

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 12 August 2009

Public Authority: Commissioner of the Metropolitan Police Service
Address: New Scotland Yard
Broadway
London
SW1H 0BG

Summary

The complainant requested the numbers of vehicles removed and the number of fixed penalty notices issued at a specified location at Heathrow Airport since the introduction of the Heathrow Airport (Terminal Three Departures Forecourt) Experimental Traffic Order 2008. The public authority refused to confirm or deny whether it held information falling within the scope of the request on the basis of the pattern of policing that it believed would be revealed as a result and cited the exemption provided by section 31(3) (prejudice to law enforcement). The Commissioner does not accept that confirmation or denial would reveal anything about policing and so concludes that the exemption provided by section 31(3) is not engaged. The public authority is required to confirm or deny whether it holds information falling within the scope of the request. In relation to any information that is held, the public authority is required to either disclose this, or provide a reason valid under the Act for why this 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 requested the following information on 14 October 2008:

"How many vehicles have been removed from the forecourt lay-bys in Canberra Road, Heathrow Airport since the introduction of the Heathrow

Airport (Terminal Three Departures Forecourt) Experimental Traffic Order 2008?

How many Fixed Penalty Notices have been issued to vehicles stopped in the forecourt lay-bys in Canberra Road, Heathrow Airport since the introduction of the Heathrow Airport (Terminal Three Departures Forecourt) Experimental Traffic Order 2008?"

3. The public authority responded to this on 2 November 2008 and refused to confirm or deny whether it held information falling within the scope of the requests. The exemption provided by section 31(3) (prejudice to law enforcement) was cited. By way of explanation the public authority indicated that it believed that confirmation or denial of whether the information requested is held would reveal the level of enforcement of the traffic order referred to in the request. The public authority also wished to avoid setting a precedent for confirmation or denial in response to requests for similar information as it believed that this could reveal a pattern of traffic enforcement in relation to other locations around airports.
4. The complainant responded on 12 November 2008 and requested that the public authority carry out an internal review of its handling of the request. The public authority responded to this on 15 January 2009. The refusal of the request was upheld.

The Investigation

Scope of the case

5. The complainant contacted the Commissioner initially on 19 January 2009. The complainant gave some background about the traffic order referred to in the request and specified that he was dissatisfied with the refusal to confirm or deny whether the requested information was held.

Chronology

6. The Commissioner contacted the public authority on 7 May 2009. The background to the complaint was set out and the public authority was asked to respond with further explanation of its reasoning for the refusal to confirm or deny. Specifically the public authority was asked to specify which of the matters mentioned in subsection 31(1) it believed would, or would be likely to, be prejudiced through confirmation or denial of whether the information requested was held and to explain its reasoning for this. The public authority was also asked to explain why it believed that the public interest in maintenance of the exemption outweighed the public interest in confirmation or denial.
7. The public authority responded to this on 16 June 2009 and specified that it believed that the matters mentioned in subsections 31(1)(a), (b) and (c) would be prejudiced through confirmation or denial. By way of reasoning for this, the public

authority stated again that its stance related to the pattern of enforcement that it believed would be revealed through confirmation or denial. It believed that any site where it was revealed that police monitoring was not regular would become a more attractive site to terrorists planning attacks using vehicles.

Analysis

Exemptions

Section 31

8. The public authority has cited section 31(3), which is set out in full in the attached legal annex, as are all other sections of the Act referred to in this notice. This provides an exemption from the duty to confirm or deny where doing so *would, or would be likely to*, prejudice any of the matters mentioned in section 31(1). In this case the public authority has specified that it believes confirmation or denial would result in prejudice relevant to sections 31(1)(a), (b) and (c).
9. Section 31(1)(a) refers to the prevention or detection of crime. The argument of the public authority is that the pattern of police monitoring and traffic enforcement that would be revealed through this and other future, similar requests would provide information that would assist in the planning of terrorist attacks. This argument relates to the prevention of crime and so is relevant to the matters mentioned in section 31(1)(a).
10. Section 31(1)(b) refers to the apprehension and prosecution of offenders. It is not clear how the argument of the public authority is relevant to the processes specified in this section, which relate broadly to the investigatory and judicial processes. The public authority has argued that confirmation or denial would provide information that would be of assistance to terrorists; it has not advanced any arguments that confirmation or denial would prejudice the *investigation* of terrorists and terrorism or the *prosecution* of terrorists.
11. It is also unclear how these arguments are relevant to section 31(1)(c). The Commissioner's guidance on this exemption states the following:

"This covers a wide variety of matters that surround any type of judicial body and its administrative support. It will include the administrative arrangements of the courts and tribunals, the appointment of magistrates and judges and the requirement to conduct proceedings fairly. It will cover arrangements for the care of witnesses, the transport of defendants in custody and the service and execution of process and orders in civil cases. Consideration of the many Administration of Justice Acts gives an indication of the size of the area this covers."
12. The suggestion of the public authority appears to be that this exemption is significantly wider than this in that it covers the entire process from the committing of a crime to conviction of the culprit. The Commissioner would advise the public

authority that the key word in this exemption is the *administration* of justice. Bearing in mind the interpretation mentioned previously, the arguments put forward by the public authority do not appear to be relevant to this subsection of section 31. Nor is it clear how complying with section 1(1)(a) of the Act would result in prejudice to the administration of justice.

13. As the arguments of the public authority are relevant only to section 31(1)(a), the remainder of the analysis will cover only prejudice to the prevention or detection of crime. Having established that the arguments of the public authority are relevant to this exemption, it is necessary to go on to consider whether the prejudice described by the public authority would, or would be likely to, occur as a result of confirmation or denial.
14. The public authority has specified that its stance is that prejudice *would* occur, rather than that it *would be likely to* occur. The test that the Commissioner applies when considering whether prejudice would occur is that the likelihood of this must be at least more probable than not. This is in line with the approach taken by the Information Tribunal in *Hogan v Oxford City Council & the Information Commissioner* (EA/2005/0026 and EA/2005/0030) where it stated:

“[the] prejudice test is not restricted to “would be likely to prejudice”. It provides an alternative limb of “would prejudice”. Clearly this second limb of the test places a much stronger evidential burden on the public authority to discharge.” (paragraph 36)

15. If the Commissioner concludes that the test for ‘would prejudice’ has not been met, he will go on to consider whether the test for would be likely to prejudice is met. This test is that the likelihood of prejudice must be real and significant and more than hypothetical or remote, as set out by the Information Tribunal in *John Connor Press Associates Limited v the Information Commissioner* (EA/2005/0005) where it stated:

“the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.” (paragraph 15)

16. The argument of the public authority is based on the notion that confirmation or denial in response to this request and in response to other, similar requests would reveal something about the level of police monitoring and enforcement of traffic regulation in this area, or different areas specified in other requests. The first step in establishing whether this exemption is engaged is, therefore, to consider whether confirmation or denial would reveal anything about police monitoring and enforcement.
17. The contention of the public authority is essentially that, were it necessary for it to deny that it held information in response to this request or in response to a similar request made in future, this would reveal that the area that was specified in the request was not monitored and that the relevant traffic regulations at this location were enforced only rarely, or never. The Commissioner does not believe that denial could reasonably be taken as suggesting this, however. Instead, it appears

that no information being held that falls within the scope of this request is at least as likely to be the result of a high rate of compliance with the relevant traffic regulations as it is to be the result of a low level of police monitoring and enforcement.

18. The public authority has also argued that a neither confirm nor deny response in this case is necessary in order to prevent the development of a picture of the level of police monitoring and traffic enforcement at other areas close to airports. However, the Commissioner believes that a discrepancy between the response to this request and the response to a similar request made about another location is also at least as likely to be the result of an increased or decreased level of compliance with traffic regulations at one or other location as it is to be the result of a difference in the level of police monitoring or enforcement. The difference in the level of compliance could, for example, be the result of signage that is easier to understand at one location compared to the other, or to the fact that one of the areas about which information is requested has less traffic than the other.
19. The Commissioner also notes that only the location specified in the request is subject to the traffic order mentioned in the request. Whilst it may well be the case that other areas close to airports are subject to similar orders, a discrepancy between the response to the complainant's request and a response to a request about another area could presumably be ascribed to the other area not being subject to the Heathrow Airport (Terminal Three Departures Forecourt) Experimental Traffic Order 2008, rather than this being due to differences in policing. Furthermore, each request must be considered on a case by case basis and determined based on the circumstances at the time of the request. Therefore it cannot be assumed that a decision that the public authority should confirm or deny in this case means that the same conclusion would be reached in other cases.
20. It is also notable that, even if compliance with section 1(1)(a) did require the public authority to confirm that it held information falling within the scope of the request, this would not necessarily reveal anything about the number of vehicle removals or fixed penalty notices. Compliance with section 1(1)(a) requires a public authority to confirm or deny whether it holds information of relevance to the request. If the public authority held information that recorded that there had been no vehicle removals or fixed penalty notices, the existence of this information would require that the public authority confirm that relevant information is held when complying with section 1(1)(a). If it were the case that the public authority kept a record that there had been no vehicle removals or fixed penalty notices, confirmation would not, in itself, reveal whether or not vehicle removals had taken place, or whether fixed penalty notices had been issued.
21. Further to this point, even if the public authority only holds information falling within the scope of the request if at least one vehicle has been removed and a fixed penalty notice issued, confirmation alone would not reveal how many vehicles had been removed or notices issued. Whether these figures were small or large, compliance with section 1(1)(a) would require only that the public authority confirm that relevant information is held.

22. The Commissioner does not accept that confirmation or denial in response to this request would reveal information about police monitoring or enforcement that would be prejudicial in the way that the public authority has suggested. Neither does the Commissioner accept that differing confirmation or denial responses to a number of similar requests made about other areas close to airports would reveal any differences in the policing of these areas. This means that the Commissioner also does not accept that confirmation or denial would provide information of use to terrorists. As a result he is not satisfied that it is more probable than not that prejudice to the prevention or detection of crime would occur through confirmation or denial.
23. As noted above, where the Commissioner concludes that the test for *would* prejudice has not been met, he will go on to consider whether the test for *would be likely to* prejudice is met. The conclusion of the Commissioner is that, for the same reasons as set out above in connection with 'would prejudice', he does not believe that there is a real and significant risk that confirmation or denial in response to the complainant's request would be likely to prejudice the prevention or detection of crime.
24. The conclusion of the Commissioner is that the exemption from the duty to confirm or deny provided by section 31(3) is not engaged. The public authority specified that it believed that confirmation or denial would prejudice the matters mentioned in sections 31(1)(a), (b) and (c). In relation to section 31(1)(a), the basis for the conclusion of the Commissioner is that he does not accept that confirmation or denial would reveal anything that would prejudice the prevention or detection of crime. In relation to sections 31(1)(b) and (c), the Commissioner concludes that the arguments advanced by the public authority are not relevant to the matters mentioned in those sections.

Procedural Requirements

25. In failing to provide confirmation or denial within 20 working days of receipt of the request on the basis of an exemption that the Commissioner now concludes is not engaged, the public authority failed to comply with the requirements of sections 1(1)(a) and 10(1).

The Decision

26. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act in that it did not confirm or deny whether it held information falling within the scope of the request on the basis of an exemption that the Commissioner concludes is not engaged and, in so doing, failed to comply with the requirements of section 1(1)(a) and 10(1).

Steps Required

27. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Provide to the complainant confirmation or denial of whether information falling within the scope of his request is held. If any information is held, this should either be disclosed, or the complainant should be provided with a refusal notice valid for the purposes of section 17 setting out why this information will not be disclosed.
28. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

29. 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.

Other matters

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

The Commissioner's published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days. In this case the Commissioner notes that there appeared to be no exceptional circumstances, but that the public authority failed to provide the outcome to the review within 20 working days. The Commissioner would advise the public authority to ensure that comprehensive internal reviews are conducted promptly in future.

Right of Appeal

31. 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.

32. 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 12th day of August 2009

Signed

**Jo Pedder
Senior Policy Manager**

**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 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”

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).”