

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 13 September 2010

Public Authority: Chief Officer of Greater Manchester Police
Address: Police Headquarters
Chester House
Boyer Street
Old Trafford
Manchester M16 0RE

Summary

The complainant requested information relating to the public authority's guidance or policy for its officers on the use of section 27 of the Violent Crime Reduction Act. The public authority refused to provide this information citing various provisions of section 31 (Law Enforcement) as its basis for doing so. It upheld this position at internal review. The Commissioner has examined the withheld information and is not persuaded that it is exempt by virtue of section 31(1)(a) or section 31(1)(b). He therefore requires the public authority to disclose the requested information.

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.

Background

2. The complainant is a campaign group which has concerns about the way section 27 of the Violent Crime Reduction Act 2006 ("VCRA") has been implemented. Section 27 of the VCRA provides that:

"... in the case of an individual aged 16 or over who is in a public place, a constable in uniform may give a direction to that individual (a) requiring him to leave the locality of that place; and (b) prohibiting the individual from returning to that locality for such period (not exceeding 48 hours) from the giving of the direction as the constable may specify ..."

3. This provision includes a test of the likelihood of the individual causing or contributing to the occurrence of alcohol-related crime in that locality.
4. The notice issued is usually referred to as a Direction to Leave notice. It is a criminal offence to breach the terms of a Direction to Leave notice. The Commissioner understands that such notices are often referred to colloquially as "Yellow cards", using a football-related analogy.¹
5. In November 2008, officers of the public authority gave 80 Stoke City fans a direction to leave a public house in Irlam (outside Manchester) and to return south. The fans had been intending to watch their team play Manchester United at Old Trafford. One of the fans took the matter to judicial review with the support of the complainant. In June 2009, he was awarded compensation where the public authority conceded that its use of section 27 of the VCRA had, in this case, been unlawful. Further information about the case is available from the website of the Football Supporters Federation².

The Request

6. On 3 February 2009, the complainant made a request to the public authority for information of the following description:

*" 1. a copy of any written guidance or policy to Greater Manchester Police (the "GMP") officers on the use of s.27 of the Violent Crime Reduction Act 2006 (the "Act");
2. any information or guidance issued by the UK Football Policing Unit or Association of Chief Police Officers since 8 November 2006 in relation to s.27 of the Act; and
3. the GMP policy on direction and control complaints, as required under Home Office Circular 19/2005."*

¹ <http://www.thisislondon.co.uk/standard/article-23823458-police-show-world-cup-drunks-the-yellow-card.do>

² http://www.footballsupportersfederation.org/uploaded/press-releases/FSF_Liberty_news-fan-awarded-compensation.pdf

7. The public authority responded on 23 March 2009 and disclosed part of the information requested under the first of the three requests but withheld the remainder of the information on the basis of certain provisions in section 31 (Law Enforcement Exemption) of the Act. It also denied holding information caught by the second request. In relation to the third request, it explained that its policy on Direction and Control complaints was to interpret section 14 of the Police Reform Act 2002 and the Home Office circular referred to in the request.
8. The complainant requested an internal review of the public authority's decision on 16 April 2009. Specifically, it disputed its application of section 31 and sought further clarification as to its denial that it held information within the scope of request 2. It also asked for confirmation that no local policy was held regarding the implementation of Home Office Circular 19/2005.
9. On 12 June 2009 the public authority wrote to the complainant with the details of the result of the internal review it had carried out.
10. Regarding request 1, it explained that it had found a revised version of the policy that had been requested and acknowledged that it was this version which should have been considered for disclosure at the time of the complainant's original request. It provided the complainant with a copy of the revised policy with redactions. It explained that it had revised its view as to the risk of harm and that the redactions it had made to the revised policy reflected this. It also enclosed what it described as an "associated document". This was the actual form that is used when officers of the public authority issue Direction to Leave notices along with explanatory notes and other supporting information. One page of this form was withheld from disclosure.
11. Regarding request 2, it stated that, following further investigations, it had concluded that it did not hold the information described. It directed the complainant to the UK Football Policing Unit or to ACPO. It also directed the complainant to a page on the Home Office's website.
12. Regarding request 3, it reiterated its previous position and explained that the Home Office circular in question did not require chief officers to develop local policies and procedures.

The Investigation

Scope of the case

13. On 25 June 2009 the complainant contacted the Commissioner to complain about the way its request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - the public authority had incorrectly relied on provisions of section 31 as a basis for withholding information described in the first of its three requests.
14. The Commissioner will confine his decision to that information which remains withheld from the complainant in relation to the first of its three requests. This information is contained in a document entitled "Direction to Leave – Policy and Operational Procedures" and in the associated document described above. As noted above, the public authority provided the complainant with its most recent version of this document following internal review. It withheld some of the information contained in that document from disclosure citing exemptions within section 31 as its basis for doing so.

Chronology

15. The Commissioner wrote to the public authority on 27 July 2009 to advise it of the complaint.
16. On 2 March 2010, the Commissioner wrote to the public authority to ask it for a copy of the withheld information and to seek its full and final arguments as to the application of exemptions.
17. The public authority responded on 30 March 2010 and provided an unredacted electronic copy of the requested information. It showed where the redactions had been made and set out its arguments as to the basis for those redactions. Some of the arguments make specific reference to the withheld information. To avoid inadvertent disclosure of the withheld information, the Commissioner has set out part of his analysis in a Confidential Annex to this document which is available to the public authority but not to the complainant.
18. The public authority also confirmed that it was in fact seeking to rely on sections 31(1)(a) and (b) and not section 31(1)(c).

Analysis

Exemptions

Section 31(1)(a) and (b) – Engaging the exemptions

19. As indicated above, the public authority has sought to rely on sections 31(1)(a) and (b) as its basis for withholding some of the requested information.
20. The exemptions at sections 31(1)(a) and (b) are engaged where disclosure would or would be likely to prejudice a) the prevention or detection of crime; and b) the apprehension or prosecution of offenders. In its letter of 30 March 2010, the public authority asserted that disclosure would be likely to give rise to the prejudicial outcomes described in those exemptions. Both of these exemptions are subject to a balance of public interests test. The public authority argued that the balance of public interests favoured maintaining both exemptions and withholding the information in question.
21. When considering the application of a prejudice-based exemption, such as those in section 31 which have been cited in this case, the Commissioner adopts the three step process laid out in the Information Tribunal case of *Hogan v the ICO and Oxford City Council* (EA/2005/0026, EA/2005/0030) (the "*Hogan/Oxford CC case*"):

"The application of the 'prejudice' test should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption.....Second, the nature of 'prejudice' being claimed must be consideredA third step for the decision-maker concerns the likelihood of occurrence of prejudice" (paragraphs 28 to 34).
22. This Notice will now set out the Commissioner's approach in relation to section 31(1)(a) and section 31(1)(b) in this case when following the three steps described above.

Step 1 – relevant applicable interests

23. In the case of the exemption under section 31(1)(a), the relevant applicable interest is the prevention or detection of crime. In the case of the exemption under section 31(1)(b), the relevant applicable interest is the apprehension or prosecution of offenders.

Step 2 – nature of the prejudice

24. When considering the nature of the prejudice, the Commissioner has considered the Tribunal's further comments in the *Hogan/Oxford* CC case (paragraph 30):

"An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, as Lord Falconer of Thoroton has stated, 'real, actual or of substance' (Hansard HL, Vol. 162, April 20, 2000, col. 827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected. There is therefore effectively a de minimis threshold which must be met."

25. Therefore, the Commissioner takes the view that, for the exemption to be engaged, the disclosure of the information must have a causal effect on the applicable interest, this effect must be detrimental or damaging in some way, and the detriment must not be insignificant or trivial.
26. If he concludes that there is a causal relationship between potential disclosure and the prejudice outlined in the exemption *and* he concludes that the prejudice that could arise is significant and not trivial, the Commissioner will then consider the question of likelihood. In doing so, he will consider the information itself and the arguments put forward by the public authority in this regard.

Step 3 – standard of proof

27. The public authority has sought to argue that the prejudicial outcomes described in both exemptions *would be likely* to arise as a result of disclosure. In the case of *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) the Tribunal commented that, in such cases, *"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk"*.

Evidence of likely prejudice

28. In the *Hogan/Oxford* CC case, the Tribunal stated that the *"evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice"*. However, in *England v ICO and London Borough of Bexley* (EA/2006/0060 & 0066) the Tribunal stated that it was impossible to provide:

"evidence of the causal link between the disclosure of the list [of empty properties] and the prevention of crime. That is a speculative task, and as all parties have accepted there is no evidence of exactly what would happen on disclosure, it is necessary to extrapolate from the evidence available to come to the conclusion about what is likely".

29. Taking into account the *Hogan/Oxford* case and other adjudications of the Tribunal, the Commissioner takes the view that although unsupported speculation or opinion will not be taken as evidence of the nature or likelihood of prejudice, neither can it be expected that public authorities must prove that something definitely will happen if the information in question is disclosed. Whilst there will always be some extrapolation from the evidence available, the Commissioner expects the public authority to be able to provide some evidence (not just unsupported opinion) to extrapolate from.
30. The Commissioner has assessed the weight of the public authority's arguments based on the three-step test outlined above.

The public authority's submissions – section 31(1)(a)

31. The public authority argued that disclosure of the information may provide criminals with an advantage over the public authority where it seeks to prevent crime or disorder. It gave a specific example from the withheld information in support of this argument. It sought to argue that disclosure of this information would be likely to give rise to the prejudicial outcome described in the exemption.
32. To avoid inadvertent disclosure of the withheld information, the Commissioner has analysed the merit of this argument in a Confidential Annex to this Notice.

Section 31(1)(a) – Conclusion

33. The Commissioner recognises that there may, in certain circumstances, be a causal link between the disclosure of information of the type withheld in this case and the prejudicial outcome described in section 31(1)(a). However, he is not persuaded, in this case, that this prejudicial outcome would be likely to arise. The causal link has been asserted by the public authority but it has not provided sufficiently persuasive arguments as to the likelihood of prejudice.
34. The Commissioner is therefore not persuaded that any of the withheld information engages the exemption at section 31(1)(a).
35. However, the Commissioner has gone on to consider whether the withheld information is exempt under section 31(1)(b). The public

authority gave particular emphasis in its submissions to the application of this exemption. To avoid inadvertent disclosure of the withheld information, the Commissioner has also analysed the merit of its arguments in a Confidential Annex to this Notice.

The public authority's submissions – section 31(1)(b)

36. The public authority argued that disclosure of the information in question may provide criminals with an advantage over the public authority where it seeks to apprehend or prosecute offenders. The information in question relates to processes and procedures.
37. To avoid inadvertent disclosure of the withheld information, the Commissioner has analysed the merit of this argument in a Confidential Annex to this Notice.

Section 31(1)(b) - Conclusion

38. The Commissioner recognises that there may, in certain circumstances, be a causal link between the disclosure of information about processes and procedures used in law enforcement and the prejudicial outcome described in section 31(1)(b). However, he is not persuaded, in this case, that this prejudicial outcome would be likely to arise. The causal link has been asserted by the public authority but it has not provided sufficiently persuasive arguments as to the likelihood of prejudice.
39. The Commissioner is therefore not persuaded that any of the information engages the exemption at section 31(1)(b).
40. Given that the Commissioner is not persuaded that either section 31(1)(a) or section 31(1)(b) are engaged, he has not considered how the balance of public interests applies in relation to either of those exemptions.

Procedural Requirements

41. The public authority failed to confirm or deny it held information or to provide a refusal notice within 20 working days of receiving the request in contravention of the requirements of section 10(1) and section 17(1) of the Act. These provisions are set out in a Legal Annex to this Notice.
42. In failing to disclose information that was not otherwise exempt and to do so within 20 working days, it also contravened the requirements of section 1(1)(b) and section 10(1) of the Act. This provision is also set out in a Legal Annex to this Notice.

The Decision

43. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.
- It failed to disclose requested information that was not otherwise exempt and to do so within 20 working days in contravention of the requirements of section 1(1)(b) and section 10(1) of the Act.
 - It also failed to confirm or deny it held information or to provide a refusal notice within 20 working days of receiving the request in contravention of the requirements of section 10(1) and section 17(1) of the Act

Steps Required

44. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- to disclose the information which it has incorrectly marked as being exempt from disclosure on its Form 1011/Version 2/November 2006 and on its Form 0805E (09/2007) v0.9.
45. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

46. 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

47. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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.

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

Dated the 13 day of September 2010

Signed

**Gerrard Tracey
Principal Policy Adviser**

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

Legal Annex

General Right of Access

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."

Time for Compliance

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."

Refusal of Request

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."

Law enforcement exemption

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,