human rights cases, the fight against terrorism, international crime, and specifically in terms of this particular request the safe return of Madeleine McCann.

Balance of public interest arguments

41. As discussed above, the Commissioner believes that there is a strong public interest in disclosure of information which would inform the public about how decisions were reached in relation to the remit and funding of Operation Grange. However, as with the information withheld under section 36 the Commissioner believes that the extent to which documents 4 and 6 would serve this public interest are quite limited. In contrast the Commissioner believes that it is very clear how disclosure of the information would harm the UK's relationship with Portugal specifically in relation to the case of Madeleine McCann but also on other bilateral issues. Furthermore, it is evident that disclosure of this information could also prejudice the UK's relations with other countries. The Commissioner is clear that such a broad prejudicial outcome is firmly against the public interest and he has therefore concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
42. In light of the Commissioner's findings in relation to the exemptions contained at sections 36(2)(b)(i) and (ii) and section 27(1)(a) he has not gone on consider whether the 6 documents withheld are also exempt from disclosure on the basis of the other exemptions cited by the Home Office in the refusal notice issued to the complainant.

Right of appeal

43. 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

44. 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.
45. 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