

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 11 January 2018

**Public Authority:** Crown Prosecution Service  
**Address:** Rose Court  
2 Southwark Bridge  
London  
SE1 9HS

#### Decision (including any steps ordered)

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1. The complainant requested information from the Crown Prosecution Service (CPS) relating to their involvement in the London Borough of Tower Hamlets Election Petition Judgment of 2015.
2. During the course of the Commissioner's investigation, the CPS clarified the amount of information it held within the scope of the request. It provided some information within the scope of those parts of the request that comprised requests for information but refused to provide the remainder, citing sections 40(2) (personal information) and 42(1) (legal professional privilege) of the FOIA.
3. The Commissioner has concluded that the CPS was entitled to rely on the exemptions at sections 40(2) and 42(1) of the FOIA to withhold the information. She requires no steps to be taken as a result of this decision.

#### Background

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4. The CPS is the principal prosecuting authority for England and Wales, acting independently in criminal cases investigated by the police and others<sup>1</sup>.
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<sup>1</sup> <http://www.cps.gov.uk/about/>

5. Amongst its various functions, the CPS:
  - decides which cases should be prosecuted – keeping them all under continuous review;
  - determines the appropriate charges in more serious or complex cases – advising the police during the early stages of investigations.
6. The CPS publishes its organisational structure<sup>2</sup> together with details of its senior and junior staff posts.
7. The topic that is the subject matter of this request was referred to by the Electoral Commission in its report '*Analysis of cases of alleged electoral fraud in the UK in 2016 - Summary of data recorded by police forces*<sup>3</sup>:

*"1.13 In March 2016 the MPS [Metropolitan Police Service] announced that that no charges would be brought in relation to allegations of electoral fraud following the May 2014 elections in Tower Hamlets. A statement by the MPS explained that, following assessment of information arising from the trial and the April 2015 judgment of the election court in relation to the petition challenging the result of the May 2014 Mayoral and local government elections in Tower Hamlets, and in consultation with the Crown Prosecution Service, 'a decision has been made that there is insufficient evidence that criminal offences had been committed'".*

## Request and response

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8. On 23 December 2016, the complainant wrote to the CPS and made a multi-part request for information under the FOIA. In summary, he requested information in the following terms:

*"1. May I be informed as to the brief provided to Ms Stella Hayden who, I understand, acted for the CPS during the Tower Hamlets Election Court?*

*2. May I be informed as to the date of call and subsequent specialist experience of Ms Hayden which qualifies her for a CPS*

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<sup>2</sup> <https://www.cps.gov.uk/data/organogram/>

<sup>3</sup> [http://www.electoralcommission.org.uk/\\_\\_data/assets/pdf\\_file/0020/223184/Fraud-allegations-data-report-2016.pdf](http://www.electoralcommission.org.uk/__data/assets/pdf_file/0020/223184/Fraud-allegations-data-report-2016.pdf)

*appointment in a case of enormous complexity, which aroused enormous public interest and continued for a record length of time?....*

*3. May I have a copy of the written advice and notes of any advice in conference provided by Ms Hayden which resulted in her recommendations as to admissible evidence?*

*4. .... what is the name of the Specialist Prosecutor?*

*5. Some 27 files of material were delivered to the CPS after the Court decision. Were these taken into consideration by either Ms Hayden or the Specialist Prosecutor?*

*6. Was the Specialist Prosecutor aware that the Police had not undertaken interviews with numerous potential and willing witnesses.....?*

*7. May I see a copy of the decision by the Specialist Prosecutor not to proceed with prosecutions based on material provided by the Police?*

*8. Are the CPS aware of the detailed file ... If they are what actions are they taking to consider a prosecution?*

*9. Will the CPS provide a valid reason as to why both they and the Police Service have declined to meet the Election Petitioners.....?"*

9. The CPS responded on 20 January 2017. It explained that some of the questions the complainant had asked were not valid requests for information.
10. In relation to point 8, it said that it was unable to locate any information in relation to that aspect of the request.
11. It provided some information within the scope of the other parts of the request but refused to provide the remainder. It cited the following exemptions of the FOIA as its basis for doing so:
  - section 40(2) (personal information)
  - section 42(1) (legal professional privilege).
12. The complainant requested an internal review of the CPS' handling of points 1, 2, 3, 4 and 7 of the request.
13. Following an internal review, the CPS wrote to the complainant on 16 March 2017 upholding its original position.

## Scope of the case

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14. The complainant contacted the Commissioner on 12 April 2017 to complain about the way his request for information had been handled. He disputed the CPS' refusal to provide the requested information. The complainant provided comprehensive documentation in support of his complaint.
15. In his correspondence he posed six questions which he asked the Commissioner to *'agree ... be answered'*. Those questions related to some, but not all, of the information within the scope of his request. He also raised matters which were outside the scope of his request for information.
16. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the FOIA.
17. Accordingly, the Commissioner wrote to the complainant clearly setting out the scope of her investigation, namely whether the CPS was entitled to rely on sections 40(2) and/or 42(1) of the FOIA to refuse the requested information in relation to points 2 (date of call and experience of Stella Hayden), 3 (written advice), 4 (name of Specialist Prosecutor) and 7 (written decision of the Specialist Prosecutor) of the request for information.
18. The complainant responded, again referring to matters outside the scope of his request.
19. During the course of the Commissioner's investigation, the CPS clarified its response to part 2 of the request. It clarified that it did not hold any information within the scope of that part of the request and confirmed what it had told the complainant, namely that Ms Hayden's dates of call and specialist experience are publicly available on her chambers' website.
20. Also during the Commissioner's investigation, the CPS clarified its response with regard to the information requested at part 7 of the request. It confirmed that the CPS did not hold the specific material within the scope of that part of the request.
21. The complainant did not respond to the Commissioner with respect to the CPS' clarification.
22. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the FOIA.

23. In light of the above, and mindful of the wording of the request, the analysis below considers the CPS' application of sections 40(2) and 42(1) of the FOIA to points (3) and (4) of the request - written advice provided by Ms Hayden and the name of Specialist Prosecutor respectively.

## Reasons for decision

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### *Section 40 - personal information*

24. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3) or 40(4) of the FOIA is satisfied.
25. In this case the relevant condition is contained in section 40(3)(a)(i) of the FOIA. This applies where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act 1998 (DPA).
26. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data then section 40 cannot apply.
27. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

### *Is the information personal data?*

28. Section 1 of the DPA defines personal data as:

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

*a) from these 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."*

29. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable.

30. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
31. In this case, the requested information is the name of the individual who was the Specialist Prosecutor. Clearly that information, by its very nature, relates to them.
32. The Commissioner is satisfied that, given its nature, the information withheld by virtue of section 40(2) of the FOIA constitutes information that falls within the definition of 'personal data'. In other words, she is satisfied that it relates to a living individual who may be identified from that data.

*Would disclosure breach any of the data protection principles?*

33. Having accepted that the withheld information constitutes the personal data of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach any of the data protection principles.
34. The CPS considers – and the Commissioner agrees - that the first data protection principle is relevant in this case.

*Would disclosure contravene the first data protection principle?*

35. The first data protection principle 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."*

36. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions (and one of the Schedule 3 conditions if relevant). If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

*Would disclosure be fair?*

37. Under the first data protection principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public.

38. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
- the data subject's reasonable expectations of what would happen to their information;
  - the consequences of disclosure; and
  - the balance between the rights and freedoms of the data subject and the legitimate interests of the public.

*Reasonable expectations*

39. With respect to fairness, the CPS told the complainant that the individual has:

*"... a clear and strong expectation that their personal data will be held in confidence and not disclosed to the public under the FOI Act".*

40. In correspondence with the Commissioner, the CPS told her that it does not routinely release names of staff graded below Senior Civil Servant (SCS) level under the FOIA. In that respect it said:

*"There is an expectation that senior staff are accountable for decisions made in their professional capacity. This argument is not as strong for less senior staff and therefore consider their names to be exempt from disclosure under section 40(2) [sic]".*

41. With respect to the requested information, it said that the CPS *"would not usually approach staff under SCS to discuss the disclosure of their data"*.

42. In its submission to the Commissioner the CPS explained that 'Specialist Prosecutor' is a grade within the CPS and that such prosecutors:

*"... work most commonly in our Central Casework Divisions that deal with the most complex and sensitive cases".*

43. In support of its argument to withhold the name of the Specialist Prosecutor, the CPS emphasised that the Head of Special Crime – a Senior Civil Servant:

*"... has repeatedly and publicly held himself accountable for the CPS conduct of this case".*

44. In the Commissioner's view, a key issue to consider in assessing fairness is whether the individual concerned has a reasonable expectation that their information will not be disclosed. She considers that the expectations of an individual will be influenced by the distinction

between his or her public and private life. This means that it is more likely to be fair to release information that relates to the professional life of an individual.

45. The Commissioner has issued guidance about requests for personal data about public authority employees<sup>4</sup>. In that guidance, she recognises that:

*"Information about an employee's actions or decisions in carrying out their job is still personal data about that employee, but given the need for accountability and transparency about public authorities, there must be some expectation of disclosure".*

46. In relation to the reasonable expectations of the Specialist Prosecutor, the Commissioner accepts that the withheld information relates to the data subject in a professional capacity rather than their private life.
47. Although employees may regard the disclosure of personal information about them as an intrusion into their privacy, this may often not be a persuasive factor on its own, particularly if the information relates to their public role rather than their private life.
48. Acknowledging that the information relates to their public role rather than their private life, the Commissioner has been assisted by the explanation provided by the CPS of the role the Specialist Prosecutor played in this particular case.
49. The Commissioner is mindful of the subject matter of the request in this case – a matter that attracted strong media interest. She considers that it would not be unreasonable or unexpected that the public interest would require transparency.
50. In that respect, however, she accepts that the Head of Special Crime held himself publicly accountable for the CPS conduct of the case that is the subject matter of the request.
51. In the circumstances of this case the Commissioner is therefore satisfied that the Specialist Prosecutor could reasonably expect that their personal data would not be made publicly available.

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<sup>4</sup> [https://ico.org.uk/media/for-organisations/documents/1187/section\\_40\\_requests\\_for\\_personal\\_data\\_about\\_employees.pdf](https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf)



*Consequences of disclosure*

52. The Commissioner accepts that disclosure of the requested information could have a detrimental or distressing effect on the individual concerned, particularly as she has found that disclosure of the information would not have been within their reasonable expectations.

*The legitimate public interest*

53. Assessing fairness also involves balancing the individual's rights and freedoms against the legitimate interest in disclosure to the public. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to disclose the requested information if there is a more compelling public interest in its disclosure.
54. As disclosure under the FOIA is considered to be disclosure to the public at large and not to the individual applicant, it is the legitimate interests of the public in disclosure that must be balanced against the interests of the data subject, including their right to privacy. In other words, the Commissioner must consider whether or not it is appropriate for the requested information to be released to the general public
55. With regard to the legitimate interests of the public in disclosure in this case, the Commissioner accepts that they include the general public interest in transparency. In that respect, the Commissioner recognises that matters relating to allegations of electoral fraud and malpractice in the Tower Hamlets mayoral election in 2014 were in the public domain.
56. The Commissioner recognises that there is a legitimate public interest in the openness and accountability of the CPS as a public authority responsible for determining the appropriate charges in more serious or complex cases.
57. However, she has also taken into account that the CPS Head of Special Crime has publicly held himself accountable for the CPS conduct of this case.
58. In the Commissioner's view, disclosure of the requested information – the name of the Specialist Prosecutor - would neither augment nor assist the public's understanding of the criminal justice system and how it operated in this case.

*Conclusion*

59. Having taken into account all the circumstances of the case, and having considered the reasonable expectations of the data subject, the potential consequences of disclosure and the public interest factors, the Commissioner has concluded that there is no legitimate public interest in

disclosure which would outweigh the detriment which could be caused to the data subject as a result of disclosure of the requested information. Therefore, disclosure would be unfair and would breach the first data protection principle.

60. Having concluded that it would not be fair to disclose the requested information the Commissioner has not gone on to consider whether any condition of Schedule 2 to the DPA is satisfied.
61. The Commissioner is satisfied that the CPS was entitled to withhold the information under section 40(2) by way of section 40(3)(a)(i).

#### *Section 42 legal professional privilege*

62. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings.
63. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of *Bellamy v The Information Commissioner and the DTA (EA/2005/0023)*<sup>5</sup> (*Bellamy*) as:

*"... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communications or exchanges come into being for the purposes of preparing for litigation."*

#### *Does the information attract legal professional privilege?*

64. There are two categories of legal professional privilege (LPP) – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal

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[http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i28/bellamy\\_v\\_information\\_commissioner1.pdf](http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i28/bellamy_v_information_commissioner1.pdf)

adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.

65. The withheld information in this case comprises written advice provided to the CPS by Ms Stella Hayden.
66. In correspondence with the complainant, the CPS advised him that the section 42(1) exemption of the FOIA applies on the basis of advice privilege.
67. In correspondence with the Commissioner the CPS said that the withheld information:

*"... contains confidential communication made for the purpose of providing or obtaining legal advice or for lawyers preparing for a case for litigation".*

68. The Commissioner's view is that for LPP to apply, information must have been created or brought together for the dominant purpose of litigation or for the provision of legal advice. With regard to legal advice privilege the information must have been passed to, or emanate from, a professional legal adviser for the sole or dominant purpose of seeking or providing legal advice.
69. The Commissioner has published guidance on section 42 of the FOIA<sup>6</sup>. That guidance states:

*"The client's ability to speak freely and frankly with his or her legal adviser in order to obtain appropriate legal advice is a fundamental requirement of the English legal system. The concept of LPP protects the confidentiality of communications between a lawyer and client. This helps to ensure complete fairness in legal proceedings.*

...

*"The legal adviser must have given advice in a legal context; for instance, it could be about legal rights, liabilities, obligations or remedies. Advice from a lawyer about financial matters or on an operational or strategic issue is unlikely to be privileged, unless it also covers legal concerns, such as advice on legal remedies to a problem".*

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<sup>6</sup> [https://ico.org.uk/media/for-organisations/documents/1208/legal\\_professional\\_privilege\\_exemption\\_s42.pdf](https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf)

70. In support of its application of section 42 of the FOIA, the CPS told the Commissioner:

*"It is vital for the effective conduct of the prosecution process that confidential communications within the CPS and between the CPS and third parties can take place."*

71. It argued that lawyers and their clients have a general expectation that their communications will remain confidential, adding that:

*"The rationale for LPP is to allow robust and honest legal advice to be given, and this raises a strong presumption against disclosure".*

72. Having viewed the withheld information, the Commissioner is satisfied that it constitutes communications between a lawyer and their client and that it clearly relates to legal matters. Furthermore, having considered the disputed information, the CPS' submissions and her guidance, the Commissioner is satisfied that it attracts LPP.

73. It follows that the Commissioner finds that section 42(1) of the FOIA engaged.

#### *The public interest test*

74. Section 42 is a qualified exemption, subject to the public interest test as set out in section 2(2)(b) of the FOIA. In accordance with that section 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*

75. The complainant argued:

*"There was and indeed remains massive public interest in this case ... as to why there have been no prosecutions".*

76. He also referred to a case on a different topic – namely, Cabinet Minutes as to the reasons behind the decision to go to war in Iraq - which the Commissioner had investigated, the outcome of which the complainant considered was of relevance in this case.

77. The CPS recognised the public interest in transparency. In its submission to the Commissioner it emphasised the ways in which the CPS demonstrated that it had been:

*"... as open as possible about its involvement in this investigation whilst protecting the important principle of LPP".*

78. In support of that view, it cited the attendance of the Head of Special Crime at public and private meetings and extensive correspondence with the complainant.

*Public interest arguments in favour of maintaining the exemption*

79. In relation to the public interest in favour of withholding the requested information, the CPS told the complainant that the prosecution process would be severely prejudiced if such communications were hindered by the fear of disclosure.

80. The CPS repeated that view in its submission to the Commissioner.

*Balance of the public interest arguments*

81. In *Bellamy* the principal question which the Tribunal had to consider was whether it was in the public interest for the public authority to disclose the information sought. Explaining the balance of factors to consider when assessing the PIT, it said:

*"...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest".*

82. In balancing the opposing public interest factors under section 42, the Commissioner considers it necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of LPP. In her view, the general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. In her view, that principle is fundamental to the administration of justice and disclosing any legally privileged information threatens that principle.
83. The Commissioner recognises that additional weight may be added to the above factor in favour of maintaining the exemption if the advice is: -
- recent;
  - live;
  - protects the rights of individuals.
84. Although she considers there will always be an initial weighting towards maintaining the exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information.

85. In accordance with her guidance on section 42, the Commissioner considers the factors in favour of disclosure include the assumption in favour of disclosure and the rationale behind the assumption (ie accountability, transparency, furthering public debate etc).
86. She recognises that additional weight may be added to the above factor in favour of disclosure if the following issues are relevant in the particular case:
- large amount of money involved;
  - whether or not a significant group of people are affected by the advice or resulting decision;
  - lack of transparency in the public authority's actions;
  - misrepresentation of advice that was given;
  - selective disclosure of only part of advice that was given.
87. The Commissioner recognises that it is also important to take into account the significance of the actual information and what it reveals.

### *Conclusion*

88. The Commissioner acknowledges that the background to the request in this case is one of allegations of electoral fraud. The disputed information relates to legal advice provided in that context.
89. In reaching a conclusion in this case, the Commissioner is mindful that, while the inbuilt weight in favour of the maintenance of legal professional privilege is a significant factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is outweighed by the factors favouring disclosure.
90. In reaching her decision in this case, the Commissioner has considered the arguments put forward by the complainant and the stated position of the CPS in addition to the prior findings of the Commissioner and the Information Tribunal in relation to legal professional privilege. She has also had regard for the content of the withheld information.
91. The Commissioner accepts that there is a public interest in ensuring that public authorities are transparent in their actions and accountable for the decision making process. She gives weight to those arguments.
92. However, the Commissioner has also taken into account that, at the time of the request, the legal advice was relatively recent and was live in that it was still being relied on. She also considers that the privilege attached to the information had not been waived and was still relevant. Furthermore, she gives weight to the context of the disputed

information in this case, namely a criminal context where prosecutions were under consideration.

93. In all the circumstances of this case the Commissioner does not consider that there are factors present that would equal or outweigh the particularly strong public interest inherent in this exemption.
94. The Commissioner is therefore satisfied that the exemption provided by section 42(1) of the FOIA for legal advice privilege has been correctly applied.

## Right of appeal

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95. 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: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

96. 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.
97. 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 .....**

**Gerrard Tracey  
Principal Adviser  
Information Commissioner's Office  
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Wilmslow  
Cheshire  
SK9 5AF**