

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 August 2012

Public Authority: Cleveland Police Authority
Address: Police Headquarters
Ladgate Lane
Middlesbrough
TS8 9EH

Decision (including any steps ordered)

1. The complainant requested information from Cleveland Police Authority about one of its former Chief Executives. This information included records of his corporate credit card spending and the basis upon which he received additional payments in addition to his basic salary. The Authority withheld both types of information on the basis of various exemptions contained within section 31 of the Freedom of Information Act (the law enforcement exemption).
2. The Commissioner's decision is that none of the exemptions cited by the Authority provide a basis to withhold the details of the corporate credit card spending. However, the Commissioner is satisfied that the exemptions contained at sections 31(1)(a) and 31(1)(b) provide a basis to withhold the information regarding the basis for the additional payments and in all the circumstances of the case the public interest favours maintaining these exemptions.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Provide the complainant with the details of the payments by the former Chief Executive, Mr Joe McCarthy, on his corporate credit card (with the exception of the credit card number itself)
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 24 February 2012, the complainant wrote to Cleveland Police Authority (the Authority) and requested information in the following terms:

'Further to the recent media coverage of police authority chief executive pay, I would like to know more about the payments to Joe McCarthy, the former chief exec at Cleveland.

I would like to know what he was paid annually over the duration of his time with Cleveland.

If there are amounts that were paid in bonuses or in other ways separate to his basic salary I would like these to be identified.

I would also like an explanation of any extra amounts that were paid, ie what they were for, any police authority approval etc.

In addition, I would like to know when Mr McCarthy left and what payments he received on departure, including a breakdown of what they were for.

If you need me to clarify any of the above, please give me a call.'

6. The complainant submitted the following further requests to the Authority on 10 April 2012:

'Regarding the outstanding FOI issues, I think they are:

1) As per the request surrounding Mr McCarthy's salary/redundancy pay arrangements...(24/2/12)

2) Mr McCarthy's credit card records. On this one, I would be happy to be guided on the timeframe.

I can't recall off the top how long he was at the authority and I don't know if he had use of a card throughout his time as chief executive.

I would like to ask for all the records throughout his time as chief exec but if you think this can be reasonably and fairly reduced to a shorter time period (ie 3/4/5 years??) I'm happy to take that on board.

3) Mr McCarthy's other expenses' records. Again, I think it would be helpful to receive guidance here but I would be interested in any other 'manual' expenses claims though I do not seek to over-egg the pudding on this one.

If, for example, foreign travel is recorded on manual expenses (ie not paid for on a credit card), I would like to receive this. Similarly, if other travel/accommodation is similarly recorded and not paid for on a credit card, I would like to receive this. It maybe that all his travel, accommodation, meals etc - or the vast majority of it - was recorded on a credit card in which case it maybe more sensible to stick to 2) only.

4) Any other expenses/remuneration/benefits in kind received by both the former chief executive and former chairman (Dave McLuckie) not covered by the responses previously provided or by the outstanding requests above.

These might include anything considered as a gift from a company/police force or authority in terms of services provided (which would normally be considered, I think, a benefit in kind). In layman's terms, this might include 'freebies' provided to either. A value of any such services/work should be provided along with any record/authorisation of such services.

As regards 4) it might make sense to include the chief and deputy chief constable in this bracket to adopt a belt and braces approach unless this provides particular difficulties. Again, happy to receive guidance on this one.

In terms of time, technically 1) is already overdue though the others could be said to run from today.

If it helps in terms of bagging up, it might be that 20 working days from today might be a sensible timeframe.

Naturally I'd like it sooner if possible but happy to receive guidance.'

7. On 18 April 2012 the Authority provided the complainant with a response to his request of 24 February 2012. In this response the Authority provided the complainant with a breakdown of the payments made to Mr McCarthy between 2006 and up to and including, his departure from the Authority in June 2010.
8. The Authority contacted the complainant again on 10 May 2012 and referring directly to the requests numbered 2 to 4 of 10 April 2012, explained that it held some of the information requested. However it noted that it had already provided the complainant with details of many of the expenses / remuneration paid to the figures named in the requests. It explained that it was withholding the remaining information on the basis of the following sub-sections of section 31 of FOIA: 31(1)(b), 31(1)(c), 31(2)(a) and 31(2)(b). This section provides a number of different exemptions relating to the disclosure of information

which would prejudice some aspect of law enforcement. The Authority explained that these requests had already been considered by all of its Members and therefore it did not intend to offer an internal review of its decision.

Background

9. At the time of the complainant's requests, and indeed at the time this notice is being issued, the Authority and Cleveland Police are involved in an on-going criminal investigation currently being undertaken by police officers under the Command of Keith Bristow, the Chief Constable of Warwickshire Police. The investigation, code named Operation Sacristy, is *'into a number of people with current or past associations with Cleveland Police Authority and the manner in which the Authority may have conducted some of its business'*.¹

Scope of the case

10. The complainant subsequently contacted the Commissioner in order to complain about the Authority's refusal to provide him with all of the information he had requested in relation to the above requests.
11. Following discussions between the complainant, the Commissioner and the Authority it was agreed that the complainant was happy for the Commissioner's investigation to simply focus on two classes of information:
- All of Mr McCarthy's corporate credit cards statements - i.e. not just information restricted to a particular time period, simply all of the records that were held by the Authority. (Such information falls within the scope of request 2 of the complainant's email of 10 April 2012.)
 - Any further information held by the Authority regarding the 'extra payments' made to Mr McCarthy, i.e. information beyond the financial breakdown provided to the complainant on 18 April 2012. (Such information falls within the scope of request 1 of the email of 10 April 2012, and by default the original request of 24 February

¹Taken from the Authority website, <http://www.clevelandpa.org.uk/operation-sacristy>

2012, in particular the part of that request which sought information about 'police authority approval' for such payments.)

12. During the course of the Commissioner's investigation the Authority confirmed that in respect of this first class of information, i.e. Mr McCarthy's credit card payments, it was withholding this information on the basis of the exemptions cited in the refusal notice, namely: 31(1)(b), 31(1)(c), 31(2)(a) and 31(2)(b).
13. During the course of the Commissioner's investigation the Authority explained that in respect of the second class of information, i.e. the further information regarding the extra payments, it was withholding this information on the basis of the exemptions contained at sections 31(1)(a), 31(1)(b) and 31(1)(c).

Reasons for decision

14. The various exemptions contained within section 31 of FOIA which the Authority has cited are prejudice based exemptions which can only be relied upon if disclosure of the information would, or would be likely to, result in the harm which the specific exemption is designed to protect. The exemptions cited by the Authority protect the following specific types of prejudice:
 - 31(1)(a) -the prevention or detection of crime;
 - 31(1)(b) – the apprehension or prosecution of offenders;
 - 31(1)(c) - the administration of justice;
 - 31(2)(a) - the purpose of ascertaining whether any person has failed to comply with the law; and
 - 31(2)(b) - the purpose of ascertaining whether any person is responsible for any conduct which is improper.
15. The latter two exemptions are in fact only relevant by virtue of the exemption contained at section 31(1)(g) which provides that information is exempt if its disclosure would, or would be likely to, prejudice the exercise by any authority of its functions for any of the purposes listed in section 31(2).
16. In order for a prejudice based exemption to be engaged the Commissioner believes that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was

disclosed has to relate to the applicable interests within the relevant exemption;

- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.
17. In the particular circumstances of this case the Commissioner is of the view that it is not possible to include in this notice a detailed examination of the Authority's arguments regarding its reliance on section 31 as to do so risks revealing the content of the information itself. Therefore, although the Commissioner's reasoning which is set out below is not particularly detailed, this does not mean that he has not fully considered the submissions of both parties and their relevance to the actual information that has been withheld. Where the Commissioner feels that it has been necessary to elaborate on why he has reached a particular finding he has included this in a confidential annex which has been provided to the Authority only. The Commissioner appreciates the fact that he cannot explain his reasoning in any greater detail in this notice may be frustrating to the complainant; however, in certain cases this is simply the approach which the Commissioner has to take in order to ensure that no potentially prejudicial information is disclosed.

The Authority's position

18. In the refusal notice – which dealt with the request for the credit card information, amongst other requests, - the Authority explained that disclosing the requested information at the time of the request would be likely to prejudice the ongoing Operation Sacristy investigation by undermining the integrity of the investigation itself and potentially, in due course, prejudicing any proceedings that may ensue undermining the prospects of a fair trial. In support of this position the Authority explained that the information in question was 'live' in the sense that it is part of a major large scale, complex and wide-ranging criminal

investigation which was not yet complete. The Authority's submissions to the Commissioner in which it explained why it considered the withheld information about the 'extra payments' information to be exempt from disclosure followed the same logic. That is to say disclosure of this information could undermine the integrity of the investigation and furthermore risks prejudicing any subsequent proceedings.

19. The Authority confirmed that it was relying on the lower threshold of likelihood, i.e. that disclosure would be likely to occur rather than would occur, if the information was disclosed.
20. In respect of both sets of withheld information the Authority provided the Commissioner with more detailed submissions to support its position and the Commissioner has referred to these in the confidential annex.

The complainant's position

21. In support of his view that the exemptions were not engaged, the complainant advanced a number of points:
22. Firstly, that basic factual evidence of recorded public spending will remain just that, i.e. basic factual evidence of recorded public spending regardless of any criminal inquiry or trial. One of the best examples of this point being the detailed disclosure of MPs' expenses; nothing in that disclosure, which the complainant argued was analogous to the information he had requested here, halted, prejudiced or made any difference to subsequent police inquiries or trials resulting in convictions.
23. Secondly, the Authority had previously provided him with similar information relating to persons that were being investigated by the Police in relation to Operation Sacristy and there had been no suggestion that these disclosures had prejudiced the investigation. (The Commissioner understands that such previous disclosures include an unredacted record of the corporate credit card statements of a previous Chairman of the Authority, Mr McLuckie, and a redacted copy of the corporate credit card statements of the Chief Constable of Cleveland Police, Sean Price.)
24. Thirdly, that the former Chief Executive, Mr McCarthy, had not been arrested by the inquiry in contrast to Mr Price and Mr McLuckie.
25. The complainant also argued that the full, unredacted details of Mr McCarthy's credit card spending should be disclosed in contrast to the redacted format of similar information that was provided to him in relation to Mr Price. The complainant argued that in this case, in contrast to the credit card statements of Mr Price, there was no policing role involved and no reason why exact expenditure should not be

available. The complainant suggested that there was much less sensitivity involved in the location of any chief executive's expenditure and indeed he had been provided with numerous examples of exact credit card spending records for senior staff by other public authorities under FOIA.

The Commissioner's position

26. In the Commissioner's view the Authority's arguments as to why prejudice would be likely to occur can be described as fitting into one of two categories: firstly that disclosure would be likely to result in harm to the ongoing investigation itself and secondly that disclosure would be likely to result in harm to any potential subsequent judicial or disciplinary process.
27. With regard to the first criterion of the three limb test described above, the Commissioner accepts that potential prejudice to an ongoing police investigation clearly relates to the interests which the exemptions contained at sections 31(1)(a), 31(1)(b), 31(2)(a) and 31(2)(b) are designed to protect. The Commissioner also accepts that the potential prejudice to any judicial process is an interest that the exemption contained at 31(1)(c) is clearly designed to protect. Finally the Commissioner also accepts that any prejudice to a disciplinary, rather than judicial process, is an interest that can be seen to fall within section 31(2)(b). This is on the basis that the purpose of ascertaining whether any person is responsible for improper conduct arguably covers any necessary investigatory process and any subsequent disciplinary hearings.
28. The Commissioner also accepts that the second criterion of the test is met. This is on the basis that the nature of prejudice envisaged by the Authority, both to the investigation itself and any subsequent proceedings (criminal or otherwise) is one that can be correctly categorised as real and of substance. Furthermore, the Commissioner accepts that there is a logical connection between disclosure of both sets of withheld information and the prejudice occurring. In other words there is a causal link between disclosure of the both sets of information and the various types of prejudice envisaged by the Authority.
29. However, with regard to the third limb of the test, the Commissioner is not satisfied that the Authority has demonstrated that the likelihood of prejudice occurring to the judicial process or any potential disciplinary process is anything more than hypothetical. This is the case for both the corporate credit card information and the extra payments information. Therefore the Commissioner has concluded that the exemption contained at section 31(1)(c) does not provide a basis to withhold either the credit card payments information or the extra payments information.

30. The Commissioner has also concluded that the Authority has not demonstrated that the likelihood of prejudice occurring to the investigation if the credit card information is disclosed is anything more than hypothetical. The Commissioner has therefore concluded that the credit card information is not exempt from disclosure on the basis of sections 31(1)(b), 31(2)(a) or 31(2)(b) of FOIA. (The only exception to this is the number of the credit card itself which the Commissioner notes is included in the withheld credit card information. The Commissioner believes that disclosure of this information, because of its very nature, would be likely to prejudice the prevention of crime because it could be used by individuals intent on committing credit card fraud. The card number is therefore exempt from disclosure on the basis of section 31(1)(a) of FOIA).
31. In contrast the Commissioner is satisfied that the Authority has demonstrated that there is a real possibility of the investigation being harmed if the extra payments information was disclosed. Therefore the Commissioner accepts that this information is exempt from disclosure on the basis of the following exemptions: 31(1)(a) and 31(1)(b) of FOIA.
32. The Commissioner has explained his reasoning for reaching these particular decisions in more detail in the confidential annex.

Public interest test

33. Section 31 is a qualified exemption and therefore the Commissioner must consider the public interest test contained at section 2 of FOIA and whether in all the circumstances of the case the public interest in maintaining the exemptions outweighs the public interest in disclosing extra payments information.
34. The Authority argued that it was clearly in the public interest for the Police to be able to investigate potential criminal activity unhindered. It also noted that if any individuals are prosecuted in respect of the matters which Operation Sacristy were investigating then the public would have evidence to any relevant information during the course of trial.
35. The Commissioner recognises that the issues which Operation Sacristy is investigating have attracted significant public interest. Therefore the Commissioner accepts it could be argued that it would be in the public interest if the extra payments information was disclosed in order to ensure that the public have a greater understanding of the issues which the investigation was considering.
36. However, the Commissioner is firmly of the view that the balance of the public interest in respect of this particular information favours

maintaining the exemption. The Commissioner acknowledges that the public have a legitimate and genuine interest in the issues being considered by Operation Sacristy given that they focus on potential irregularities in the management of the both the Authority and Cleveland Police Force. However, the Commissioner believes that there is a more compelling public interest in protecting the integrity of the investigation in order to ensure that any potential criminal offences are properly considered.

37. The Commissioner is also satisfied that the public interest favours maintaining section 31(1)(a) in respect of the credit card number; although there is a public interest in transparency this is outweighed by the risk of fraud should this information be disclosed.

Right of appeal

38. 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,
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

39. 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.

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

Signed

**Gerrard Tracey
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