

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 4 August 2009

Public Authority: Home Office
Address: Seacole Building
2 Marsham St
London
SW1P 4DF

Summary

The complainant requested all information held by the public authority about the website 'Confidential Access'. The public authority refused to confirm or deny whether it held information falling within the scope of this request and cited the exemption provided by section 31(3) (prejudice to law enforcement) as it believed that confirmation or denial would reveal whether a police investigation of 'Confidential Access' is or has taken place, or is planned. The Commissioner finds that confirmation or denial in response to the complainant's request would reveal nothing about police investigations and that the exemption provided by section 31(3) is not, therefore, engaged and that the refusal to confirm or deny consequently constituted a breach of sections 1(1)(a) and 10(1). The Commissioner also finds that the public authority failed to comply with the requirements of sections 17(1)(c) and 17(3)(a) through its handling of the request. The public authority is required to provide to the complainant confirmation or denial of whether information falling within the scope of the request is held. For any information that is held, the public authority is required to either disclose that information, or provide a valid reason as to why that information will not be disclosed.

The Commissioner's Role

1. 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 Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant made the following information request on 1 November 2006:

"...please provide information the Home Office has in connection with a website called Confidential Access."

3. The public authority responded to this on 13 November 2006. This response informed the complainant that the public authority neither confirmed nor denied whether it held information falling within the scope of the request, but cited no provision of the Act or gave any other explanation for this refusal of the request.
4. The complainant contacted the public authority again on 28 November 2006 and requested that it carry out an internal review of its handling of the request. The complainant pointed to the fact of the existence of the Confidential Access website being in the public domain and suggested that it was in the public interest for it to be publicly known whether the public authority had monitored the activities of this website.
5. The public authority responded with the outcome to the internal review on 20 March 2007. This upheld the initial refusal of the request and cited the exemption provided by section 31(3) (prejudice to law enforcement). The public authority briefly addressed why it believed that the public interest favoured the maintenance of this exemption, although the reasons given appeared to be more closely related to its reasoning for why the exemption was engaged than to the balance of the public interest.

The Investigation

Scope of the case

6. The complainant contacted the Commissioner initially on 21 March 2007 and stated that he did not agree with the exemption applied by the public authority. In support of his argument that the information requested should be disclosed, the complainant stated that the existence of the website referred to in the request was not confidential and that it has been in existence for a number of years.
7. The complainant contended that the content of the site showed how highly aware the operators of the site are of the legal issues surrounding the service that the site provides and suggested that this demonstrates that they would be aware of the possibility of an investigation. The complainant also suggested that any investigation by the public authority would be more likely to target those who use the service provided by the website to commit fraud than it would be to target the website itself.
8. On the issue of the balance of the public interest, the complainant believed that disclosure would be in the public interest in order to raise awareness of the possibility of fraud occurring as a result of the service offered by this website. The complainant further believed that disclosure would be in the public interest as he perceived the issue of 'false identity' to have been promoted as a concern by the public authority and in order to allow public discussion on the existence of websites of this kind and debate about how they should be policed.

Chronology

9. The Commissioner contacted the public authority initially on 5 November 2008. The public authority was asked to respond with further explanations for its reasoning for citing the exemption, including which subsection(s) of section 31(1) it believed to be relevant, and why it believed that the public interest favoured the maintenance of the exemption.
10. The public authority responded to this on 18 December 2008 and specified subsection 31(1)(a) (prejudice to the prevention or detection of crime) in connection with the citing of section 31(3). The public authority indicated that it believed that prevention and detection of crime would have been prejudiced through confirmation or denial by alerting the operators of Confidential Access that information falling within the scope of the request was or was not held. This would enable the operators of this site to act accordingly, which the public authority suggested would include either seeking to disrupt and evade an investigation if it was confirmed that information falling within the scope of the request was held, or continuing any possibly criminal activities in the knowledge that it was not under investigation were it to be confirmed that information falling within the scope of the request was not held.
11. The public authority also believed that a wider prejudice could result through confirmation or denial in response to a number of requests about whether an organisation is under investigation if a precedent were to be set through such responses. If, for example, the public authority was to deny that information was held in relation to a number of organisations, this could be interpreted as establishing that the public authority is willing to state that an organisation is not under investigation. If, following the establishment of this precedent for cases where no information is held, the public authority was to refuse to confirm or deny whether it held information relating to a specific organisation, the public authority was concerned that this would be taken as a de facto confirmation that information falling within the scope of that request was held.
12. The public authority also addressed the balance of the public interest. The public authority recognised the public interest in the accountability of government and that disclosure would be in the public interest where this would demonstrate that the government is or is not reacting to an issue of concern. However, the public authority did not believe that these factors in favour of disclosure would carry significant weight in this case as any information that it did hold falling within the scope of the request would relate only to the website identified in the request, rather than to any wider issue that is a source of public concern.
13. The public authority believed that the public interest in disclosure was outweighed by the public interest in preventing crime, including crime in the form of fraud and identity theft. The public authority believed that the harm caused to the process of the prevention and detection of crime would be heightened in a case where confirmation or denial was given in relation to a single website as is the case here, rather than to a group of websites offering similar services, and indicated that it believed that the weight that this factor carries in favour of maintenance of

the exemption is greater as a result.

14. The Commissioner contacted the public authority again on 10 February 2009 to raise the issue of the range of responsibilities of the public authority and the nature of the information that could be held about Confidential Access. The public authority responded to this on 19 March 2009.

Analysis

Procedural matters

Section 17

15. At refusal notice stage, the public authority gave no reason for its refusal of the request. At internal review stage, the public authority remedied this by citing section 31(3), but did not provide an adequate explanation for why this exemption was believed to be engaged. In failing to provide this explanation, including failing to specify which of the matters mentioned in subsection 31(1) it believed would be prejudiced through confirmation or denial, the public authority failed to comply with section 17(1)(c). In failing to adequately address why the public interest favoured maintenance of the exemption at either the refusal notice or internal review stage, the public authority did not comply with the requirement of section 17(3)(a).

Exemption

Section 31

16. Section 31(3) of the Act provides an exemption from the duty to confirm or deny where to do so *would*, or *would be likely* to, prejudice any of the matters specified in section 31(1). In this case the public authority has specified section 31(1)(a) (prejudice to the prevention or detection of crime) and has stated that its stance is that confirmation or denial would result in prejudice, rather than that it would be likely to result. The task for the Commissioner here is to consider whether confirmation or denial of whether information requested by the complainant is held would prejudice the prevention or detection of crime. In order for the Commissioner to conclude that prejudice would result the risk of this prejudice must be at least more probable than not. This approach is in line with that taken by the Information Tribunal in the case *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0030). This exemption is also subject to the public interest test.

Prejudice to the prevention or detection of crime?

17. The arguments advanced by the public authority are based on the notion that confirmation that information is held that falls within the scope of the request would provide a de facto confirmation that Confidential Access is the subject of an

investigation and that denial would confirm that it is not. The public authority has then gone on to argue that Confidential Access would behave in a manner prejudicial to the prevention or detection of crime in reaction to this confirmation of whether it is or is not the subject of investigation. The first step for the Commissioner here is, therefore, to consider whether it is correct for the public authority to suggest that confirmation or denial in response to the request would be equivalent to confirmation or denial of whether an investigation is taking or has taken place or is being considered.

18. First, the wording of the request is significant here; this is wide in scope in that it asks for any information held by the public authority that relates to Confidential Access. Had the complainant requested information specifically relating to an investigation of Confidential Access, a stronger argument could have been made that confirmation that such information is held would equate to confirmation that an investigation is or has taken place or is being considered, and denial that such information is held could be taken to equate to the opposite. In this case, however, confirmation or denial that such information is held by the public authority would not appear to provide any insight into the reasons why this information is or is not held.
19. Secondly, the Commissioner considers the role of the public authority of significance when considering for what purposes it may hold information. Had the request been made to a police force, for example, it is likely that a stronger argument could have been made that confirmation or denial could be linked more closely to criminal investigations.
20. Whilst the Commissioner recognises that the public authority does have responsibilities in the area of the prevention and detection of crime, he considers it conceivable that the public authority may hold information falling within the scope of the request that is unconnected to this area of its responsibilities, particularly given that the request was wide in scope and did not specify information relating to investigations. For example, the public authority has responsibilities in the area of formulation and development of government policy. It appears possible that the public authority may hold information relating to a wide variety of organisations recorded in connection with this process. Bearing in mind the wide scope of the request, a single mention of Confidential Access within a document associated with the formulation and development of government policy would constitute information falling within the scope of the request. The existence of this information would require the public authority to confirm that it does hold information falling within the scope of the request when complying with the requirement of section 1(1)(a).
21. It would be possible to go to great length about the possible areas where the public authority may hold information falling within the scope of the request - minutes of a meeting not related to police investigations but in which Confidential Access is mentioned, for example - without this list being definitive as to all possible areas where relevant information may be held. However, an exhaustive list is not necessary in order to illustrate the central issue; this being that given the range of contexts within which the public authority may hold information relating to Confidential Access, and the wide scope of the request, confirmation or denial

in response to the complainant's request would not reveal anything about police investigations.

22. The conclusion of the Commissioner is that compliance with section 1(1)(a) in response to the complainant's request would not prejudice the prevention or detection of crime. Whilst this conclusion has been reached in connection with the higher test of *would* prejudice, this conclusion would have been the same had the lower test of *would be likely* to prejudice been applied. In order for the Commissioner to conclude that prejudice would be likely, the possibility of this must be real and significant and more than hypothetical or remote. The Commissioner does not believe that a real and significant risk of prejudice to the prevention or detection of crime would be likely to result through confirmation or denial in response to the complainant's request.
23. The Commissioner finds that the exemption from the duty to confirm or deny provided by section 31(3) is not engaged. As this conclusion has been reached, it has not been necessary to go on to consider the balance of the public interest.

The Decision

24. The Commissioner's decision is that the public authority did not respond to the request for information in accordance with the Act, in that it applied the exemption provided by section 31(3) incorrectly and in so doing did not comply with the requirements of sections 1(1)(a) or 10(1). The Commissioner also finds that the public authority failed to comply with the requirement of sections 17(1)(c) and 17(3)(a) in that it failed to provide adequate explanations as to why the exemption was engaged, or as to why the balance of the public interest favoured the maintenance of this exemption.

Steps Required

25. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
 - In accordance with section 1(1)(a), provide to the complainant confirmation or denial of whether information falling within the scope of the request is held. In accordance with section 1(1)(b), any information that is held should either be disclosed, or a refusal notice valid for the purposes of section 17 should be issued.
 26. The public authority must take these steps within 35 calendar days of the date of this notice.
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Other matters

27. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. Whilst he recognises that in this case, the delay initially occurred before the publication of his guidance on the matter, the Commissioner remains concerned that it took over 70 working days for an internal review to be completed.

Failure to comply

28. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

29. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

30. Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 4th day of August 2009

Signed

**Gerrard Tracey
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1

Section 1(1) provides that -

“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.”

Section 10

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 17

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 31

Section 31(1) provides that –

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,

- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.”

Section 31(3) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).”