



Neutral citation number: [2023] UKFTT 00269 (GRC)

Case Reference: EA/2022/0205

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

**Heard by: remotely by video conference
Heard on: 15 December 2022 & 2 March 2023
Decision given on: 9th March 2023**

Before

**TRIBUNAL JUDGE HAZEL OLIVER
TRIBUNAL MEMBER SUZANNE COSGRAVE
TRIBUNAL MEMBER DAN PALMER-DUNK**

Between

EDWARD WILLIAMS

Appellant

and

**(1) INFORMATION COMMISSIONER
(2) THE COMMISSIONER OF POLICE OF THE METROPOLIS**

Respondents

Representation:

For the Appellant: In person

For the Respondent: Did not attend

For the Second Respondent: Mr Ben Amunwa, counsel

Decision: The appeal is Dismissed

REASONS

Mode of hearing

1. The proceedings were held by video (CVP). All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

Background to Appeal

2. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 27 July 2022 (IC-122471-P6R0, the “Decision Notice”). The appeal relates to the application of the Freedom of Information Act 2000 (“FOIA”). It concerns information about why a particular case was not pursued that was requested from the Metropolitan Police Service (the “MPS”).

3. On 16 June 2021, the appellant wrote to the MPS and requested the following information (the “Request”): *“Provide all information relating to the reason not to arrest/prosecute Forever Family Force for s1 Public Order Act 1936 offence (wearing a political uniform) during the Afrikan Emancipation Day Reparations March, Brixton, London, 1 August 2020.”*

4. By way of background, no members of Forever Family Force were arrested or prosecuted following this incident. A question was put to the Mayor of London about this on 17 September 2020, which complains that the police are sending a signal that laws will be enforced differently for individual communities in London. The Mayor replied on 18 March 2021 as follows:

“The Met had no advance warning that a group calling themselves the ‘Forever Family Force’ (FFF) would be attending the Afrikan Emancipation Day celebrations on Saturday 1 August 2020. This was the first time that the Met had encountered the group at any community event or protest in London.

The Met command team on the day recognised that their style of dress and the way in which they were marching could potentially constitute an offence under the Public Order Act 1936, and an investigation was opened the same day. The FFF were informed of this directly and it was made clear that any future repetition of the same kind of display could also be a breach of that legislation.

This investigation is now concluded, and a case has been given to the Crown Prosecution Service for them to determine whether they believe any offences under the Public Order Act 1936 have occurred and whether the Attorney General will grant approval to charge which is a prerequisite for a charge for this offence”.

5. The MPS responded on 7 July 2021. The response said they had decided to disclose the located information in full but went on to say it would not disclose either Crown Prosecution Service (“CPS”) advice or the rationale involved as both would involve “legal privilege and DPA”.

6. The Appellant requested an internal review on 11 July 2021. THE MPS responded on 5 August 2021 revised its position, relying on section 30(1)(a)(i) FOIA (investigations and proceedings) to withhold the requested information.

7. The Appellant complained to the Commissioner on 5 August 2021. During the Commissioner’s investigation, the MPS revised its position again by adding reliance on sections 31 (law enforcement), 40 (personal information) and 42 (legal professional privilege) of FOIA.

8. The Commissioner decided that the MPS could withhold the information under section 42 FOIA:

- a. Section 42(1) applied to the entirety of the withheld information, which consisted of advice from counsel to the CPS, and a completed MG3A form (in which the MPS provides information to the CPS and records their advice).
- b. Although there were public interest arguments in favour of disclosure, these were outweighed by the public interest in favour of maintaining the exemption, taking into account the in-built weight of the public interest in maintaining legal privilege and the very strong public interest in the MPS being able to obtain full and thorough legal advice without fear that this may be disclosed into the public domain.

The Appeal and Responses

9. The Appellant appealed on 27 July 2022. His grounds of appeal are:
 - a. Section 42 FOIA is not engaged because there is no client/lawyer relationship between the MPS and CPS, and the CPS role is supervisory.
 - b. The public interest balance is in favour of disclosure. There is a clear public interest in understanding why Paul Golding, leader of Britain First political party, and Jayda Fransen, former deputy leader, were both prosecuted (and convicted) of the same offence.
10. The Commissioner's response maintains that the Decision Notice was correct.
 - a. The role of the CPS is not merely supervisory. Where the police approach the CPS for advice on charging decisions this is legal advice in which the police are the client and the CPS lawyer the legal adviser. The MG3A form records further police investigations and is completed by the CPS with charging advice, and in this case clearly contains legal advice from the CPS to the police. The counsel's advice was clearly shared with the MPS by the CPS in order to further advise the MPS regarding the decision on charging. The CPS website makes it clear that the CPS regard such documents as being subject to legal professional privilege.
 - b. The Commissioner accepted in his DN that there is a public interest in disclosure of the withheld information, but maintains that the interest in disclosure is clearly, on the facts of this case, outweighed by the strong public interest in withholding the information.
11. The MPS was joined as a party to the proceedings. The MPS's response says that the Decision Notice was correct.
 - a. The relationship between the MPS and the CPS was that of client and legal adviser (or alternatively, 'tantamount' to client and legal adviser). The withheld information was created as part of confidential communications between the police and the CPS for the dominant purpose of obtaining and/or providing legal advice in relation to the policing of the Forever Family Force protest. The MPS's legal advisors were acting as such in a professional capacity.
 - b. The MPS accepts various pro-disclosure factors – transparency and public understanding; the nature of the investigation relating to public protest and

corresponding rights, freedoms and responsibilities; and enhancement of accountability. However, these are outweighed by the public interest in upholding legal professional privilege in this case - summarised as disclosure being likely to place the MPS at a significant operational and legal disadvantage in relation to the administration of justice and prosecution of offences, to the detriment of a key public service and at avoidable public expense.

12. The Appellant submitted a reply which maintains that the CPS is acting in a supervisory role and maintains that there are various strong public interests in favour of disclosure. He disputes that there is inherent weight in legal professional privilege being upheld and says that the Decision Notice contains an error of law by referring to an “exceptional” test.

Applicable law

13. The relevant provisions of FOIA are as follows.

1 General right of access to information held by public authorities.

- (1) *Any person making a request for information to a public authority is entitled—*
- (a) *to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
 - (b) *if that is the case, to have that information communicated to him.*

.....
2 Effect of the exemptions in Part II.

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(2) *In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—*
- (a) *the information is exempt information by virtue of a provision conferring absolute exemption, or*
 - (b) *in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*

.....
42 Legal professional privilege.

- (1) *Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.*

.....
58 Determination of appeals

- (1) *If on an appeal under section 57 the Tribunal considers—*
- (a) *that the notice against which the appeal is brought is not in accordance with the law, or*
 - (b) *to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
- the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*
- (2) *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

14. Legal professional privilege protects the confidentiality of legal communications. It has two parts – legal advice privilege, and litigation privilege. Legal advice privilege concerns confidential communications between lawyer and client. It applies to communications between a client and their legal adviser, acting in a professional capacity, for the dominant purpose of seeking or giving legal

advice or assistance in a relevant legal context (*Three Rivers District Council v Governor and Company of the Bank of England* (no 6) [2004] UKHL 48). Legal advice privilege also extends to wider communication of privileged advice, such as internally to a client's *Board of Directors (Civil Aviation Authority v R Jet2.com Ltd* [2020] EWCA Civ 35).

15. Section 42 FOIA is subject to the public interest test, meaning if information falls within this exemption, it can be withheld if, "*in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*" (Section 2(2)).

16. It has been accepted in numerous cases that there is a strong public interest built into legal privilege, based on the interest in public bodies being able to receive frank legal advice in order to assist them to make appropriate decisions. This was confirmed by the High Court in *DBERR v O'Brien and IC* [2009] EWHC 164 (QB). The Court stated that section 42 "*is not to be elevated 'by the back door' to an absolute exemption*" (Wyn Williams J at para 41). However, it is not necessary to demonstrate any specific prejudice or harm from the disclosure in question (para 51). "*The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight. Accordingly, the proper approach for the Tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least.*" (para 53).

Issues and evidence

17. The original hearing on 15 December 2022 was adjourned because it appeared that some information within scope of the Request may not have been disclosed to the Commissioner (or to this Tribunal), and some of the redactions in the open bundle may not have been necessary. The hearing resumed on 2 March 2023. In advance of this hearing the MPS had provided new unredacted pages to the Appellant (plus one extract on the day of the hearing), together with witness evidence about the information within scope and what was provided to the Commissioner.

18. The issues are:

- a. Has the MPS provided all information within the scope of the Request to the Commissioner and/or the Tribunal?
- b. Does section 42(1) FOIA apply to the withheld information?
- c. If so, in all the circumstances of the case, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

19. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

- a. An agreed bundle of open documents (including some redacted correspondence between the Commissioner and the MPS).
- b. A closed bundle of documents containing the withheld information, consisting of advice from counsel and a completed MG3A form (plus unredacted correspondence with the Commissioner).
- c. A further closed document – a completed form MG3.
- d. A witness statement and witness evidence from Mr Peter Braganza.
- e. Written submissions from the MPS, and oral submissions from both parties.

Discussion and Conclusions

20. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision. We deal in turn with the issues.

21. ***Has the MPS provided all information within the scope of the Request to the Commissioner and/or the Tribunal?*** This became an issue during the first part of the hearing. It appeared that form MG3 had not been provided to the Commissioner. This is the form used by the police to obtain advice from the CPS. Only form MG3A had been provided, which is the form used by the CPS to provide its advice.

22. Mr Braganza provided evidence at the second part of the hearing. He is a Detective Inspector in the public order branch of the MPS, which dealt with this Request. He explained that he had checked the file after the first part of the hearing and found that the MG3 had not been provided to the data office by his colleague who was dealing with the Request, DS Hearing. He says that he has spoken to DS Hearing who explained he had thought the MG3A had contained the MG3. Mr Braganza's evidence was that in his experience the MG3A form would usually include the original MG3 as well. He says that this was a genuine error at the time. The MG3 was provided to the Tribunal as closed evidence attached to his statement.

23. Having considered the evidence, we find the explanation provided by Mr Braganza is credible and accept that the omission of the MG3 from the information provided to the Commissioner was a genuine mistake. The MG3 was clearly within the scope of the Request and should have been provided to the Commissioner and the Tribunal. Both Mr Braganza and Mr Amunwa (on behalf of the MPS) have apologised for this error, which did cause some confusion during the first part of the hearing. The Tribunal now has the MG3 and has taken it into account when making this decision.

24. We have also considered whether there was other information within scope of the Request. Correspondence from the MPS to the Commissioner dated 12 July 2022 contains a paragraph listing the "held information within scope of this appeal". This lists a number of other items, including emails, video evidence and meeting minutes. The final information provided to the Commissioner as within scope was only two items (counsel's advice and the MG3A).

25. Mr Braganza's evidence was that significant material had been generated during the initial investigation, which included evidence such as video and CCTV footage as well case papers and email chains between officers and the CPS. However, he said that most of this material was considered not to be relevant to the request as it was preparatory and did not specifically contain any rationale or discussion relating to the decision not to arrest or charge members of Forever Family Force. The relevant materials were documents in DS Hearing's Early Investigative Advice file – an MG3 sent to the CPS for them to advise on the case, independent counsel's advice obtained by the CPS, and the CPS advice itself on form MG3A.

26. The wording of the Request is for all information "relating to" the reason for the decision not to arrest or prosecute. It is arguable that this could be read more widely than the MPS has done, for example to include supporting evidence. The Appellant confirmed at the hearing that the reason for his request was to find out whether CPS charging decisions were based on race. He said that he wanted to know the reason why the CPS refused to charge in this case. He has said he does not need to see other evidence such as the video footage for this purpose. Having considered the

position, we are satisfied that the documents we have seen are the ones which are clearly within the scope of the Request. These documents are the request for advice and the answer from the CPS which explain the reasoning in this case. Supporting evidence may have been used as part of the decision-making process but would not explain the actual reasons for the decision. We therefore find that the MPS has now provided all information to the Tribunal within the scope of the Request.

27. The Appellant raised an issue at the first hearing about the Commissioner not having conducted an adequate investigation. It appears that the issue about the missing MG3 was not dealt with during the investigation. However, it is not within the jurisdiction of the Tribunal to consider the way in which the Commissioner carried out his investigation. Instead, we are able to consider the matter afresh and make our own decision based on the facts and evidence, which is what we have done here.

28. **Does section 42(1) FOIA apply to the withheld information?** The Appellant submits that it does not. He says that the CPS was not providing advice to the MPS, and so the test for legal advice privilege is not met. The CPS rather than the police make the charging decision, and they have a supervisory role.

29. The MPS says that the Appellant's position is incorrect, and refers to the following:

- a. The duty of the Director of Public Prosecutions ("DPP") (who heads the CPS) "*to give, to such extent as he considers appropriate, advice to police forces on all matters relating to criminal offences*" (section 3(2)(e) Prosecution of Offences Act 1985).
- b. The decision of Moore-Bick J in **Goodridge v. Chief Constable of Hampshire** [1999] 1 W.L.R. 1558. This case concerned disclosure of communications between the Chief Constable of Hampshire and the DPP. Legal professional privilege did not apply on the facts of the case. However, the Court confirmed that legal professional privilege applies to relevant communication in "*a relationship, tantamount to that of client and legal adviser*" (p1562H-1563A-B). At p1565F-H, the Court accepted that the relationship between the police and the DPP was such that where the former sought the legal advice of the latter, legal professional privilege may apply.
- c. CPS legal guidance on the status of its communications with the police and the application of legal professional privilege to the provision of advice. This refers specifically to the MG3 and other communications between the CPS and police and says that completed MG3s are covered by legal professional privilege – "*The MG3 is in substance a request by the police for legal advice on whether there is sufficient evidence to charge a suspect*" (available at <https://www.cps.gov.uk/legal-guidance/disclosure-material-third-parties>).

30. We accept that the relationship between the MPS and CPS was that of client and legal adviser, or tantamount to client and legal adviser. This is the position taken in the CPS's legal advice. That in itself is not binding on this Tribunal. However, it is also clear from the decision in **Goodridge** – where the police are seeking legal advice from the CPS, legal professional privilege may apply. Not all communications will fall within this category. This depends on whether the remainder of the test is satisfied.

31. We have considered whether each of the withheld documents was created as part of confidential communications between MPS and the CPS for the dominant purpose of obtaining and/or providing legal advice, in a professional capacity. We find that they were.

- a. The MG3 – this is used to ask for advice from the CPS. Having viewed the MG3 in this case, it is clearly being used for this purpose. The MPS are seeking legal advice on the issue of charging. The advice is sought confidentially and in a professional capacity. This is not a situation where the police were simply providing information to the CPS (as on the facts of **Goodridge**).
- b. Counsel's advice – this is legal advice on the issue that the MPS had asked about. It was requested by the CPS and then passed on to the MPS. It clearly relates to the same confidential and legal matter and is given in a professional capacity.
- c. MG3A form – this sets out the CPS's legal advice on the issue that MPS has asked about. Again, it clearly relates to the same confidential and legal matter and is given in a professional capacity.

32. We therefore find that section 42(1) FOIA does apply to the withheld information.

33. ***If so, in all the circumstances of the case, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?*** The Appellant makes two main submissions as to why the balance has been struck incorrectly in this case.

34. Firstly, the Appellant takes issue with the suggestion that the legal professional privilege exemption has inbuilt weight. He says that the scales should start evenly balanced rather than stacked in favour of a particular exemption. This inbuilt weight is not stated in FOIA. He questions what other exemptions have inbuilt weight or inbuilt weakness. At the resumed hearing, he asked the Tribunal to specify a percentage for the applicable weight and a reason for this, and to explain what would happen if each member of the Tribunal used a different percentage. He says that the public need guidance on how strong this weight is. He referred the Tribunal to the decision in **South Bucks District Council & Anor v. Porter** [2004] UKHL 33), which says that a tribunal's reasons for its decision must be intelligible and adequate.

35. The MPS submits that the exemption does have significant weight, referring to **DBERR** and various First-Tier Tribunal decisions. This is a qualified exemption, but the caselaw references it having inbuilt weight which must be acknowledged when the public interest balancing test is carried out. It is not possible to reduce this to a mathematical formula. It is necessary for an appellant to identify a clear, compelling and specific justification for disclosure. The assessment of weight is fact-sensitive, for example the exemption may carry less weight if the information in question is old.

36. We have considered the Appellant's submissions. We understand his desire for clarity. However, it is not possible to reduce a test of this nature to a specific percentage. The caselaw is clear that legal professional privilege has inbuilt weight. It is an important principle that protects the administration of justice because it enables open communications and the provision of free and frank legal advice, which is strongly in the public interest. The mere fact that legal professional privilege applies to the information means it is in the public interest for that privilege to be upheld. It is not necessary for the person seeking to protect the information to show any additional prejudice or chilling effect that would be caused by disclosure (See **DBERR** paragraph 51 and **Callender Smith v Information Commissioner & Crown Prosecution Service** [2022] UKUT 60 (AAC), paragraph

50). An appellant must therefore show that there are features supporting disclosure which are sufficient to outweigh the public interest in protecting legal professional privilege.

37. This does not mean the weight is always the same. As accepted by the Upper Tribunal in **DCLG v Information Commissioner & WR** [2012] UKUT 103 (AAC), in relation to the legal privilege under the Environmental Information Regulations 2004, “...*the weight that should properly be given to the exemption in any event, by reason of the risk that disclosure would weaken the confidence of public bodies and their advisers in the efficacy of [legal professional privilege], may vary from case to case. If, for example, the requested information is very old, or relates to matters no longer current, a disclosure may damage that confidence to a lesser extent than if the information was recent, or relates to matters still current.*” (Paragraph 45). There may be factors that limit the importance of protecting legal professional privilege in a particular case. Similarly, there may be factors which increase that importance, such as the context of the legal advice and the risk of prejudice to other related matters. The starting point of in-built weight, however, always applies. This is based on the general importance to the public of protecting legal professional privilege.

38. We note that in paragraph 35 of the Decision Notice the Commissioner has used the word “exceptional” to describe cases when information should be disclosed where this exemption applied. We find that this puts the test too highly. As noted in **DBERR**, this should not be elevated to an absolute exemption through the “back door”. Disclosure will not always require an exceptional case – it depends on the factual situation, and in some cases the importance of upholding legal professional privilege will carry more weight than in others. However, it is well established by the caselaw that legal professional privilege is an exemption that carried considerable weight without the need to show specific prejudice, and an individual who seeks privileged information must show why this is outweighed by factors in favour of disclosure in a particular case. It is not possible to reduce this to a percentage.

39. Secondly, the Appellant submits that the public interest in disclosure is sufficient to outweigh public interest in maintaining the exemption. He says that he wants to know whether the incident did not meet the evidential test or the public interest test (both tests being used by the CPS in relation to decisions to prosecute). He points to examples of others who have been arrested for the same offence (including leaders of Britain First), and criticism of selective policing in the Spectator. He says that the Forever Family Force protestors appeared to be wearing dark clothes and berets, which had been found to be a political uniform in the 1975 case of **O’Moran v DPP**. They looked like paramilitary uniforms which is what the relevant law was originally all about. He is not satisfied with the response by the Mayor to a request raised at the time, and says the CPS should have made a public statement about why there was no prosecution. His overall issue is whether this was an example of race discrimination, because white members of Britain First were charged with this offence but black members of Forever Family Force were not.

40. The MPS accepts that this is an important allegation by the Appellant. They also accept there are wider public interests in favour of disclosure. There is a general interest in transparency in relation to policing operations, and public understanding of the decision and rationale in relation to this incident. The context of public protest and corresponding rights, freedoms and responsibilities may generally raise the public interest in disclosure. The interests of accountability would also be enhanced by the MPS being required to demonstrate that its decisions and personnel were acting in accordance with the law and exercising their powers in a fair and consistent manner.

41. The MPS submits, however, that these interests are outweighed by the public interest factors in favour of non-disclosure –

- a. The strong in-built interest in upholding legal professional privilege – based on the fundamental principle that all parties should be able to hold confidential discussions with their legal advisors that are free and frank - which underpins the administration of justice.
- b. The context in which the information was created relates to the MPS's core law enforcement function.
- c. The MPS relies upon full, frank and impartial legal advice to inform and guide its decision-making on policing matters. Disclosure would have a detrimental effect on those relationships and on those communications. It would affect the candour, quality and reliability of the advice, due to the risk of future disclosures. This would impact upon the MPS's ability to seek and obtain legal advice, and its indirect effect would be to impair the quality of the MPS's decision-making on policing matters, with the risk of undermining both public confidences, the administration of justice and the rule of law.
- d. This was a relatively recent and a broadly "live" issue in relation to the policing response to public protests by activist groups.
- e. There are no special or peculiar features of this case which would prevent the CPS from concluding that, if disclosure were directed by the Tribunal, there would be a risk of disclosure more widely, weakening general confidence in the effectiveness of legal advice privilege and compromising its ability to obtain full and proper legal advice essential to fulfilling its core functions.
- f. The MPS's actions do not lack transparency in the circumstances - the Mayor of London responded to written questions regarding the policing of the incident on 1 August 2020 and provided answers in a democratic forum, including an update on the progress of a live investigation.
- g. Disclosure would be likely to result in prejudice to law enforcement. Although the investigation to which the withheld information relates is closed, the wider issues relating to the use of section 1 of the Public Order Act 1936 in relation to protests remain. The fact that an investigation has been closed does not necessarily mean that disclosure would not be likely to result in any prejudice to law enforcement operations. The specific prejudice is due to: (i) the policing response is likely to be relevant to current and future investigations of related matters; (ii) disclosure may hinder future investigations by undermining their confidential nature; (iii) closed investigations may be re-opened in the future; and (iv) future investigations may intersect with a closed investigation.
- h. Overall, disclosure would be likely to place the MPS at a significant operational and legal disadvantage in relation to the administration of justice and prosecution of offences, to the detriment of a key public service and at avoidable public expense.

42. There are a number of public interest factors in favour of disclosure. As well as general public interests in transparency of policing and charging decisions, there are particular interests in how public protests are policed and how the criminal law applies. The Appellant also relies on a specific interest in whether there has been selective policing and race discrimination. It appears that this is a rarely used offence, and we accept that there is public interest in finding out why there were no charges in the Forever Family Force example (which involved black participants), when white

members of Britain First have been arrested for the same offence. The issue of race discrimination would add particular weight if there was other evidence to suggest this influenced the decision. However, the Appellant has not explained any basis for these concerns (apart from the Spectator article) or shown a pattern of similar decisions. The closed information that we have seen does not cause the Tribunal any concerns that would enhance the public interest in disclosure. We also note the statement that was provided by the Mayor on 18 March 2021. Although it does not provide a reason for not charging, it does provide some information about the incident. Similarly, the following was included in press lines logged with the Press Bureau – *“We were aware of a small group of individuals who were dressed alike in the Clapham area on Saturday, 1 August. Officers engaged with the group to understand their intentions. The group’s actions were monitored throughout the day. No arrests were made. We are currently reviewing legislation in light of the way they were dressed, and further action will be considered, if necessary.”* Again, this does not explain the charging decision, but it provides some information about the incident.

43. In relation to the public interests in favour of upholding the exemption, our starting point is the in-built weight of legal professional privilege. This is enhanced rather than reduced by the context of the information. We are not considering advice that was given a long time before the request for disclosure. The incident occurred in August 2020 and the Request was made in June 2021. The decisions about this incident may have been made by the time of the Request, but we agree with the MPS’s submissions that the issue was still “live”. There may have been further issues involving Forever Family Force, and the issue of the policing response to public protests by activist groups was (and remains) live. The requested information would be relevant to current and future investigations into similar protests. The fact the legal advice relates to criminal offence charging decisions is also relevant, because of the risk of prejudice to law enforcement. It would clearly be against the public interest for there to be damage to the ability of the MPS to receive full and frank legal advice. We accept the various submissions by the MPS about why disclosure would cause damage to the administration of justice and the prosecution of offenders, as set out above. These factors show specific prejudice that would be caused by disclosure, which adds further weight to the already in-built weight of legal professional privilege.

44. We therefore find that there is a significant weight of factors in favour of maintaining legal professional privilege in this case. The Appellant has provided some reasons in favour of disclosure, including the concerns about selective policing and race discrimination. This is more than a general interest in transparency. However, for the reasons set out in paragraph 42 above, these do not equal or outweigh the factors in favour of non-disclosure. In all the circumstances of the case, the public interest in maintaining the exemption does outweigh the public interest in disclosing the information.

45. We find that MPS was entitled to withhold the requested information under section 42 FOIA. The Commissioner’s decision was in accordance with the law, and we dismiss the appeal.

Signed Judge Hazel Oliver

Date: 6 March 2023