

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 15 August 2011

Public Authority: The Chief Constable of Hampshire Constabulary
Address: Police Headquarters
West Hill
Romsey Road
Winchester
Hampshire
SO22 5DB

Summary

The complainant requested a copy of an INCA report. This is a report detailing the movements of a Police vehicle. It can be retrieved and downloaded from the vehicle in question. The public authority neither confirmed nor denied it held the INCA report on the basis of the exemption at section 30(3) of the Act (investigations and proceedings conducted by public authorities).

The Commissioner found that the public authority incorrectly refused to confirm or deny it held the INCA report on the basis of the exemption at sections 30(3). The Commissioner has therefore ordered the public authority to confirm or deny it holds the INCA report in accordance with its duty under section 1(1)(a) of the Act.

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 21 October 2010 the complainant requested a copy of an INCA report¹ for a specific police vehicle.
3. On 22 October 2010 the public authority responded. It refused to confirm or deny it held the information requested on the basis of the exemption at section 30(3) of the Act. The public authority did not however conduct a public interest test.
4. On 25 October 2010 the complainant requested a review of the public authority's decision.
5. On 18 November 2010 the public authority wrote back to the complainant with details of the outcome of the review. It upheld the original decision to neither confirm nor deny it held the information requested. The public authority did not conduct a public interest test and no explanation was provided as to why it had failed to carry out the required public interest assessment.

The Investigation

Scope of the case

6. On 30 March 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
7. The Commissioner would however like to point out that during the course of his investigation, the public authority decided to respond to the request outside the framework of the Act in view of the nature of the circumstances which led to the request in the first place.
8. Details of the circumstances surrounding the request and the public authority's response outside the Act can be found in the confidential annex which is to be made available to the complainant and the public authority only.

¹ As the Commissioner understands it, an INCA report details the movements of a police vehicle and can be retrieved and downloaded from the vehicle in question.

Chronology

9. On 18 and 23 May 2011 there were telephone exchanges between the Commissioner's representative and the public authority's representative.
10. On 27 May 2011 the public authority wrote to the Commissioner.
11. On 31 May 2011 there was a telephone conversation between the Commissioner's representative and the complainant.
12. Between 31 May 2011 and 2 June 2011 there were email exchanges between the Commissioner and the complainant.

Analysis

Exemptions

13. The full text of the statutory provisions referred to below can be found in the legal annex.

Section 30(3) – Neither Confirm nor Deny

14. By virtue of the provisions of section 1(1)(a) of the Act, a public authority is under a duty to inform an applicant in writing whether it holds the information requested (commonly referred to as the duty to confirm or deny).
15. By virtue of the provisions of section 30(3), a public authority may refuse to confirm or deny it holds information which would in any event be exempt from disclosure on the basis of sections 30(1) or 30(2) were it held.
16. 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.”

17. 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.”

18. According to the public authority, “any INCA report that has been retrieved and downloaded will always relate to an investigation”. The public authority clarified that this could be a criminal investigation or an internal investigation. Therefore, confirming that the INCA report is held would, by implication, be confirming that an investigation has taken place or is taking place in respect of a particular event. Likewise, if the INCA report is not held, it would effectively be a denial that an investigation is taking place or has taken place. The public authority explained that it did not wish to confirm or deny whether an investigation had taken place and for that reason, it considered section 30(3) was correctly applied.

19. The public authority also submitted that whilst an individual may be aware that information does or does not exist because of their direct involvement in events, it did not follow that the general public was also aware of the existence of that information. Disclosure under the Act is a disclosure to the world at large.

Application of Exemption

20. Additional details of the reasons for the Commissioner’s decision below can be found in the confidential annex.

21. The Commissioner considers that in order for section 30(1)(a) to be engaged, the information must be, or have been held by the public authority for a specific or particular criminal investigation and not for investigations in general.
22. The public authority confirmed that an INCA report that has been retrieved and downloaded would always relate to an investigation.
23. However, sections 30(1) (a), (b), and (c) respectively apply to criminal investigations, investigations which may lead to a decision to commence criminal proceedings, or any criminal proceedings which the public authority has power to conduct.
24. The Commissioner finds that were it to exist, the INCA report requested by the complainant would not have been held for the purposes of a criminal investigation in the circumstances of this case and for reasons set out in the confidential annex. Applying the public authority's reasoning to the circumstances of the request, the INCA report would not have been retrieved and downloaded for the purposes of a criminal investigation. In addition, the information in the report was not recorded for the purposes of a specific investigation or indeed a criminal investigation or any criminal proceedings.
25. The Commissioner also finds that were it to exist, the INCA report requested by the complainant would not have been held for the purposes of any of the functions identified in section 30(2). In particular, the Commissioner finds that, were it held, the INCA report would not have related to information obtained from confidential sources (a necessary condition for the application of section 30(2)).
26. The Commissioner therefore finds that the public authority incorrectly relied on the exemption at section 30(3) to neither confirm nor deny it held the INCA report requested by the complainant on 21 October 2010.

Procedural Requirements

27. Sections 1(1)(a) and 10(1) combine to impose a duty on a public authority to respond to a request within 20 working days.
28. The Commissioner finds the public authority in breach of sections 1(1)(a) and 10(1).
29. By virtue of section 17(3), if a public authority is relying on a qualified exemption (i.e. an exemption not listed in section 2(3) of the Act), it must conduct a public interest test and communicate its decision to the applicant.

30. The Commissioner finds the public authority in breach of section 17(3) for failing to conduct a public interest test following its refusal to confirm or deny whether it held the requested information.

The Decision

31. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

Steps Required

32. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Confirm or deny it holds the INCA report requested by the complainant on 21 October 2010.
33. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

34. 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

35. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

36. 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.
37. 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 15th day of August 2011

Signed

**Alexander Ganotis
Group Manager – Complaints Resolution
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."

Section 17(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

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-
 - iii. whether a person should be charged with an offence, or
 - iv. 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-

- (d) it was obtained or recorded by the authority for the purposes of its functions relating to-
 - v. investigations falling within subsection (1)(a) or (b)
 - vi. criminal proceedings which the authority has power to conduct,
 - vii. 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
 - viii. civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and
- (e) it relates to the obtaining of information from confidential sources."

Section 30(3) provides that –

"The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2)."

Section 30(4) provides that –

"In relation to the institution or conduct of criminal proceedings or the power to conduct them, references in subsection (1)(b) or (c) and subsection (2)(a) to the public authority include references-

- (a) to any officer of the authority,
- (b) in the case of a government department other than a Northern Ireland department, to the Minister of the Crown in charge of the department, and
- (c) in the case of a Northern Ireland department, to the Northern Ireland Minister in charge of the department."

Section 30(5) provides that –

"In this section-

"criminal proceedings" includes-

- (a) proceedings before a court-martial constituted under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 or a disciplinary court constituted under section 52G of the Act of 1957,
- (b) proceedings on dealing summarily with a charge under the Army Act 1955 or the Air Force Act 1955 or on summary trial under the Naval Discipline Act 1957,
- (c) proceedings before a court established by section 83ZA of the Army Act 1955, section 83ZA of the Air Force Act 1955 or section 52FF of the Naval Discipline Act 1957 (summary appeal courts),
- (d) proceedings before the Courts-Martial Appeal Court, and
- (e) proceedings before a Standing Civilian Court;

"offence" includes any offence under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957."

Section 30(6) provides that –

"In the application of this section to Scotland-

- (a) in subsection (1)(b), for the words from "a decision" to the end there is substituted "a decision by the authority to make a report to the procurator fiscal for the purpose of enabling him to determine whether criminal proceedings should be instituted",
- (b) in subsections (1)(c) and (2)(a)(ii) for "which the authority has power to conduct" there is substituted "which have been instituted in consequence of a report made by the authority to the procurator fiscal", and

- (c) for any reference to a person being charged with an offence there is substituted a reference to the person being prosecuted for the offence."

Law enforcement

Section 31(1) provides that –

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

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment."

Section 31(2) provides that –

"The purposes referred to in subsection (1)(g) to (i) are-

- (a) the purpose of ascertaining whether any person has failed to comply with the law,

- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) the purpose of ascertaining the cause of an accident,
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,
- (i) the purpose of securing the health, safety and welfare of persons at work, and
- (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work."

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)."