

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 18 October 2010

Public Authority: Wiltshire Police
Address: Police Headquarters
London Road
Devizes
Wiltshire
SN10 2DN

Summary

The complainant made an information request in several parts. The Commissioner investigated his request for an expert witness report which had been provided to Wiltshire Police on the effects in humans of Pyrexal, a lethal substance. The request repeated a substantially similar request by the complainant in 2005 and which had been refused by the Police in 2009 on the grounds that it was a repeat request. The Commissioner decided that the Police had satisfied section 17(5) of the Act.

The complainant had been made aware of his appeal routes in 2005 but had not made use of them prior to repeating his request in 2009. The content of the information had not changed in the interim but there had been material developments in the meantime such that a reasonable interval of time had elapsed.

The Commissioner therefore decided that the Police did not deal with the request in accordance with the requirements of section 1(1) of the Act, in that they inappropriately applied section 14(2) to justify non-compliance. He required the Police either to provide the information requested or issue a valid refusal notice, with reasons for refusal, including an analysis of the balance of the public interest, as matters stood at the time of the second request on October 2009.

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. Porton Down (Porton) in Wiltshire is the site of a Ministry of Defence (MOD) research establishment, the Defence Science and Technology Laboratory, formerly known as the Chemical Defence Experimental Establishment. This, and its successor bodies, carried out experiments relevant to chemical warfare between 1939 and 1989 on thousands of human volunteers, many of them service personnel. Some of the experiments involved the administration to volunteers of potentially harmful chemicals including Sarin, CS gas, mustard gas, hallucinogens and Lipopolysaccharides (LPS).
3. In May 1953 a young serviceman volunteer died very shortly after being the subject of an experiment at Porton Down; the contemporary inquest into his death decided that the cause of his death had been misadventure. In 2002, arising from challenges by the complainant in this matter and other Porton volunteers, and following enquiries by Wiltshire Police (the Police), the High Court quashed the original verdict and ordered a new inquest. In 2004 the new inquest found that the airman had been unlawfully killed by the application of a nerve agent in a non-therapeutic experiment. In June 2006 the MOD acknowledged that there appeared to have been gross negligence and paid compensation to the serviceman's family.
4. In 1958 some small scale civilian medical research experiments on body temperature regulation had been carried out by the Medical Research Council (MRC), not at Porton, which involved observing the effects in man of a LPS known as Pyrexal, a substance which induces in humans the signs and symptoms usually associated with fever. In 1960 scientists at Porton themselves conducted experiments with Pyrexal to explore its effects on volunteers in more detail. The MOD records show that 115 service volunteers took part in the Porton LPS experiments, one of whom was the complainant.
5. In recent years a number of former Porton volunteers have become concerned at the impact on their long term health of some of the activities to which they had been subjected. The complainant had volunteered to be a test subject at Porton on, he says, three separate occasions in 1959 and 1960. The visit from 6 to 13 August 1960 was the only one of his visits for which the MOD now hold records; it involved the administration of Pyrexal. The complainant now suffers from ill health

and has become concerned that the experiments at Porton, including those with Pyrexal, for which he volunteered, may have been a contributory or even the sole cause.

6. Following a lengthy campaign by the complainant and others, an investigation was conducted by the Police between 1999 and 2003 codenamed "Operation Antler". At its height, more than 20 officers took part. Following the investigation, papers were sent to the Crown Prosecution Service (CPS) and examined by a Senior Crown Prosecutor who gave the matter exhaustive consideration before deciding in 2003 that there were not sufficient grounds for bringing criminal charges in connection with the Porton experiments.
7. Early in the life of Operation Antler the Police decided not to fully index the records being generated by the investigation. The records are voluminous, occupying three former police holding cells and, because they were not fully indexed, cannot now readily be searched to locate and retrieve specific pieces of information.
8. The complainant remains dissatisfied at the outcome of the Operation Antler investigation and the outcome of the subsequent CPS consideration of it. He is concerned that information from Operation Antler and related issues, which could be of value to himself and other Porton volunteers, is being withheld from him by the Police (and other public authorities) despite his having made 29 information requests to them since the Act came into force in 2005. He has continued to campaign for the authorities, including the Police, to take further action to make the full facts public, to reopen the Operation Antler investigation, and to give further consideration to bringing criminal charges in connection with the experiments at Porton.
9. The MOD have offered compensation payments to many of the former Porton volunteers, including the complainant, which he has refused to accept.
10. During Operation Antler the Police commissioned, from a forensic medical expert, a report about the effects of Pyrexal on humans (the Pyrexal report).

The Request

11. Since the Act came into force, the complainant has made around 30 information requests to the Police about Operation Antler and related

matters. Specifically, on 5 October 2009 the complainant asked the Police for information in the following terms:

*This request relates to LPS (Pyrexal) exposures that took place at Porton Down that were supposedly investigated by "Operation Antler" officers. In a letter to me LPS was described as being a "noxious substance" by [a named police officer] who formed part of the investigation. It is now known that a series of human LPS experiments were conducted by the MRC at Oxford **prior** [his emphasis] to the tests being carried out at Porton Down.*

(1) During the course of the five year police investigation into Porton Down did any investigating officer make contact with the MRC in order to establish if any of their "volunteers" suffered any adverse effects due to LPS exposure? If so did they find out the method used to recruit them, and whether or not they were military personnel and in what laboratory the test took place in?

(2) On what grounds - or information - did [the named police officer] use to describe LPS as being a "noxious substance"?

(3) Did investigating officers discover the relationship between the MRC and Porton Down that led to Porton Down carrying out further experiments on servicemen involving LPS exposure?

(4) What did your "expert witness" [name] have to say in his report [the Pyrexal report] about the after effects on health due to LPS exposure?

(5) Have any steps been taken to establish the whereabouts of 109 servicemen who were exposed to LPS and have not yet - to my knowledge - been accounted for?

(6) Did any of the investigating officers with Operation Antler access the MRC report on "Pyrexal" exposure published by [five named former members of Porton staff]?

12. On 22 October 2009 the complainant told the Commissioner that he was attempting to gain access to the Pyrexal report from the Police. He said that a past request for it had been refused despite the author having told him in 2005 that he should have been able to get a copy by submitting an information request to the Police. On 3 November 2009 the complainant told the Commissioner that the Police had not yet replied; he made the first of many references to Operation Antler as a "corrupted police investigation".

13. On 4 November 2009 the Police told the complainant in their refusal notice that they were not obliged to supply the information requested. The Police responded to the matters raised saying, using the complainant's numbering:

For requests (1), (2) and (5) the information held was provided and, for request (2), reference was also made to information sent to the complainant by the CPS in December 2003.

For request (3) the Police said that they had been unable to locate any formal records to substantiate any detail in respect of any relationship that may have existed between Porton and the MRC. They invited the complainant to provide more information to enable a more focussed search to be made but the complainant did not do so.

The Police refused Request (4) relying on section 14 of the Act and saying it was a repeat request.

For request (6) the Police said that they were unable to locate a document with precisely the same list of authors that the complainant had requested and asked him to provide a full citation of the MRC report to enable them to confirm whether or not they held the information; the complainant did not respond. (The Police added that some documents were held which might be relevant but said that to answer the request definitively would require a manual check of the full record of the whole Antler enquiry; that was not possible within the statutory time limits and as such that part of the request was refused under the provisions of section 12 of the Act.)

14. On 8 November 2009 the complainant asked the Police to review their refusal of his request. On 16 November the then Police FOI officer replied saying that there would be little benefit to the complainant or the Police in wasting any time reviewing a decision that refused him information on the grounds of exceeding the fees limit, or because he had already made that request before and the information held by the Police had not changed since. The officer concluded by saying that the complainant should complain to the Commissioner without further involvement from the Police. There was no evidence in the Police reply that a senior officer had been involved in this decision.
15. Also on 16 November 2009 the complainant immediately replied by email saying that he could see no reason why the Police should want to keep the Pyrexal report from him adding that its author had said that he had no objections to it being released. He said that the cost over run "*excuse*" could not be used in this instance although he gave no reasons for his view. The email continued at length with its content becoming aggressive, abusive and personally insulting to the officer concerned. The complainant said that the Police "*have a lot to hide*" and were "*again making a mockery of the FOI Act*". He said, without supporting evidence

that "109 veterans were never accounted for during the five year long corrupted Antler investigation" and asked if the Police "seriously think you can get away with this outrage?".

16. Again on 16 November 2009 the complainant emailed the Commissioner to say that he was very concerned that the Police would not let him access the Pyrexal report despite the author having no objections to him seeing it. He concluded that: "*This is a corrupt police force that cannot be made accountable ... [and] have a complete disregard for the FOI Act ...*".

The Investigation

Scope of the case

17. The Commissioner accepted an emailed complaint of 16 November 2009 as a valid complaint about the way the request for information had been handled. The complainant specifically asked the Commissioner to consider the refusal of the Police to allow him to access the Pyrexal report which was part (4) of his request.
18. During the course of his investigation the Commissioner saw that the Police had dealt with parts (1), (2), (3) and (5) of the request in accordance with the Act.
For part (6) of the request the Police had invited the complainant to provide them with clarification to enable them to respond further which he did not do.
Therefore these matters are not addressed in this Notice – which deals only with part (4) of the request.
19. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

20. On 23 November 2009 the Commissioner told the Police that he had received the complaint and would be investigating it.
21. On 11 December 2009, the Police replied to another information request from the complainant, made on 15 November, about related matters which they had declared to be vexatious and therefore refused, citing section 14 of the Act. The Police told the complainant that they would not respond to any further information requests from him about Operation Antler; their correspondence with him had, they said, run for just under five years and they could do no more for him. The letter from the Police

ran to four full pages and explained in detail that the Operation Antler inquiry had not been fully indexed and the difficulties this now presented in locating information contained within the database. The Police said that it was to the eternal credit of the complainant that Operation Antler had been instigated but the Police had done everything that they could and a pattern of repeated requests for information previously refused had emerged. The Police said that to try to progress complaints against individuals and the Police using the provision of the Act was a misuse of it. The Police said that they were concerned at the demands placed on their resources by the succession of requests from the complainant, meetings and other correspondence seeking to re-open the Operation Antler inquiry. The Police concluded by saying that a further request of 7 December 2009, being a similar line of questioning, was vexatious and would not be answered.

22. There were further exchanges of emails between the complainant and the FOI officer dealing with the matter for the Police. The complainant referred to his "*temper reaching breaking point*" and added that his cause was honourable as he needed "*to discover the truth about the atrocities committed at Porton Down*". He said that he would not accept the MOD offer of compensation until such time as "*the missing airmen*" were found. On 16 December 2009 the complainant sent to the Police an intemperate and personally abusive email which continued to allege "corrupt" practices by the Police as an organisation and the officer personally and which effectively ended their correspondence.
23. In an email to a member of the Commissioner's staff on 12 January 2010 the complainant referred to rejection by the Police of his many FOI requests over the years. He referred to what he saw as widespread and fundamental malpractice by the Police in connection with the Operation Antler inquiry.
24. On 8 March 2010 the Commissioner began his inquiry. On 10 March the Police told the Commissioner that the complainant had made 29 requests for information since January 2005. (The Commissioner has seen several of these, provided by the complainant, and has seen that the complainant has routinely adopted a hostile and abusive tone towards the Police and some other public authorities.) The Police said that his complaints about the circumstances surrounding the testing of the effects that certain lethal substances had on service personnel volunteers at Porton Down had precipitated Operation Antler. The Police told the Commissioner that for Operation Antler only keywords for titles of documents had been indexed not the full text contents. This limited their ability to search the database. The Police added that in December 2009 the complainant had begun making repeat requests for information and had become personally abusive to officers; those requests had been

treated as vexatious. The Police said they had blocked incoming emails from the complainant due to their abusive content. (The Police have assured the Commissioner that emails from the complainant to their official FOI inquiry point will continue to be read and considered.) The Police said that the complainant continued to fear that he might have been the victim of a cover up and to carry out an extensive campaign in seeking to bring the full facts to light.

25. The complainant continued to lobby the Commissioner on the matter and several times, notably on 23 April 2010, emphasised his strong desire to see the Pyrexal report and expressed his concern that the Police continued to withhold it. The complainant provided evidence that the Police had, in 2001, provided him with a copy of a further expert report on a related topic which they had received from another academic witness to their inquiry (the second expert report). The Commissioner has seen that the complainant continues to have concerns that the Police may have acted inappropriately towards him during their Operation Antler inquiry.
26. On 23 May 2010 the complainant told the Commissioner that there was no reason for the Police to keep the Pyrexal report hidden from him. He also said that the author of the Pyrexal report had not responded to the many emails sent to his various email addresses. The complainant told the Commissioner that he intended to visit the UK again and that he feared for his physical safety while there.
27. On 27 June 2010 the complainant provided to the Commissioner a copy of the Summary Record of the tests conducted on him during his August 1960 visit to Porton Down. He said, but provided no supporting evidence, that he believed that the Summary Record had been rewritten and therefore faked.
28. On 6 July 2010 the Police provided further evidence to the Commissioner. The Police said that the complainant had originally requested a copy of the Pyrexal report in 2005. The request had been refused on 28 October 2005 relying on the exemptions in sections 30(1), 30(2) and 42 of the Act.
29. On 7 July 2010 the complainant again reminded the Commissioner of his wish to see the Pyrexal report. He also asserted that it was time for the Operation Antler investigation to be reopened.
30. On 3 August 2010 the Commissioner provided the complainant with his preliminary view of the matter and invited him to accept informal resolution of his complaint. The Commissioner understood that the information had not changed since the time of the 2005 first request but

invited the complainant to provide evidence if he believed that it had changed in the meantime.

31. In a response of 4 August 2010 the complainant said that he was not aware of any changes to the Pyrexal report since the time of his first request. He said that the reason it was being withheld from him was "corruption for the purpose of cover-up." On 10 August, in a further email which followed further email exchanges, the complainant asked the Commissioner for a formal Decision Notice.
32. On 12 August 2010 the Commissioner asked the complainant if there was any reason why he had not appealed the 2005 refusal by the Police to disclose the Pyrexal report to him. The complainant told the Commissioner that: *"at that time I was not aware of the correct appeal procedure, as [the author of the report] indicated he had no objection to [the Police] supplying me with a copy of his report so I foolishly thought [the Police] would provide me with a copy"*.
33. On 16 August the Police confirmed to the Commissioner that their 28 October 2005 refusal notice had contained a description of the appeals process. This had explained that an applicant was entitled to appeal against a decision and that, in the first instance, he should contact the Police. It went on to say that if he was still dissatisfied after the appeals process he had a right to appeal direct to the Information Commissioner.
34. On 18 August 2010 the Commissioner's staff put this information to the complainant who replied saying that, with so many servicemen unaccounted for, one had to wonder why the Police would want to keep the Pyrexal report secret. He offered no further explanation about why he did not appeal to the Commissioner in 2005.

Findings of fact

35. In a personal email dated 29 September 2005, the author of the Pyrexal report told the complainant that, subject to any of its contents being classified, he would have no personal objection to the Police making a copy of the Pyrexal report available to the complainant under the Act if they so wished.
36. A letter to the complainant from the CPS of 12 December 2003, which ran to 51 pages, explained to him in considerable detail the legal, evidential and related issues raised by the results of the Operation Antler investigation. The letter set out the reasons why, after careful and detailed deliberation, the CPS had decided that there was insufficient evidence available to prosecute any person with a criminal offence over the testing which had been carried out at Porton.

37. The second inquest into the 1953 death at Porton Down of a serviceman took place during 2004 and returned a verdict of unlawful killing. MOD pursued a judicial review application of the inquest decision before the High Court but abandoned the case following an agreement between the parties on 13 February 2006 and subsequently compensated the serviceman's family.
38. In June 2006 the CPS announced that there would be no prosecutions of scientists over allegations made arising from the Porton experiments as there was insufficient evidence available to prosecute any person with a criminal offence over the testing which was carried out. CPS said that it had considered the evidence from the inquest into the serviceman's death to see whether it had any impact on the 2003 CPS decision not to prosecute. CPS said that it had also looked at recent cases before the courts since 2003 which had clarified the legal issue of consent.
39. The author of the letter from the Police of 16 November 2009 refusing an internal review was the same person that had sent the 4 November 2009 refusal notice. There is no evidence in the 16 November letter that a senior officer or anyone else in the Police had contributed to the decision to refuse an internal review.
40. The complainant has asserted in this and other complaints that 109 of the 115 servicemen who were exposed to Pyrexal during experiments at Porton Down in 1960 are "missing". MOD say that 115 servicemen took part in the LPS experiments but that their identities are unknown and that it is not possible easily to locate them within the totality of the historical experimental record books held as there are over 20,000 such records. Of the 115, six were traced and contacted by the Police during Operation Antler; the complainant regards the remaining 109 as "missing", a view which the Police do not share.
41. The Commissioner asked the complainant to provide evidence to support his claims that 109 Porton volunteers are missing but he has provided none. The Commissioner has seen no independent evidence to support the complainant's assertion that the 109 Porton servicemen who were exposed to LPS but who were not contacted by the Police are missing. The complainant also asserted that the subjects of the 1958 MRC experiments with Pyrexal are "missing". The Commissioner has seen no evidence that any of the MRC volunteer subjects are missing.
42. The Police have located and are able to access the Pyrexal report and have confirmed that its content has not changed since 2005.

Analysis

Substantive Procedural Matters

43. In refusing to disclose the Pyrexal report, the Police said that they relied on section 14 of the Act as it was a repeat request but did not specify which limb of section 14 was intended. The Commissioner decided that the Police had done enough to satisfy section 17(5) of the Act by making clear that it was a repeated request so that section 14(2) of the Act applied.

Exemptions

44. Where a public authority has previously complied with a request for information, it is not obliged to comply with a subsequent identical or substantially similar request unless a reasonable interval has elapsed. The complainant's 2005 request for the Pyrexal report was refused and he did not at that time either seek a review of the refusal by the Police or appeal to the Commissioner. The Police say, and the complainant does not deny, that he was made aware of his right to appeal by way of seeking internal review and appealing to the Commissioner in 2005. The complainant did not appeal at the time and the Police decided that it was too late for him to appeal the 2005 decision four years later in 2009. The Commissioner has been assured by the Police that the content of the information requested has not changed in the meantime and there has been no material change in the complainant's own circumstances.

45. In deciding whether or not a reasonable time interval had elapsed between the 2005 and 2009 requests the Commissioner had regard to the circumstances of the requests. The exemptions relied upon by the Police in 2005 in refusing the request were those in section 30(1) and 30(2) (Investigations and proceedings conducted by public authorities) and section 42(1) (Legal professional privilege) of the Act. These exemptions are subject to a public interest test. The Commissioner therefore also had regard for what changes there might have been in the balance of the public interest in deciding whether or not a reasonable interval had elapsed between the requests.

46. The Commissioner has seen that the information being withheld (the contents of the Pyrexal report) has not changed in the meantime. He has also seen that the complainant had an opportunity to appeal in 2005 but did not take it. Both of these factors point to there being no reason to presume that a reasonable interval of time has elapsed to require reconsideration of the refusal to disclose the information.

47. However the Commissioner has also seen that the CPS undertook further consideration of the Porton matter during 2006 in the light of the outcome of the inquest into the 1953 death of a serviceman. This consideration by CPS culminated in its announcement in June 2006, which confirmed that in 2003, that there would be no prosecutions of any of the surviving suspects relating to the Porton experiments. The exemptions relied upon by the Police in 2005 related to the conduct of proceedings or of possible proceedings and the application of legal professional privilege in connection with proceedings. The 2006 announcement by CPS meant that there is now no realistic prospect of criminal proceedings being launched into this matter.
48. The Commissioner therefore decided that a reasonable time interval had elapsed between the 2005 and 2009 requests. It follows that the Police could not rely on the section 14(2) exemption and that they should have considered the substance of the request and decided afresh whether or not the Pyrexal report should have been disclosed in October 2009 because a reasonable interval had elapsed between the requests. A significant change of circumstances had occurred during the period since the previous request. This meant that the outcome might now be different, particularly on consideration of the balance of the public interest.

The Decision

49. The Commissioner's decision is that the Police did not deal with the request in accordance with the requirements of section 1(1) of the Act, in that they inappropriately applied section 14(2) to justify non-compliance. He decided that the Police did deal with the request in accordance with section 17(5) of the Act.

Steps Required

50. The Commissioner requires the Police to either provide the information requested or issue a valid refusal notice, with reasons for refusal, including an analysis of the applicability of any relevant exemption and, if relevant, the balance of the public interest as matters stood at the time of the second request in October 2009.

Right of Appeal

51. 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 18th day of October 2010

Signed

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

Legal Annex

Vexatious or Repeated Requests

Section 14(1) provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious”

Section 14(2) provides that –

“Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with a previous request and the making of the current request.”

Refusal of Request

Section 17(5) provides that -

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

... .

Investigations and proceedings conducted by public authorities.

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 30(2) provides that –

"Information held by a public authority is exempt information if-

- (a) it was obtained or recorded by the authority for the purposes of its functions relating to-
 - (i) investigations falling within subsection (1)(a) or (b),
 - (ii) criminal proceedings which the authority has power to conduct,
 - (iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or
 - (iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and
- (b) it relates to the obtaining of information from confidential sources."

Legal Professional Privilege

Section 42(1) provides that –

"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."

Section 42(2) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings."