

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 20 January 2009

Public Authority: Chief Constable of Northumbria Police
Address: North Road
Ponteland
Newcastle upon Tyne
NE20 0BL

Summary

The complainant requested the total spent on and number of informants registered by the public authority for the five years preceding his request. The public authority refused the request, citing section 30(2) (information relating to the obtaining of information from confidential sources) and 38(1)(b) (endangerment to safety). Following the intervention of the Commissioner, the public authority amended its stance and stated that to provide the number of informants would exceed the appropriate cost limit. The Commissioner finds that the public authority concluded incorrectly that the public interest favoured the maintenance of section 30(2) and that the exemption provide by section 38(1)(b) is not engaged. The public authority is required to disclose the information showing the total spend on informants for the five years preceding the request. In relation to the request for the numbers of informants, the Commissioner concludes that the public authority estimated correctly that the cost of complying with the request would exceed the appropriate cost limit and no steps in connection with this part of the request are required.

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 18 April 2006, the complainant requested the following information:

"the amount of money spent by your force on paying "informants" for each of the last five years.

the number of registered "informants"

3. The public authority responded to this on 16 May 2006. The public authority confirmed that it does make use of Covert Human Intelligence Sources (CHIS) and in so doing in effect confirmed that it did hold the information requested.
4. The public authority went on to refuse to disclose the information requested, citing sections 30(2)(b) (information relating to the obtaining of information from confidential sources), 31(1)(a), (b) and (c) (law enforcement) and 38(1)(b) (endangerment to safety). The refusal notice included a 'harm test', stating that disclosure could result in identification of individuals as CHIS. This could lead to the safety of CHIS being placed at risk and could disrupt the flow of information to the police. The public authority stated that the existence of the exemption provided by section 30(2) showed the intention of Parliament to ensure that information relating to CHIS would be exempt from disclosure.
5. The refusal notice also covered the balance of the public interest, with a public interest in disclosure recognised where this would improve accountability in the spending of public funds and where it would contribute to public debate on the use of informants. Against disclosure, the public authority suggested that disclosure could compromise the law enforcement role of the public authority, that disclosure would be unfair to individuals acting as CHIS, that disclosure of any information that may provide an advantage to the 'criminal fraternity' would adversely affect public safety and that the flow of information to the public authority may be reduced as individuals would be deterred from providing information to the public authority. The public authority concluded that the balance of the public interest favoured maintenance of the exemption.
6. The complainant subsequently requested an internal review of the handling of his request and the public authority responded with the outcome to the review on 25 May 2006. The review upheld the initial refusal under sections 30(2), 31(1)(a), (b) and (c) and 38(1)(b).

The Investigation

Scope of the case

7. The complainant raised the issue of the refusal of this request on 14 June 2006. The complainant rejected the reasoning given by the public authority for refusing the information request as he was not asking for individual payments, or any other information that he believed would enable identification of individual CHIS. The complainant also stated that Staffordshire Police had previously disclosed information of greater detail than he had requested and enclosed a newspaper article based on the information disclosed by Staffordshire Police.

Chronology

8. The Commissioner contacted the public authority initially on 16 November 2007. The basis for the complaint was set out and it was anticipated that the arguments given by the public authority would focus on section 30(2). The public authority was asked to respond clarifying why it believed that section 30(2) was engaged and why the public interest was believed to favour maintenance of this exemption. It was stressed to the public authority that for this exemption to be engaged, the information should conform to the classes specified in both 30(2)(a) and (b). On the issue of the public interest, the public authority was advised that, whilst section 30(2) is a class based exemption, the issue of what specific prejudice had been identified and the level of likelihood of it occurring as a result of disclosure would be a relevant issue when considering where the balance of the public interest lies. The public authority was asked to address what particular prejudice it had identified and the likelihood of it arising as a result of disclosure. It was noted that at least one police force, Staffordshire Police, had not believed it necessary to withhold similar information to that withheld here. Finally, the public authority was asked to provide the Commissioner with a copy of the information withheld from the complainant.
9. The public authority failed to respond within the 20 working days stipulated in this letter as it wished to consult with the Association of Chief Police Officers (ACPO) on this matter. It was also suggested that ACPO may respond to the Commissioner on the issues raised in this case rather than the public authority. The involvement of ACPO in this case is covered further in the 'Other matters' section below.
10. The involvement of ACPO culminated in a meeting at Merseyside Police HQ between representatives from the Commissioner's office and ACPO on 27 February 2008. At this meeting, the representatives of ACPO set out their concerns about the overall issue of information requests made for information about CHIS. The stance of ACPO was that disclosure of information that did not in itself directly identify any individual would however lead to it being more likely that individuals could be identified as having acted as CHIS. Where an individual has, for example, received a large payment from a police force and the subsequent enhancement to that individual's means has been noted by their associates, disclosure that a police force had paid a significant sum to CHIS during that period may be taken as confirmation of an existing suspicion that the individual in question has acted as a CHIS.
11. ACPO also argued that any disclosure in this case would lead to a precedent for disclosure of similar information held by other police forces and this would enable the development of a nationwide picture of the resources used on CHIS by the various police forces. After a further delay following this meeting a document was provided to the Commissioner on 6 May 2008 by ACPO showing the totals spent on CHIS by a number of police forces nationwide.
12. The Commissioner was yet to receive any substantive response to the letter of 16 November 2007. On 14 May 2008 the public authority was contacted again. This largely repeated the content of the previous letter and also stressed that the

arguments advanced by ACPO previously would be strengthened if they were detailed, evidenced and made in writing. The public authority was also reminded that the responsibility of communicating with the Commissioner about this case lay with it, rather than with ACPO.

13. Prior to the meeting with ACPO the public authority provided the Commissioner with some information on the basis that it was relevant to the request. This showed the total spend on informants for the five years prior to February 2008. It was stressed to the public authority that it would be necessary to provide the cost information for the five years preceding the date of the complainant's request. The public authority also stated previously that its stance was now that to provide the number of CHIS would exceed the cost limit. On this point the public authority was asked to provide its estimate of the cost of providing a response to this part of the request.
14. The public authority responded on 26 June 2008, stating that it believed that subsection 30(2)(a)(i) is engaged as information relating to CHIS is recorded in connection with investigations and that 30(2)(b) is engaged as the information relates to confidential sources. The public authority went on to address the issue of what prejudice it believed would result from disclosure in connection with the balance of the public interest. The public authority believed that disclosure would reduce the willingness of individuals to act as CHIS which would reduce the flow of information to the public authority to the detriment of its investigatory ability. The public authority stressed that gathering information from CHIS *"takes place in an environment of absolute trust and confidence"* and any disclosure that undermines this would impede the gathering of information through CHIS. The public authority believed a further prejudice may result through increased danger to public safety through a tactical advantage being provided to the 'criminal fraternity' through disclosure. The public authority further suggested that a prejudice would result through endangerment to the health and safety of CHIS, although the Commissioner notes that this argument appears to be relevant to section 38 rather than the public interest in connection with section 30.
15. The public authority gave further arguments as to why it believed that the public interest favoured maintenance of the exemption here, stating firstly that police use of CHIS is regulated by the Regulation of Investigatory Powers Act and the Human Rights Act and that oversight is provided by the Office of the Surveillance Commissioner. The public authority did not believe that any additional accountability provided through disclosure would be necessary. The public authority also referred to other organisations that make use of informants and that disclosure of the information requested here would harm relationships between the public authority and other organisations. The public authority did not identify these organisations or state how its relationships with these organisations would be harmed. The public authority further believed that disclosure of sums paid to informants would encourage others to come forward and provide false information in an attempt to gain payment. Where information is disclosed about several police forces, the public authority believed that disclosure would lead to potential CHIS preferring to provide information to police forces with a record of higher spending on informants than the public authority.

16. On the issue of disclosure of information by Staffordshire Police, the public authority stated that this had been acknowledged by that force as an accidental inclusion within a publication and was not in response to a request for information made under the Act. The public authority did not believe that this disclosure was relevant to its position in response to this request.
17. The public authority confirmed that its stance was that to respond to the request for the number of registered informants for the five years prior to the request would exceed the appropriate limit and that section 12(1) was therefore engaged. The public authority also stated that it was unable to extract the financial information requested for the years 2001-02 and 2002-03 due to this information having been manually recorded meaning that it would take a significant period of time to collate this information.
18. On section 38(1)(b) the public authority stated that it believed that disclosure would result in endangerment to the *'entire public'*. The public authority believed that witnesses could be attacked as individuals with *'criminal minds'* may believe them to be informants. The public authority also stated that disclosure would lead to endangerment to the mental health of CHIS as they would no longer believe themselves to be secure.
19. The Commissioner contacted the public authority again on 1 July 2008. Firstly, the public authority was asked for additional detail about its cost estimate for the request for numbers of CHIS. Secondly, the public authority was asked to be specific about its stance in relation to the cost information covering the years 2001-02 and 2002-03. If its stance was that to provide this information would exceed the cost limit, the public authority was asked to provide a cost estimate and a breakdown of how this cost estimate was formed.
20. The public authority responded to this on 4 July 2008, giving further detail about its cost estimate in connection with the request for numbers of CHIS. The public authority stated that its records of CHIS dating from prior to May 2003 were held in a manual form and that 3,800 records of this kind are held. The public authority stated that in order to collate the information requested it would be necessary to review each of these records. The public authority gave what it considered to be a conservative estimate of 5 minutes per record, giving a total time estimate of approximately 317 hours.
21. The public authority went on to state that its records of CHIS dating from post May 2003 are held in an electronic form. The public authority stated that there are a total of 481 electronic records of relevance to the request and again stated that it would be necessary to search each of these records, which would take an estimate of 5 minutes per record. This gives a time estimate of approximately 40 hours. The public authority also stated that CHIS can be *"registered, revoked and re-registered"* within a 12 month period.
22. On the issue of the request for funds spent on CHIS for the five years prior to the request, the public authority amended its stance, stating that its previous response that it could not provide this information for 2001-02 and 2002-03 within a reasonable period of time was based on its understanding at that time that this

information was only held in a manual form. The public authority now stated that this information was held in an electronic form and provided a copy of this information to the Commissioner.

23. The Commissioner contacted the public authority again on 13 November 2008 and asked that it provide further detail in connection with its cost estimate. The public authority had stated that it holds 3,800 manual files. The public authority was asked to confirm if each of these files related to a single CHIS, indicating that there were 3,800 registered CHIS for the period specified in the request. The public authority was also asked to confirm how these records are ordered. The example was given that if they are ordered by year and each file relates to one CHIS, if there were 100 files for 2003 - 04 this would indicate that there were 100 CHIS registered for that year. The public authority was also asked to confirm whether there was any other method by which the number of CHIS registered during a certain period could be ascertained if, for example, there was an operational need to do so.
24. On the issue of the 481 records held in an electronic form, the public authority was asked to respond confirming how the figure of 481 had been reached. The public authority was also asked to confirm what the estimate of 5 minutes per record for this information was based on, including whether this was an estimate of the time taken in searching the electronic records, or whether this related to the time that would be taken in searching the paper records from which this database is derived.
25. The public authority was also asked to respond stating from where the total figures for expenditure provided to the Commissioner with its response of 4 July 2008 had been sourced. Specifically, the public authority was asked to specify whether it was necessary to gather this information from the record of each investigation in which a payment to a CHIS was made, or whether this information was held in a ready collated form elsewhere. If this information was held in a ready collated form, the public authority was asked to specify the purpose for which this information is held.
26. The public authority responded on 18 November 2008 and confirmed that each of the 3,800 manual files does relate to one informant, but that these are not recorded by reference to year. The public authority again stated that a CHIS may be revoked, re-registered and revoked again and so it believed that the only means by which to gather an accurate figure for the numbers of registered CHIS would be to review each record.
27. In response to the question of how the public authority would identify the number of registered CHIS for a particular period if it was necessary for it to do so, the public authority stated that it had no means by which to do this, other than via a manual search. The public authority stated that its software is capable of producing a figure for CHIS currently registered, but not an equivalent historical figure.
28. The public authority went on to state that the figure of 481 was the total number of records held electronically. The public authority stated that it would be necessary

to carry out a manual search of each of these records. The public authority also now amended its earlier time estimate and stated that a search of a paper record would take an average of 15 minutes, whilst a search of an electronic record would take an average of 10 – 12 minutes.

29. On the issue of the purpose for which the total spent on CHIS is held, the public authority stated that this information is held in a pre collated form and is held “*on the finance system for financial control purposes, primarily to monitor and manage the budget, and to provide an accounting record that supports the Annual Statement of Accounts*”. The public authority also stated that it is not possible to discern from the finance system the number of individual payments made to CHIS as this records only the total costs paid to CHIS with no indication of the number of individual payments this total comprises.
30. A further exchange of correspondence between the Commissioner and the public authority followed in which the public authority confirmed that each record, both those held manually and those held electronically, do relate to a single CHIS, but that each record may show that an individual has been registered as a CHIS and subsequently revoked multiple times. The public authority clarified that it would be necessary to view each record in order to verify the date, or multiple dates, at which the individual to whom the record relates has been registered as a CHIS within the time period specified in the request. The public authority also further amended its estimate of the time that would be taken to view each record, giving an estimate of 10 minutes per manual record and 5 minutes per electronic record.

Findings of fact

31. The public authority uses CHIS and has funds allocated for this purpose.
32. A record of expenditure on CHIS is held in an electronic form.

Analysis

Procedural matters

Section 12

33. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the “Regulations”) provide that the cost limit for non central government public authorities is £450. This must be calculated at the rate of £25 per hour, providing an effective time limit of 18 hours. If a public authority estimates that complying with a request would exceed 18 hours, or £450, section 12(1) provides that the request may be refused.
34. Section 12(2) provides that a public authority can refuse a request if the cost of complying with section 1(1)(a) alone, that is the cost of confirming or denying whether the information requested is held, would exceed the cost limit. In this case the public authority is not able to confirm precisely what is held that falls

within the scope of the request, but does not dispute that information of relevance is held. The Commissioner's considerations are on whether the cost limit would be exceeded through compliance with the requirement of section 1(1)(b).

35. Regulation 4(3) provides that the following factors can be taken into account when formulating a cost estimate:

*“(a) determining whether it holds the information,
(b) locating the information, or a document which may contain the information,
(c) retrieving the information, or a document which may contain the information,
and
(d) extracting the information from a document containing it.”*

36. It appears that 4(3)(b) and (c) are relevant here. The public authority has described how from May 2003 CHIS records have been held in an electronic form and that there are 481 such records. The public authority has stated that prior to May 2003 these records were held in a manual form and that there are 3,800 such records. The public authority has stated that these are not ordered according to date and that the only means by which to collate the information specified in the request would be to view the content of each record.
37. The issue of whether each record relates to an individual CHIS was raised with the public authority and whether it would be possible to collate the information specified in the request by reference to the total number of records. In response to this, the public authority stated firstly that to establish the date of each record it would be necessary to view the content of each record. Secondly, the public authority also stated that, whilst each record relates to an individual CHIS, each CHIS may have been re-registered and revoked, possibly multiple times. This would be recorded within the record relating to individual CHIS. This means, for example, a CHIS may have been registered in June to August 2004, then revoked and re-registered in September to November 2005. This CHIS should then feature twice within the information provided in response to the request, in the totals for 2004-05 and 2005-06.
38. The Commissioner accepts that it would be necessary to view the content of each CHIS record in order to collate an accurate figure of the numbers of CHIS registered for the years 2001-02 to 2005-06. Viewing each record would be necessary in order to establish the date, or multiple dates, during which the individual to whom that record relates was registered as a CHIS.
39. Turning to whether the Commissioner accepts the estimate made by the public authority of the time that would be taken in viewing each CHIS record, the public authority has provided an estimate of 10 minutes per manual record and 5 minutes per electronic record. If it were the case that it was necessary to view the content of each record only in order to establish if it fell within the dates specified in the request, the Commissioner may have concluded that these time estimates were unreasonably high. However, given that the Commissioner has accepted that it would be necessary for the public authority to verify from the content of each record whether each CHIS had been registered multiple times, the Commissioner concludes that these time estimates are reasonable.

40. There are 3,800 manual records and the public authority has estimated an average of 10 minutes to search each record, giving a total time of approximately 633 hours. There are 481 electronic records and the public authority has estimated an average of 5 minutes to search each record, giving a total time of approximately 40 hours. At the rate of £25 per hour, this gives a total cost estimate of £16,825, well in excess of the limit of £450.
41. The Commissioner accepts that the estimate of the public authority of the cost of compliance with this request is reasonable in relation to providing accurate information that falls within the precise scope of the request; that is the number of registered informants for each of the five years preceding the request. The conclusion of the Commissioner is, therefore, that section 12(1) provides that the public authority is not obliged to comply with the requirement of section 1(1)(b) in respect of the second part of the request.
42. However, the Commissioner notes that the public authority has confirmed that each record relates to an individual CHIS. This suggests that the public authority may have been able to provide to the complainant information that, whilst not directly within the scope of the request, would have been relevant to it. The public authority could have, for example, confirmed the total number of CHIS that had been registered during the period covered by the records, whilst making clear that this figure did not reflect that individual CHIS may have been revoked and re-registered, possibly multiple times, during this period.

Section 17

43. Section 17(5) requires that where a public authority refuses a request under section 12, the requester shall be provided with a notice informing them of that fact. In this case, as section 12 was introduced only after the involvement of the Commissioner, the public authority issued no such notice and in so doing failed to comply with section 17(5). Also, when addressing the balance of the public interest in the refusal notice and the internal review response, the public authority did so in a general fashion, rather than with reference to each of the exemptions cited. In failing to address the balance of the public interest in relation to each individual exemption cited, the public authority failed to comply with the requirement of section 17(3)(b).

Exemptions

Section 30

44. The public authority has cited section 30(2). In order for this exemption to be engaged, the information in question must fulfil the classes specified in subsections 30(2)(a) and (b). In this case, the public authority has specified subsection 30(2)(a)(i) and (b). This means that in order for this exemption to be engaged, the information in question must have been obtained or recorded by the public authority for its functions relating to an investigation specified in subsections 30(1)(a) or (b). The Commissioner has focussed on subsection 30(1)(a)(i) & (ii) and has considered firstly whether the information in question

was obtained or recorded for the purposes of an investigation with a view to it being ascertained whether a person should be charged with an offence or whether a person charged with an offence is guilty of it.

45. Section 30(1)(a) can be cited only by those public authorities with powers to conduct investigations of the kind specified in this subsection. As the public authority in this case is a police force, it is clear that it does have powers to conduct investigations of this kind.
46. Turning to whether the information itself was obtained or recorded for the purpose of police investigations, as this information was not obtained by the public authority from elsewhere, the focus here is on the purposes for which it was recorded by the public authority. An argument can be made that the information as it is held in its present form was not recorded for the purposes of investigations. The information that the public authority has now identified as falling within the scope of the request and in the form that it has been supplied to the Commissioner's office makes no reference to any specific investigation. As noted above, the public authority has stated that the totals spent on informants are held on its finance system for accounting purposes. If this information is held solely for accounting purposes, it would not be subject to this exemption.
47. However, when assessing whether the exemption is engaged it is appropriate to consider the purpose for which this information was initially recorded rather than the purpose for which it was collated into its present form. The collated figures held for accounting purposes would not have existed had an original record not been made of payments to CHIS for the purposes of investigations and the Commissioner concludes that the original purpose for which information was recorded by the public authority of the sums paid to informants was in connection with investigations conforming to the class specified in subsections 30(1)(a)(i) & (ii).
48. Subsection 30(2)(b) requires that, in order for the exemption provided by section 30(2) to be engaged, the information must also relate to the obtaining of information from confidential sources. As covered above, the Commissioner considers that the material identified by the public authority as falling within the scope of the request is a collated form of individual payments made to CHIS in connection with specific investigations in return for the provision of information. The Commissioner concludes that this information can be fairly characterised as relating to the obtaining of information from confidential sources. Having established that the information in question conforms to the classes specified in subsections 30(2)(a) & (b), the Commissioner concludes that the exemption is engaged.

The public interest

49. Section 30(2) is qualified by the public interest. This means that, however clearly the information in question conforms to the class specified in 30(2), it should be disclosed if the public interest favours this.
50. When considering whether or not prejudice-based exemptions are engaged, the

Commissioner adopts the approach of the Information Tribunal in the case of *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005; 25 January 2006). In that case the Tribunal confirmed that “the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.” Whilst there is no prejudice test associated with section 30(2) because the exemption is class-based, the Commissioner nevertheless considers that the likelihood of prejudice occurring and the nature of that prejudice can be taken into account when determining which public interest factors are relevant in a particular case and when weighing up the various public interest arguments.

51. The stance of the public authority here as to the prejudice that would result through disclosure is primarily based on the notion that disclosure would disrupt its ability to obtain information from confidential sources through discouraging potential CHIS from acting in this capacity. The public authority has described a number of reasons why this prejudice could result, the central argument being that disclosure of the information in question here would significantly increase the likelihood of individual CHIS being identified.
52. The Commissioner would accept that disclosure of information that would be likely to lead to identification of individual CHIS would be likely to discourage those acting as CHIS currently from continuing to do so and would also discourage potential future CHIS from acting in this capacity. It is necessary to consider, therefore, what likelihood there is of disclosure here leading to the identification of CHIS in order to determine whether it is a relevant factor in this case. No information that directly identifies any CHIS is in question here and the Commissioner has upheld the section 12 refusal for information that would disclose the number of CHIS. The stance of the public authority remains that disclosure of the total cost of informants per year could lead to identification of individual CHIS.
53. The public authority has explained that criminal groups are increasingly sophisticated and that they are increasingly intent on identifying those who agree to provide the police with information which risks their detection and apprehension. As a result it is important to avoid any potential that informants may be identified. It has been suggested that where an individual has been suspected by their associates of having unexpectedly received a large sum of money as a result of ostentatious display of this new found wealth, the disclosure of information that confirms that a high sum has been paid to CHIS during the corresponding period may lead other individuals to deduce that their newly wealthy associate has acted as a CHIS as had previously been suspected. The Commissioner does not give weight to this argument for two main reasons; firstly, no evidence to support this suggestion has been provided and it is possible that such a conclusion could be drawn irrespective of the disclosure of the requested information if someone were to publicly demonstrate a sudden increase in their means. Secondly, the withheld information does not show that payments in any one year have been significantly higher than in any other years.
54. The Commissioner does not believe that disclosure of the information in question here is likely to lead to identification of individuals and has taken the following

factors into account when forming this conclusion:

- The level of detail requested: the request is not for individual payments, or payments broken down by any other criteria.
 - The content of the information: whilst the public authority has suggested that this may reveal a pattern of unusually high payments, the information shows no such pattern.
 - The size of the area to which the information relates: the information relates to the entire area covered by the public authority; the request does not, for example, ask for the information to be broken down into smaller areas.
 - The length of time covered by each total: the totals relate to 12 month periods, rather than any shorter period.
55. The public authority has further argued that disclosure would discourage those currently acting as CHIS from continuing to do so. Also, the argument of the public authority that potential future CHIS would be discouraged from supplying information to the police extends further than this prejudice resulting only through identification of individuals; the public authority has suggested that, such is the expectation of complete confidence about all matters involving CHIS, disclosure of any information in this area would restrict the flow of information to the police.
56. The Commissioner accepts the premise of this argument, but gives it little weight for the following reasons. Firstly, the nature of the information in this case; whilst the basis of this argument from the public authority is that disclosure of *any* information relating to the obtaining of information from confidential sources would restrict the flow of information, the Commissioner considers it inevitable that the nature of the specific information in question will be relevant to the severity of this disruption. In this case, the information is sufficiently far removed from information about individual CHIS that the Commissioner concludes that any disruption that would result to the flow of information to the police from the disclosure of the information in question here would, at worst, be minimal.
57. Secondly, the Commissioner is aware of other examples where information similar to that in question here has been disclosed. Most notably, the Audit Commission Act includes a provision that has in the past enabled access to the totals spent on CHIS during 12 month periods by police forces. Whilst ACPO has made clear that its intention is that CHIS information will no longer be disclosed via this Act, that information has been disclosed via this route in the past, with no evidence of prejudice as a result of this disclosure having been made available to the Commissioner, remains a relevant factor. These previous disclosures erode the argument of the public authority that the confidentiality of any information related to CHIS should be regarded as sacrosanct.
58. ACPO made the argument that a decision in this case that the total spent on CHIS should be disclosed would set a precedent for disclosure of similar information about other forces. ACPO was concerned that this would give a nationwide picture of how much is spent on CHIS by all forces and that this would lead to prejudice to functions relevant to section 30(1). Whilst this case will indicate the factors that the Commissioner will take into account in a case

presenting a similar scenario, each case will be considered individually and the arguments presented in each case on their merits in relation to the specific information in question.

59. The Commissioner also notes that it is not clear what specific prejudice would arise from being in a position to compare the sum spent on CHIS by different police forces. The public authority has suggested that disclosure of which forces spend the highest sums on CHIS would encourage criminals to target areas with lower CHIS expenditure. However, this suggestion does not appear to take into account that a decision as to where to commit a crime would be likely to be based on a range of factors. At least some of these factors, such as the location of the target of the crime, appear likely to be of more weight when choosing where to commit a crime than which force spends the lowest sum on CHIS.
60. The public authority has made further arguments about the predicted effect of disclosure, stating that it may lead to CHIS opting to provide information to forces with a larger informant budget, in anticipation of receiving a higher sum in return for the information. The Commissioner would note, however, that the force to which a CHIS provides information is likely to be determined primarily on the basis of who is running a particular operation(s) or to whom the information would be of most use. The public authority has also argued that disclosure of the level of rewards paid to informants would encourage the provision of false information to the police in an attempt to gain payment. The Commissioner would note that this argument appears to contradict the more substantive argument made by the public authority that disclosure would discourage individuals from acting as CHIS. Moreover the Commissioner would expect the police to have robust methods for determining which sources of information are reliable and which are not before expending significant public funds in return for information.
61. The Commissioner accepts that there is a strong public interest in ensuring that the police can maintain their ability to recruit and manage CHIS to assist in their law enforcement functions. However, in view of the arguments above and bearing in mind the particular information sought by the complainant in this case, he does not consider that the arguments apply with significant weight in this case.
62. Having considered the extent to which the balance of the public interest favours maintenance of the exemption on the basis of any prejudice that may occur as a result of disclosure, the Commissioner has gone on to consider those public interest factors that favour disclosure. First and foremost of these is that there is a legitimate public interest in information about the use of CHIS by the police. This area of policing is the subject of discussion and some controversy. There is, in the absence of a formal mechanism for reporting expenditure on CHIS, currently little authoritative information available to inform this discussion. Where disclosure would enhance and inform public discussion on this issue without real and significant prejudice to police investigations, the public interest would favour disclosure of this information. Whilst the information in question here, relating to 12 month periods, would not necessarily demonstrate value for money in the use of public funds due to its lack of greater detail, it would still provide greater transparency to that which exists in this area currently.

63. In addition to the public interest in information specifically related to CHIS, the work of the police in investigating crime in general, including how its resources are allocated for this purpose, is an issue of considerable and legitimate public interest. As well as the universal public interest in how public funds are allocated by any public authority, there is a valid public interest argument in favour of disclosure of the information in question here in that it relates directly to the allocation of resources by the public authority for the purpose of investigating crime. When allied with other information, crime statistics for example, this may enhance debate on the effectiveness of the use of CHIS by the police.

Conclusion

64. The public authority has made clear that it and other police forces are strongly of the view that information relating to CHIS should not be disclosed. The basis of this view is the prejudice that it is anticipated disclosure would cause to the investigation of crime. The public authority has not, however, advanced strong arguments as to how or why disclosure of the total sums spent on informants for the five years preceding the request would result in such prejudice.
65. Having given no weight to the majority of the arguments advanced by the public authority in relation to the identification of CHIS, there are two remaining factors in favour of maintenance of the exemption that carry at least some weight. Firstly, as noted above, the Commissioner accepts that disclosure of any information relating to the area of CHIS may disrupt the flow of information to the police. However, as also noted above, the nature of the information in question here means that this factor is given less weight than it otherwise might. The second factor is that recognised by the Information Tribunal in the case *Guardian v The Information Commissioner and Avon and Somerset Police (EA2006/0017; 5 March 2007)* where *“the interest in principle, recognised by the exemption applying to s30(1), in protecting information acquired, often in confidence, in police investigations”* was acknowledged.
66. Having weighed the factors favouring the maintenance of the exemption against the factors in favour of disclosure, the Commissioner concludes that the public interest in maintaining the exemption does not outweigh the public interest in disclosure. The effect of the tribunal recognising the interest in principle in protecting information acquired for police investigations is that this is a factor to be taken into account when weighing the balance of the public interest in connection with section 30. That is not to say, however, that this is a factor that will outweigh all others. In this case, even having taken this factor into account, the Commissioner finds that the balance of the public interest favours disclosure. Whilst the factors favouring disclosure here are not overwhelmingly strong, given that the majority of the factors in favour of maintenance of the exemption do not carry significant weight, these factors are sufficient to tip the balance of the public interest in favour of disclosure.

Section 31

67. The public authority cited both sections 30(2) and 31(1)(a), (b) and (c). However, these sections are mutually exclusive; they cannot both be engaged in relation to

the same information. This is confirmed by the wording in section 31(1) which states *“Information which is not exempt information by virtue of section 30...”*. If 30 is engaged, section 31 cannot be engaged even where the public interest in maintaining the exemption provided by section 30 does not outweigh the public interest in disclosure.

68. In this case, whilst the conclusion is that the public interest in maintaining the exemption does not outweigh the public interest in disclosure, the conclusion was also that section 30(2) is engaged. Section 31(1)(a), (b) and (c) cannot, therefore, also be engaged in relation to this information. As the conclusion is that this exemption is not engaged, it has not been necessary to go on to consider where the balance of the public interest lies.

Section 38

69. The public authority has argued that section 38(1)(b) is engaged in relation to the information withheld here. This section exempts information the disclosure of which would or would be likely to endanger the safety of any individual. The public authority has specified that it considers that endangerment to safety would occur as a result of disclosure, rather than that it would be likely to occur. In order for the Commissioner to conclude that endangerment would occur, the possibility of this must be at least more probable than not. This follows the approach of the Information Tribunal in the case of *Hogan v Oxford City Council & The Information Commissioner (EA/2005/006 & EA/2005/0030)* in which it found that the *“prejudice test is not restricted to “would be likely to prejudice”. It provides an alternative limb of ‘would prejudice’. Clearly this second limb of the test places a much stronger evidential burden on the public authority to discharge.”*
70. If the Commissioner’s conclusion is that the exemption is engaged, it is necessary to go on to consider the balance of the public interest. If the public interest favours disclosure, the information should be disclosed regardless of the likelihood or severity of the endangerment.
71. The public authority has suggested two groups who would suffer an endangerment to safety as a result of disclosure; CHIS as they would be more likely to be identified and thus suffer reprisals, and witnesses, whom the public authority believes would be more likely to be perceived to be CHIS as a result of disclosure. On the first point, as covered above in the section 30 public interest sections, the Commissioner does not accept that disclosure of the total sums spent on informants for the five years preceding the request would be likely to lead to identification of individual CHIS and therefore he has not weighted it as a relevant factor in the context of that exemption. For the same reasons he does not accept that the public authority has evidenced why disclosure would prejudice the safety of any individual on this basis.
72. On the second point, that witnesses would be more likely to be perceived to be CHIS, the public authority has not developed its argument here. The public authority appears to be referring to witnesses in court cases. In the absence of detail on this issue from the public authority, it is not clear how disclosure of the totals spent on informants in the five years preceding the request would be likely to lead to court witnesses, correctly or otherwise, being perceived to be CHIS.

73. The conclusion of the Commissioner is that section 38(1)(b) is not engaged. As noted above, for the exemption to be engaged on the basis that prejudice would occur the possibility of endangerment must be at least more probable than not. On the basis of the arguments advanced here, the possibility of endangerment to safety resulting from disclosure of the information in question is not more probable than not. The Commissioner would further note that the test for whether endangerment is likely, which is that the possibility of endangerment must be real and significant and certainly more than hypothetical or remote, would also not be satisfied here on the basis of the arguments advanced by the public authority. As the conclusion is that this exemption is not engaged, it has not been necessary to go on to consider the balance of the public interest.

The Decision

74. In relation to the first part of the request, for the total amount spent on informants during the five years preceding the request, the Commissioner finds that the public authority failed to comply with section 1(1)(b) in that it incorrectly refused to disclose the information requested on the basis that the balance of the public interest favoured the maintenance of the exemption provided by section 30(2) and section 10(1) in failing to disclose this information within 20 working days of receipt of the request. The Commissioner also finds that the exemptions provided by sections 38(1)(b) and 31(1)(a), (b) and (c) are not engaged.
75. In relation to the second part of the request, for the number of CHIS for the five years preceding the request, the Commissioner finds that the public authority correctly estimated that the cost of complying with this part of the request would exceed the appropriate limit and so section 12(1) provides that it is not obliged to comply with section 1(1)(b). However, the Commissioner also finds that the public authority did not comply with section 17(5) by failing to specify section 12(1) in either the refusal notice or internal review.

Steps Required

76. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

Disclose to the complainant the information held by it that falls within the scope of the first part of the request; total expenditure on CHIS for the financial years 2001-02, 2002-03, 2003-04, 2004-05 and 2005-06.

77. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Other matters

78. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

In the refusal notice, the public authority included a generalised “harm test” before going on to specify which exemptions were being claimed. Although arguments relating to potential harm or prejudice may be relevant to explaining why a prejudice-based exemption is engaged or where the balance of the public interest lies in relation to a particular qualified exemption, the Commissioner is concerned that the authority did not clearly link its arguments to the specific exemptions claimed. The Commissioner emphasises that a refusal notice should clearly state, in relation to each exemption claimed, why it applies to the particular information in question.

79. In addition, when addressing the balance of the public interest in the refusal notice, the public authority cited an argument in favour of the maintenance of the exemptions under the heading “*exemption provisions*”, stating that the fact of multiple exemptions having been applied constitutes a valid public interest argument in favour of the maintenance of the exemptions. The Commissioner has also come across a number of other instances where police forces have cited this argument.
80. The Commissioner would stress to all police forces that this argument does not carry weight. That another exemption is believed to be engaged has no bearing on considering where the balance of the public interest lies in connection with any single exemption. Consideration of the balance of the public interest for each qualified exemption is a separate test to whether the exemption is engaged, and the fact that multiple exemptions have been cited is of no relevance to this test.
81. As noted in the chronology section of this notice, following the Commissioner’s letter of 16 November 2007 to the public authority, it became apparent that ACPO was involved in the process of preparing a response to this letter. The involvement of ACPO in this case raised two main issues which it will be important to ensure do not recur in any future cases involving police forces.
82. Firstly, responsibility for communicating with the Commissioner’s office. This lies with the police force to which the request was made; it does not lie with ACPO. In the early stages of this case there appeared to be some uncertainty on the part of the public authority as to whether it should communicate with the Commissioner’s office, or whether this would be done on its behalf by ACPO. Whilst it is appreciated that there will be cases where police forces wish to consult with ACPO about the issues raised, the responsibility to comply with the Act remains with the police force.
83. Secondly, the involvement of ACPO appeared to be the cause of delay. The substantive response to the Commissioner’s letter of 16 November 2007 was dated 26 June 2008. As noted above, the Commissioner is aware that police forces will wish to consult with ACPO about the issues raised in some cases and

welcomes this where this leads to an improvement in the quality of the handling of information requests by police forces. However, it must be ensured that the involvement of ACPO in any future cases is not the cause of unnecessary or extensive delay.

Failure to comply

84. 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

85. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk

86. Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 20th day of January 2009

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

Section 1

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.”

Section 10

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 12

Section 12(1) provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

Section 17

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.”

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.”

Section 30

Section 30(1) provides that –

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

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-

(i) whether a person should be charged with an offence, or
(ii) whether a person charged with an offence is guilty of it,

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or

(c) any criminal proceedings which the authority has power to conduct.”

Section 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.”

Section 31

Section 31(1) provides that –

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

(a) the prevention or detection of crime,
(b) the apprehension or prosecution of offenders,
(c) the administration of justice”

Section 38

Section 38(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to-

- (a) endanger the physical or mental health of any individual, or
- (b) endanger the safety of any individual.”