

Freedom of Information Act 2000 (Section 50)

Decision Notice

3 February 2009

Public Authority: Chief Constable of Devon and Cornwall Constabulary
Address: Police Headquarters
Middlemoor
Exeter
Devon
EX2 7HQ

Summary

The complainant requested all information held by the public authority relating to its investigation of a case of sheep killing. The public authority refused the request, citing the exemptions provided by sections 31(1)(a) (prevention or detection of crime), 31(1)(b) (apprehension or prosecution of offenders), 40(2) (personal information) and 41(1) (information provided in confidence). Following the intervention of the Commissioner the public authority amended its stance, citing the exemption provided by section 30(1)(a)(i) (investigations) and retracting its earlier citing of sections 31(1)(a), 31(1)(b) and 41(1). The Commissioner finds that section 30(1)(a)(i) is engaged and that the public interest in the maintenance of this exemption outweighs the public interest in disclosure. As this conclusion relates to the entirety of the information held by the public authority that falls within the scope of the request, it has not been necessary to go on to consider section 40(2). The Commissioner has also found that the public authority failed to comply with section 10(1) when responding more than 20 working days from receipt of the request and section 17(1) when issuing an inadequate refusal notice.

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. On 16 March 2006 the complainant made the following information request:

"...[re sheep deaths] I wish to make a formal application for the files relating to these attacks."

3. This was initially responded to on 21 March 2006 with a request for clarification as to what information the complainant wished to access. The complainant responded on 29 March 2006 with the following:

"I would like to see the information gathered by scene of crime officers who attended the incident, together with any veterinary and forensic reports relating thereto."

4. The complainant made a further request on 17 April 2006 for the following:

"I would also like to see all the photographs taken at the scene by the officers attending the incident."

5. The public authority responded to this on 11 May 2006. This response refused the request, with the public authority citing the exemptions provided by sections 31(1)(a) (prevention or detection of crime), 31(1)(b) (apprehension or prosecution of offenders), 40(2) (personal information) and 41 (information provided in confidence).
6. In connection with sections 31(1)(a) & (b) the public authority stated that its functions as described in these subsections would be "very likely" to be prejudiced through disclosure. The public authority also briefly addressed the public interest. Little explanation for the citing of sections 40(2) and 41 was given.
7. The complainant made an amended information request to the public authority on 16 May 2006 with the intention that this would avoid the information that the public authority believed to be exempt. The public authority responded initially on 23 May 2006 and advised that it had "interpreted" this as a request for internal review. The public authority responded with the outcome to the review on 4 August 2006. This upheld the refusal with no reasoning given.

The Investigation

Scope of the case

8. The complainant contacted the Commissioner initially on 30 October 2006 and specified that he did not agree with the exemptions cited by the public authority.
9. As covered above, the complainant made three information requests. The Commissioner believes that an objective reading of the cumulative effect of these requests is that they were for all information held by the public authority relating to the sheep attacks. The complainant agrees with this reading of his requests.

Chronology

10. The Commissioner contacted the public authority initially on 20 June 2008. The public authority was advised that the request made by the complainant was considered to be for all information held by it that related to the sheep attacks.
11. The exemption provided by section 30(1) (investigations and proceedings) was raised and the public authority was advised that, where information has been requested in connection with a specific investigation, section 30(1) would provide the most relevant exemption. The public authority was also advised that sections 30 and 31 are mutually exclusive and cannot both be engaged in respect to the same information. The public authority was asked to confirm if it now wished to cite section 30(1) and, if so, to provide its reasoning for this. In particular, the public authority was asked to address the issue of what information may have been disclosed into the public domain via media coverage. If, however, the public authority maintained that the exemptions provided by sections 31(1)(a) and (b) were relevant, it was asked to provide its reasoning for this.
12. In connection with section 40(2) the public authority was asked to respond stating to whom the personal data in question was believed to relate, specify which of the data protection principles it considered to be relevant and to explain how it believed that this would be breached through disclosure. In connection with section 41, the public authority was asked to specify from whom the information in question had been provided and why this information was considered to be subject to a duty of confidence.
13. The public authority responded on 19 August 2008 confirming that it held the following information falling within the scope of the request:
 - A log of the initial report of the sheep deaths
 - A record of the steps taken by the public authority in response to this report.
 - A witness statement
 - Photographs of the dead sheep
14. On the issue of section 30/31, the public authority stated that its stance was now that section 30(1)(a) was engaged on the basis that the information was held for the purposes of an investigation with a view to it being ascertained whether a person should be charged with an offence.
15. The public authority also addressed why it believed that the public interest favoured the maintenance of the exemption, stating that disclosure may disrupt the flow of information to it and that this could harm future investigations, which the public authority believed would be counter to the public interest.
16. In connection with section 40(2), the public authority clarified that this exemption was believed to be engaged in connection with all the information in question aside from the photographs. It was clarified that this information was believed to constitute the personal data of the individual who had reported the sheep deaths and that it was believed that disclosure of this information would be in breach of

the first data protection principle, which states that personal data shall be processed fairly and lawfully, and the second data protection principle, which states that personal data shall be processed only for one or more specified purposes.

17. The public authority also confirmed that it no longer believed that the exemption provided by section 41(1) was engaged.
18. On the issue of what relevant information may be available in the public domain, the public authority stated that no related press release had been issued, but that some relevant information is available online.
19. The public authority confirmed that its investigation was finalised, but that no person has been charged in connection with the sheep deaths. The public authority stated that it is possible the investigation could be reopened should new evidence come to light.

Findings of fact

20. The public authority conducted an investigation into the sheep deaths referred to by the complainant and this investigation is now complete.
21. Recorded information relating to this investigation is held by the public authority.

Analysis

Procedural matters

Section 10

22. The second information request, in response to the public authority's request for clarification of the first request, was made on 29 March 2006. The public authority responded to this on 11 May 2006. Whilst this was within 20 working days from receipt of the complainant's request of 17 April 2006, it was outside this period from receipt of the request of 29 March 2006. In failing to respond to the request within 20 working days of receipt, the public authority breached section 10(1).

Section 17

23. In failing to cite section 30(1)(a) at the time of either the initial refusal or the internal review, the public authority did not comply with the requirements of section 17(1)(a), (b) or (c).
24. In failing to specify the appropriate subsection of section 41 (41(1)) at either the refusal notice or the internal review stage, the public authority did not comply with the requirement of section 17(1)(b).
25. In failing to adequately explain why the exemptions provided by sections 40(2)

and 41(1) were engaged at either the refusal notice or internal review stage, the public authority did not comply with the requirement of section 17(1)(c).

Exemption

Section 30

26. The public authority has cited section 30(1)(a)(i). For this exemption to be engaged the information must have been held by the public authority for the purposes of an investigation with a view to it being ascertained whether a person should be charged with an offence. This is a qualified exemption and is subject to the public interest test. This means that the information should be disclosed if the public interest favours this, regardless of how clear it is that the information in question conforms to the class described within the exemption.

An investigation with a view to it being ascertained whether a person should be charged with an offence?

27. The information in this case records the steps that were taken by the public authority in response to a complaint being made to it about the sheep deaths. The withheld information includes a record of:
- the initial phone call making the complaint about the sheep deaths
 - a visit to the scene and observations made during this visit
 - photographs of the scene
 - a witness statement

It is also recorded that the offence in question is criminal damage.

28. The public authority investigated the circumstances of the sheep deaths and, in so doing, established whether an offence had been committed. Having established that an offence had taken place, the public authority took steps to identify the person responsible for this. The Commissioner accepts that these steps were necessary to ascertain whether a person should be charged with the offence of criminal damage in connection with the sheep deaths and concludes that the information in question does conform to the class specified in section 30(1)(a)(i). The exemption is, therefore, engaged.

The public interest

29. Having established that the section 30 exemption is engaged, the Commissioner must go on to consider the public interest test as set out in section 2(2)(b) of the Act.
30. Whilst section 30(1) provides a class based exemption and prejudice is not a relevant issue when considering whether this exemption is engaged, the nature of the prejudice that may result through disclosure, its magnitude and the likelihood of it arising is relevant when considering where the balance of the public interest lies. The Commissioner considers that the following factors, amongst others, are pertinent when assessing the aforementioned issues and thereby identifying

which public interest arguments are relevant in this case and in carrying out the weighing exercise.

- the stage or stages reached in any particular investigation or criminal proceedings;
- whether and to what extent the information has already been released into the public domain;
- the significance or sensitivity of the information; and
- the age of the information

31. This is in line with the direction provided by the Information Tribunal in the case *Toms v The Information Commissioner (EA/2005/0027)* where it stated that:

“In striking the balance of interest, regard should be had, inter alia, to such matters as the stage or stages reached in any particular investigation or criminal proceedings, whether and to what extent the information has already been released into the public domain, and the significance or sensitivity of the information requested.” (paragraph 8)

Stage of the investigation

32. The public authority has stated that this investigation is closed. However, this investigation concluded without establishing the identity of the person responsible for the sheep deaths and the public authority has stated that the investigation may be reopened should new evidence come to light.
33. The Commissioner accepts the premise that a reopened investigation could be disrupted through disclosure of the information in question. As to how likely it is that the investigation will be reopened, the Commissioner accepts that this possibility has some credence as the person responsible for the sheep deaths has not been identified and because the sheep deaths and the police investigation took place only shortly prior to the date of the information request. The public authority has not, however, provided any evidence that would suggest that there is a real probability of new evidence coming to light.
34. Enabling the public authority to carry out an effective reopened investigation is in the public interest and the Commissioner gives this some weight as a factor in favour of maintenance of the exemption. However, this factor would have carried greater weight had it been clear that there was a genuine likelihood of the investigation being reopened.

Information already in the public domain

35. The public authority has stated that no press release was issued about its investigation and the Commissioner has found no evidence of mainstream media coverage of the sheep deaths. There is no suggestion that any part of the withheld information has been disclosed into the public domain and any public interest there is in disclosure has not, therefore, been met through information that has already been disclosed.

36. Whilst what is of interest to the public is distinct from what it is in the public interest to disclose, mainstream media coverage can be indicative of a legitimate public interest in understanding the facts of the subject of the coverage. In this case there is no evidence that such a public interest exists.

Significance or sensitivity of the information

37. The withheld information in this case is all that held by the public authority about the investigation of the sheep deaths. There is, therefore, no debate about the significance of this information to the investigation. The argument of the public authority that a reopened investigation would be disrupted by disclosure of the information in question is strengthened as a result.
38. In the Information Tribunal case *Guardian v The Information Commissioner and Avon and Somerset Police (EA/2006/0017)* the discussions of the Tribunal mainly centred on the significance of the information in terms of what it implied about the integrity and probity of the investigation. The Tribunal indicated that had the information in that case revealed that the investigation had lacked integrity and probity, this would have been a decisive public interest factor in favour of disclosure.
39. Taking direction from this Tribunal case, the Commissioner has reviewed the information with a view to what this suggests about the integrity and probity of the police investigation. The Commissioner concludes that nothing within the withheld information suggests that the investigation was carried out with anything less than integrity and probity. Disclosure is not, therefore, in the public interest on the basis that it would evidence that the investigation was carried out with less than integrity and probity.

Age of the information

40. Where information relates to an investigation that took place and was completed many years ago, any argument that disclosure would cause harm to current and future investigations would be weakened. Conversely, any public interest that exists in the information recording the investigation would be reduced through the passage of time. This point was made by the Information Tribunal in the case *Guardian v The Information Commissioner and Avon and Somerset Police (EA/2006/0017)* where it stated that:

“The passage of time was a double-edged argument, whichever side wielded the sword. It probably reduced the risks of prejudice to future investigations but it similarly weakened the legitimate public interest in knowing more of the background facts.” (paragraph 36)

41. In this case the sheep deaths and the associated investigation took place only shortly prior to the date of the request and refusal notice. Therefore, the arguments of the public authority are not reduced due to the passage of time. However, neither would any public interest factors in favour of disclosure carry less weight due to the age of the information.

Other factors

42. As well as any disruption that could be caused through disclosure to the investigation recorded in the withheld information, it is relevant to consider whether the wider ability of the public authority to conduct investigations effectively could be disrupted through disclosure. This could result through, for example, disclosure of a technique commonly used in police investigations, but that has previously remained unpublicised. Harm to the ability of the public authority to conduct effective investigations would be counter to the public interest. The public authority has cited harm to its future ability to conduct investigations as amongst its grounds for concluding that the public interest favours the maintenance of the exemption.
43. The Commissioner does not believe that there is anything relating to investigative techniques within the content of the withheld information that could conceivably cause harm to the ability of the public authority to conduct effective investigations. The information is not detailed as to the investigative techniques used, nor does it contain any other content that appears realistically likely to result in harm to the technical ability of the public authority to carry out investigations in future.
44. The withheld information identifies the owner of the sheep and includes who provided the witness statement taken during the investigation. The public authority has argued that disclosing this information could disrupt the flow of information to it in the future as it could lead to the perception that information provided to the police will not be held in confidence. Whilst this factor would carry additional weight had the public authority provided evidence in support of it, by referring to any widespread difficulty it has experienced in obtaining information from the public for example, the Commissioner accepts the premise that this type of effect is more likely where there is a widespread perception that information provided to the police may be subject to disclosure than where the public are confident that information provided to the police will not be disclosed. This factor carries some weight in favour of maintenance of the exemption, but less than would have been the case had this factor been supported by evidence.
45. The public authority also argued with specific regard to the photographs of the sheep that these images are 'graphic' and that the disclosure of these would result in "*an adverse affect on the community as a whole*". All arguments advanced in connection with the balance of the public interest must be relevant to the exemption in question. In the case of section 30(1)(a)(i) the public interest arguments must relate to an investigation conforming to the class specified in that section.
46. In making this argument the public authority appears to be suggesting that viewing images of the sheep would result in endangerment to mental well being. This argument would be relevant to consideration of whether the exemption provided by section 38(1)(a) is engaged, rather than to the balance of the public interest in connection with section 30(1)(a)(i) and does not carry any weight in favour of maintenance of the exemption here.

Conclusion

47. The Commissioner has found no factors either in favour of disclosure or in favour of maintenance of the exemption which he considers carry significant weight. However, the Commissioner gives some weight to the possibility of the investigation being reopened and the possibility of disruption to a reopened investigation as a result of disclosure, the fact of the information having been recorded recently prior to the date of the information request and the significance of the information in question to the investigation.
48. In addition to the factors referred to above, in the case *Guardian v The Information Commissioner and Avon and Somerset Police (EA/2006/0017)*, the Information Tribunal noted the following, which the Commissioner has taken into account when forming his conclusion on the balance of the public interest here:

“the interest in principle, recognised by the exemption applying to s30(1), in protecting information acquired, often in confidence, in police investigations.”
(paragraph 36)

49. The conclusion of the Commissioner is that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Whilst the public interest factors that the Commissioner has given weight to clearly point to this conclusion, the lack of weight of each individual factor means that had a single public interest factor of significant weight existed that favoured disclosure, this would have been sufficient to tip the balance of the public interest in favour of disclosure.

Section 40

50. As the above conclusion relates to the entirety of the information falling within the scope of the request, it has not been necessary to also reach a conclusion as to whether the exemption provided by section 40(2) is engaged.

The Decision

51. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act in that the exemption provided by section 30(1)(a)(i) is engaged and the public interest in maintaining the exemption outweighs the public interest in disclosure. However, the Commissioner also finds that the public authority failed to comply with the procedural requirements of the Act as covered above at paragraphs 23 to 26.

Steps Required

52. The Commissioner requires no steps to be taken.

Right of Appeal

53. 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

54. 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 3rd day of February 2009

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

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 30

Section 30(1) provides that –

“Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

- (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-
 - (i) whether a person should be charged with an offence, or
 - (ii) whether a person charged with an offence is guilty of it,
- (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or
- (c) any criminal proceedings which the authority has power to conduct.”

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 40

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 41

Section 41(1) provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”