

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 14 October 2013

**Public Authority:** The Chief Constable Cleveland Police

**Address:** Ash House  
III Acre  
Princeton Drive  
Thornaby  
Stockton on Tees  
TS17 6AJ

#### **Decision (including any steps ordered)**

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1. The complainant requested information from Cleveland Police about a contract and payments to a named company. During the course of the Commissioner's investigation, Cleveland Police reviewed its application of exemptions, confirming that it considered sections 22 (information intended for future publication) and 31 (law enforcement) apply to the requested information.
2. The Commissioner's decision is that Cleveland Police was incorrect to apply sections 22 and 31 to the information it confirmed that it holds. He also found procedural errors.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
  - disclose to the complainant the information relating to points 1, 6 and 7 of the request that it provided to the Commissioner during the course of his investigation; and
  - issue a fresh response in relation to the remaining information within the scope of the request.
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

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5. On, or around, 21 December 2012 the complainant wrote to Cleveland Police requesting information of the following description:

*"I would like to ask for some information on the contract and payments to Combi UK.*

*I would like to know when the contract began [point 1] and the basis on which it began, ie any tendering process that was completed [point 2], what this involved [point 3], who made the decision and when [point 4], or details of any alternative arrangements to tendering [point 5].*

*I would like to know how much has been paid in each year since the contract began and on what basis these payments were made, i.e. was it a set payment or some other arrangement [point 6].*

*Finally, I would like to know whether payments continue to be made to Combi UK and, if so, on what basis, i.e. is this the same original contract or some other arrangement. If it is some other arrangement, please provide details as above [point 7]".*

6. The Commissioner has numbered the various points within the request for ease of reference.
7. Cleveland Police responded on 16 January 2013, drawing the complainant's attention to a statement on the 'Freedom of Information' page of its website about a publication scheme specifically for requests in relation to a specific investigation – Operation Sacristy. With reference to that statement, it told him that it considers that section 22 of FOIA applies (information intended for future publication).
8. Following an internal review Cleveland Police wrote to the complainant on 1 March 2013. It upheld its citing of section 22 and additionally cited section 30 of FOIA (investigations and proceedings). In relation to its application of section 30, Cleveland Police told the complainant:

*"Operation Sacristy is a current investigation to ascertain whether a person(s) should be charged with a criminal offence(s). Until the investigation is complete Cleveland Police believe it is not in the public interest to disclose the information you have requested".*

## Background

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9. At the time of the complainant's request – and this decision notice being issued – Cleveland Police Authority and Cleveland Police are involved in ongoing conduct and criminal investigations. According to Cleveland Police's website, those investigations, codenamed Operation Sacristy, are:

*"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"<sup>1</sup>.*

10. The Commissioner is aware that Cleveland Police told the complainant:

*"Further to our previous correspondence I have now seen the Gazette articles you referred to....The information in the Gazette articles is information provided by Combi UK and not Cleveland Police and therefore is not Cleveland Police information".*

11. The Commissioner is aware that information relating to the subject matter in this case has been published in the media.

## Scope of the case

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12. The complainant contacted the Commissioner on 4 March 2013 to complain about the way his request for information had been handled.

13. In further correspondence, he told the Commissioner:

*"Regarding section 22, Cleveland Police stated it would publish the information by the end of January 2014. This date is entirely arbitrary and should not apply to information already held for several years entirely unrelated to any publication scheme set up more recently. .... The information is not subject to change. It will be no different in January 2014 than it was in 2009 or at any point during the five years between".*

14. With respect to both exemptions cited by Cleveland Police, he told the Commissioner:
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<sup>1</sup> <http://www.cleveland.police.uk/advice-information/foi.aspx>

*"The response I have received provided no evidence of any reasonable consideration of the public interest".*

15. During the course of the Commissioner's investigation, Cleveland Police wrote to the complainant confirming that it was no longer applying section 30. It told him:

*"I must apologise to you for an error on our part, as the Operation Sacristy Investigation is being carried out by North Yorkshire Police the exemption applied should have been section 31(1)(b). Cleveland Police therefore withdraw the Section 30 exemption used in the letter dated 1st March 2013 from [name redacted] but advise that, in addition to Section 22 Information for Future Publication we would also rely upon Section 31(1)(b)".*

16. The correspondence also stated:

*"... Cleveland Police can neither confirm nor deny that it holds the information relevant to your request as the duty in section 1(1)(1) of the Freedom of Information Act 2000 does not apply, by virtue of the following exemptions: section 31(1)(b)";*

and

*"The information will be released in due course in its entirety and at this stage there will be transparency and accountability. However we cannot see the pressing current need for disclosure and the creditable aim of accountability and transparency should not be applied to the detriment of possible criminal proceedings".*

17. The Commissioner acknowledges that each of the prejudice-based exemptions in the FOIA contains a subsection to the effect that the duty to confirm or deny does not arise where even to confirm or deny whether the information is held would (or would be likely to) itself prejudice the interest protected by the exemption.
18. Notwithstanding that section 31(3) is the relevant sub-section that applies when a public authority neither confirms or denies (NCND) whether it holds relevant information, in the Commissioner's view it is not logical for a public authority to cite NCND and at the same time claim that the requested information is intended for future publication, as it is implicit that information intended for future publication is currently held.
19. On the basis that Cleveland Police considers that section 22 applies in this case, and in the absence of any evidence that it is applying that exemption to some but not all of the information within the scope of the

request, the Commissioner has considered its application of section 31 on the basis of 31(1)(b).

20. Accordingly the Commissioner considers the scope of his investigation to be to determine whether Cleveland Police correctly applied sections 22 and 31 (law enforcement).

## **Reasons for decision**

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21. As is his practice, during the course of his investigation, the Commissioner asked the public authority to provide him with a copy of the withheld information.
22. Although he was provided with some relevant information, the Commissioner is concerned that, from the evidence he has seen, Cleveland Police appears unable to say with clarity what information it holds within the scope of the request.
23. The following analysis relates to the information the Commissioner was provided with during his investigation. That information relates to points 1, 6 and 7 of the request. Cleveland Police failed to pinpoint the remaining withheld information within the file of papers it provided to the Commissioner during his investigation.
24. With respect to the remaining information within the scope of the request the Commissioner finds Cleveland Police in breach of section 1(1)(a) as it did not confirm to the complainant whether it holds that information. In respect of that information, the Commissioner requires Cleveland Police to issue a fresh refusal notice in accordance with section 1 of FOIA.

### *Section 22 information intended for future publication*

25. The Commissioner has first considered Cleveland Police's application of section 22 to the requested information.
26. Section 22(1) exempts from disclosure information which is intended to be published, where it is reasonable that the information should not be disclosed until the intended date of publication.
27. For the exemption to be engaged, the Commissioner first needs to be satisfied that the information is held with the intention of being published, whether by the public authority or by any other person. Secondly, section 22 requires that this intention must have existed at the time of the request, and thirdly, it must be reasonable in all the

circumstances that the information should be withheld from disclosure until the intended date of publication.

28. This exemption is also qualified by the public interest, meaning that the information should be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

*Is the information held with the intention of being published?*

29. In its correspondence of 16 January 2013, Cleveland Police told the complainant:

*"As you are aware, there is an ongoing investigation of which the information you have requested may or may not be a part and I draw your attention to the statement that is now recorded on the Cleveland police website – [www.cleveland.police.uk](http://www.cleveland.police.uk)".*

30. It included the content of that statement<sup>2</sup> in its correspondence:

*"Operation Sacristy – FOI Publication Scheme*

*Cleveland Police has set up a publication scheme specifically for Freedom of Information requests relating to Operation Sacristy. Information will be published on the dates detailed within the scheme (and at latest by 31<sup>st</sup> January 2014), therefore an exemption under Section 22 of the Freedom of Information Act will apply. The publication scheme will be reviewed monthly to ensure that it remains appropriate and fit for purpose.*

*Types of information*

*Publication strategy*

*Information about contracts under investigation that the Force holds*

*At the conclusion of the criminal investigation, and any subsequent criminal legal process, if any, that may follow.*

*Details of expenditure the Force holds for individuals concerned in the*

*At the conclusion of the criminal investigation and any subsequent criminal legal process, if any, that*

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<sup>2</sup> <http://www.cleveland.police.uk/advice-information/foi.aspx>

*investigation*

*may follow.*

*Information about assets that the Force holds that may form part of the criminal investigation*

*At the conclusion of the criminal investigation and any subsequent criminal legal process, if any, that may follow.*

*Information about potential conduct issues held by the Force about individuals concerned in the investigation.*

*At the conclusion of the criminal investigation and any subsequent criminal legal process, if any, that may follow.*

*The publication scheme relates solely to the information held by Cleveland Police”.*

31. It concluded its correspondence by saying:

*“Your request has now been closed but should you require any other information, after the investigation is closed, that is not published, please do not hesitate to contact this office”.*

32. In its internal review correspondence, Cleveland Police reiterated its position in relation to section 22:

*“A publication scheme specifically for Freedom of Information requests relating to Operation Sacristy has been set up and all requests are being collated and will be answered no later than 31 January 2014. Cleveland Police are therefore relying on the exemption under section 22 of the Freedom of Information Act.”*

33. When asked to explain its application of section 22, Cleveland Police told the Commissioner that the intention is that any questions asked via Freedom of Information requests will be answered and published:

*“when the whole investigation is complete, the criminal case and any possible appeals are concluded and all of the seized information has been returned to Cleveland Police”.*

34. The Commissioner recognises that Cleveland Police has made provision for information requests relating to Operation Sacristy to be processed at a later date. He also acknowledges that Cleveland Police’s publication scheme describes categories of information and explains its publication strategy for each of those categories.

*Intention to publish at some future date existed at the time the request was made*

35. Section 22 applies only when the information is held with a view to publication at the time the request for it was received. In this case, Cleveland Police advised the Commissioner that the publication scheme for FOI requests relating to Operation Sacristy was set up in August 2012. The Commissioner notes that the publication date is shown as being the end of January 2014.

*Reasonable to withhold?*

36. In requesting an internal review, the complainant disputed Cleveland Police's application of section 22. He said:

*"Under section 22, the public body also has to demonstrate why it is reasonable to withhold the information. In the context of this specific request, information about money spent with Combi UK has already been published, including financial information.*

*That information cannot be 'unpublished' or be ignored when considering whether it is reasonable or not to apply section 22".*

37. The Commissioner recognises that there are circumstances when it is reasonable - and correct - for public authorities to delay the provision of information until it is made generally available through planned publication.
38. However, in this case he does not consider that Cleveland Police explained to the complainant why it considers that it is reasonable to withhold the information that is the subject of this complaint. Similarly, Cleveland Police failed to explain to the Commissioner during the course of his investigation why it was reasonable to delay access to this information until the time of that publication.

*Is the exemption engaged?*

39. The Commissioner's task is to consider whether information was held with an intention to disclose at the time that the request was made and whether it was reasonable to delay access to this information until the time of that publication.
40. In this case the Commissioner is satisfied that the authority had a settled intention to publish information in response to freedom of information requests about Operation Sacristy at the time the request in this case was received. He recognises that Cleveland Police pointed the complainant to its published strategy in relation to such information requests.



41. However, he considers that its responses in relation to the request in this case are inconsistent and far from clear as to whether or not information within the scope of the request is held with the intention of being published, or, in relation to some of the requested information, even held at all. For example, the complainant has variously been told:
- the information you have requested may or may not be a part [of the ongoing investigation];
  - Cleveland Police can neither confirm nor deny that it holds the information relevant to your request;
  - no inference should be taken from this refusal that the information you have requested does or does not exist; and
  - the information will be released in due course in its entirety.
42. In the Commissioner's view, although it was clear that information related to Operation Sacristy is destined for future publication, he considers that Cleveland Police applied the exemption in this case in a blanket fashion. Having considered Cleveland Police's submissions, the Commissioner is not satisfied that the authority is able to say with confidence that it had an intention or settled expectation that all the information for which it has claimed section 22 would be published. Nor is he satisfied that it has demonstrated why, in all the circumstances, it is reasonable to withhold the information prior to publication.
43. Accordingly, the Commissioner does not find the exemption engaged. As he has not found section 22 engaged, the Commissioner has not gone on to consider the public interest test in relation to that exemption.

*Section 31 law enforcement*

44. As the Commissioner has not found the exemption in section 22 engaged, he has next considered Cleveland Police's application of section 31 in relation to the same information.
45. Section 31 provides a prejudice-based exemption which protects a variety of law enforcement interests. Consideration of this exemption is a two-stage process. First, in order for the exemption to be engaged it must be at least likely that disclosure would prejudice the apprehension or prosecution of offenders.
46. Secondly, the exemption is subject to a public interest balancing test. The effect of this is that the information should be disclosed if the public interest favours this, even though the exemption is engaged.
47. Section 31(1)(b) states:

*"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 -*

*(b) the apprehension or prosecution of offenders".*

*The applicable interests*

48. The public authority must show that the prejudice it is envisaging affects the particular interest that the exemption is designed to protect. In this case, in correspondence with the complainant, Cleveland Police referred to *"harm to potential criminal proceedings"*.

49. Against the background of Operation Sacristy and with reference to the work of the Crown Prosecution Service (CPS), Cleveland Police explained to the complainant that:

*"the criminal investigation is progressing and nearing a conclusion. Several suspects remain on bail awaiting advice on charging decision from the CPS"*.

50. It also told the Commissioner that the exemption is relevant:

*"in relation to the fair trial of any person against whom proceedings have been or may be instituted"*.

51. On that basis, the Commissioner understands that the relevant applicable interests relate to the apprehension or prosecution of offenders.

*The nature of the prejudice*

52. In the Commissioner's view, identifying the nature of the prejudice means that a public authority has to:

- show that the prejudice claimed is *"real, actual or of substance"*; and
- show that there is a *"causal link"* between the disclosure and the prejudice claimed.

53. In other words, the disclosure must at least be capable of harming the interest in some way, ie have a damaging or detrimental effect on it, and there must be a logical connection between the disclosure and the prejudice in order to engage the exemption.

54. Cleveland Police told the complainant:

*"The premature disclosure would be likely to prejudice a fair trial and run counter to the strong public interest in protecting their [the*

Crown Prosecution Service] *activity of prosecuting offenders and those who misconduct themselves in public office. The cost to date of this extensive and complex investigation is substantial, running into millions of pounds. If the potential criminal proceedings were prejudiced, not only would these costs be wasted, but the force may be exposed to litigation incurring further substantial costs*".

55. Cleveland Police also told the Commissioner that it considered that disclosure prior to the determination of any criminal proceedings would lead to "trial by media".

*The likelihood of the prejudice occurring*

56. Cleveland Police cited the lower level of likelihood in this case, that disclosure 'would be likely to prejudice' the law enforcement interest the sub-section is designed to protect.

*Is the exemption engaged?*

57. In correspondence with the Commissioner, Cleveland Police described Operation Sacristy as "an extremely complex, long running criminal investigation".
58. The Commissioner acknowledges that section 31(1)(b) will protect, amongst other things, the process for prosecuting offenders and information relating to specific crimes.
59. Although he accepts Cleveland Police's argument about costs if proceedings were prejudiced as a valid argument, in the Commissioner's view the issue of costs is not the interest the sub-section of the exemption in this case is designed to protect.
60. However, the Commissioner accepts that the alleged prejudicial effect to the ongoing criminal investigation codenamed Operation Sacristy relates to the applicable interests in section 31(1)(b) because prejudice to the investigation would consequently also be likely to prejudice the apprehension or prosecution of offenders.
61. On the basis that disclosure could impact on the right of individuals to a fair trial, and undermine the successful prosecution of those individuals, the Commissioner finds the exemption at section 31(1)(b) engaged in relation to the disputed information.

*The public interest test*

62. Having established that the section 31 exemption is engaged in respect of the withheld information, the Commissioner must go on to consider the public interest test as set out in section 2(2)(b) of FOIA. The

Commissioner must therefore consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

*Public interest arguments in favour of disclosing the requested information*

63. In requesting an internal review, the complainant said:

*"In this case, there are specific factual questions on spending and decisions underpinning that spending. Those records are immutable facts.*

*I am not seeking any information on any investigations, I am only seeking factual records held on how much, when and who by etc. I am not seeking any information behind those decisions which maybe the subject of investigation".*

64. He also told the Commissioner that the public interest in knowing how public money is spent:

*"is higher now than at any point since the FOI Act was established given the acute pressure on public spending".*

65. In correspondence with the complainant, Cleveland Police acknowledged *"the presumption in favour of disclosure unless there is good reason not to"*, the requirement to demonstrate accountability and transparency in the spending of public funds, and enhancing decision making and participation in public life.

66. It told the complainant that it accepted:

*"that there is a strong public interest in giving the fullest possible account of this investigation, particularly as it involves public money.....".*

*Public interest arguments in favour of maintaining the exemption*

67. In favour of maintaining the exemption, Cleveland Police told the complainant:

*"We cannot see the pressing current need for disclosure and the creditable aim of accountability and transparency should not be applied to the detriment of possible criminal proceedings".*

*The balance of the public interest*

68. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the

interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemptions does not outweigh the public interest in disclosure, the information in question must be disclosed.

69. The Commissioner understands that Operation Sacristy is a criminal investigation in respect of corruption and misconduct in a public office. With reference to the nature of the requested information in this case he notes that that the statement on Cleveland Police's website refers to "*information about contracts under investigation that the Force holds*".
70. The Commissioner accepts that there is a very strong public interest in ensuring that the prosecution of individuals is not prejudiced as a result of inappropriate disclosure: the public is entitled to expect that those who have committed offences are successfully prosecuted. It would clearly not be in the public interest if the disclosure of information resulted in the inability of the prosecuting authorities to successfully apprehend or prosecute offenders.
71. However, in this case, the Commissioner only places limited weight on the public authority's position that disclosure is not in the public interest on the basis that it may prejudice possible proceedings. In the Commissioner's view, the request is quite specific in the information it seeks, and, on the face of it, is neither for complex evidence nor for a full account of the investigation. The degree of likely prejudice to any proceedings arising from the information which Cleveland Police says it holds would appear to be very limited.
72. In reaching his decision in this case, the Commissioner is mindful of the fact that financial transparency and accountability of public authorities are issues of concern to the public. The Commissioner considers that there is clearly a public interest in financial transparency and accountability of public authorities. There is clearly a public interest in knowing the terms of contracts that exist in the public sector and there is also a public interest in knowing if there is a lack of clarity as to the existence of contracts or their terms.
73. In this case, having weighed the opposing public interests, the Commissioner has concluded that the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure. He therefore requires Cleveland Police to disclose the information within the scope of parts 1, 6 and 7 of the request, which was provided to him by Cleveland Police during his investigation.

## Other matters

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74. In order to comply with the requirements of FOIA and their wider information management responsibilities, public authorities clearly need to know what information they hold for the purposes of FOIA. This means they need to be aware of information they hold for their own purposes, information they are holding on behalf of another person and information that is being held on their behalf by other persons.
75. In this case, the Commissioner is concerned to understand from its submissions that Cleveland Police appears to be applying exemptions without being able to confirm with certainty that it either does or does not hold the requested information.
76. For example, it told him:
- "As far as I am aware all other information was seized and is subject of the Sacristy investigation and therefore not available to the Freedom of Information Office".*
77. This case highlights the importance of good records management. The Commissioner considers that his findings in the investigation of this case indicate that Cleveland Police's records management practice fell short of the standards he would expect, limiting their ability to respond properly to requests for information in line with legal requirements.

## Right of appeal

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78. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

79. 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.

80. 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 .....**

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