

Freedom of Information Act 2000 (Section 50)

Decision Notice

Dated 9 October 2006

Public Authority: Devon & Cornwall Constabulary
Address: Police Headquarters
Middlemoor
Exeter
Devon EX2 7HQ

Summary Decision and Action Required

The Commissioner's decision in this matter is that the Devon & Cornwall Constabulary (the "Constabulary") has dealt with the complainant's request in accordance with Part I of the Act and therefore, the Commissioner does not require it to take any action.

1. Freedom of Information Act 2000 (the 'Act') – Applications for a Decision and the Duty of the Commissioner

1.1 The Information Commissioner (the 'Commissioner') has received an application for a decision whether, in any specified respect, the complainant's request for information made to the Public Authority has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000 (the 'Act').

1.2 Where a complainant has made an application for a decision, unless:

- a complainant has failed to exhaust a local complaints procedure, or
- the application is frivolous or vexatious, or
- the application has been subject to undue delay, or
- the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.

1.3 The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority.

2. The Complaint

2.1 On 12 March 2005, the complainant wrote to request the following information from the Constabulary in accordance with section 1 of the Act:

- i) a copy of the letter read out by Sgt. Hamilton to the complainant on 11

- March 2005.
- ii) a request for all of the original paperwork, records etc taken from the complainant (and others) on the day of the alleged criminal offence [corporate manslaughter] and subsequently (once neither the Coroner nor the inquest no longer requires it).
 - iii) copies of every single piece of correspondence between the Constabulary and the Crown Prosecution Service (the "CPS") relating to the matter of the alleged offence.
 - iv) details of all information held by Constabulary relating to the complainant (and a colleague).
- 2.2 The Constabulary responded to this request on 11 April 2005 by refusing the complainant access to the requested information under sections 30(1), 32 and 40(2) of the Act. The complainant was also advised that he may be entitled to some of the information under the Data Protection Act 1998 (the "DPA") and that his request had therefore been passed to the Data Protection Unit, which would contact him separately.
- 2.3 In a letter dated 11 April 2005, the Data Protection Office of the Constabulary invited the complainant to pay a £10 fee and complete an application form in order for a subject access request to be processed.
- 2.4 The complainant requested an internal review of the decision to refuse his request under the Act by letter of 13 April 2005.
- 2.5 The internal review was carried out accordingly and the decision to maintain the exemptions was relayed to the complainant in a letter dated 27 April 2005.
- 2.6 Once this process was complete, the complainant contacted the Commissioner for a review of the Constabulary's decision.

3. Relevant Statutory Obligations under the Act

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 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 40 provides that –

- (2) Any information to which a request for information relates is also exempt information if–
 - (a) it constitutes personal data which do not fall within subsection (1), and
 - (b) either the first or the second condition below is satisfied.
- (3) The first condition is–
 - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene–
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
 - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

4. Review of the case

- 4.1 The Commissioner clarified the scope of the request for a review with the complainant. Initially, the complainant had been dissatisfied that the Constabulary had refused to supply all details of any information held about himself and another third party (request iv above), but after some initial discussions at the outset of the investigation, it emerged that the complainant had not at that time paid the £10 fee which the Constabulary had requested in its letter of 11 April 2005 from its Data Protection Office. It seems that this fee has now been paid and no further complaint was received from the complainant about this during the course of the investigation. In view of this, the investigation was solely limited to the refusal of the complainant's request for information under the Act (requests i – iii above)

- 4.2 The original request of 12 March 2005, contains a number of strands and these have each been investigated. During the course of the investigation, it emerged that part ii of the request is essentially a request to have property returned once the necessary investigations have been completed. The Commissioner has not investigated this strand of the request further than ascertaining that the property should be available to the complainant once due legal process has been observed. This should be following the completion of any investigation by the Health & Safety Executive (HSE).
- 4.3 In view of paragraphs 4.1 and 4.2 above, the Commissioner has focused the investigation on parts i and iii of the request.
- 4.4 Although section 32 of the Act was originally used to exempt the information, the Constabulary did not seek to rely upon this exemption during the course of the investigation. Following a letter of 10 February 2006 in which the Commissioner provided his view on the application of this exemption, the Constabulary did not pursue this matter. Instead, it focused the response to a full explanation as to the validity of the section 30 and 40 exemptions.
- 4.5 In reaching this decision, all relevant information has been considered including all of the original correspondence created during the course of the request and the additional submissions from both parties. As part of the investigating process, the Commissioner has reviewed the withheld information and consulted a number of relevant internal sources.

5. The Commissioner's Decision

- 5.1 The Commissioner's decision in this matter is that the Constabulary has dealt with the Complainant's request in accordance with the requirements of Part I of the Act.

Section 30(1)(a)

- 5.2 The Constabulary applied an exemption under Section 30 stating that the information requested is held by the authority for the purpose of any investigation which the public authority has a duty to conduct with a view to it being ascertained whether a person should be charged with an offence or whether a person is guilty of an offence. This exemption is 'class-based' and it is not therefore necessary to establish whether prejudice would be caused by disclosure in order to engage the exemption.
- 5.3 In coming to the decision to apply section 30(1)(a) to the requested information, the Constabulary stated that the documents covered by part i) and iii) of the request above had been used in an investigation into an alleged offence of corporate manslaughter, as well as lesser charges. The investigation had taken place with a view to ascertain whether a person or persons – including, but not limited to the complainant – should be charged with an offence.

- 5.4 When providing an explanation of the reason behind the application of the section 30 exemption, the Constabulary undertook what they described as a “Harm Test”. As noted above, the exemption under section 30 does not require a consideration of the prejudice that may arise from disclosure of the information. However, some of the points raised during the application of the “Harm Test” are relevant when considering the public interest and they have been taken into account accordingly (see section entitled “The Public Interest” below).
- 5.5 Having seen the requested information covered by parts i) and iii) of the request, and taking into account the submissions of both the Constabulary and the complainant, the Commissioner is satisfied that the exemption applied under Section 30(1)(a) is appropriate. In other words, the requested information has been held at some point by the Constabulary with a view to establishing whether a person or persons should be charged with an offence. Accepting that this is the case, the Commissioner has gone on to consider the application of the public interest test.

The Public Interest

- 5.6 A number of factors have been considered in determining whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the requested information. These have all been thoroughly examined and appropriate advice sought where necessary. The various factors are set out in detail below.

For disclosure

- 5.7 The Commissioner recognises that there a number of factors in favour of disclosure. Disclosing parts i) and iii) of the requested information would, for instance, allow the public to have a greater understanding of the current justice system and the relationship between police authorities and the CPS. It is likely that a greater familiarity with the work of these organisations would provide the public with an insight into their obligations and duties, while highlighting any problems they face in trying to carry these out. If the public had a greater understanding of these issues, it is probable that they would be able to more accurately assess the effectiveness of the current system. On the one hand, if this were proven to be inefficient, informed public opinion would have a greater chance of amending the system, while on the other hand a transparently successful process would increase trust and confidence in the authorities' ability to satisfactorily carry out their duties.
- 5.8 Disclosing the requested information would also increase the accountability of police authorities and the CPS. Where such information reveals the effectiveness of the activities of police authorities, this would allow the public to better assess whether authorities have followed the proper procedures, for example during the course of an investigation. If it were, for example, revealed that an investigation had been compromised by the actions of a police force or that the chances of a successful prosecution had been reduced, the authority in question could be more easily held to account where information about the investigation was freely available. This would assist in informing the debate as to whether the best use of

public money was being made. As the topic of policing is regularly debated in political circles and the media, there must be a strong public interest in allowing access to any information which provides the public with an opportunity to participate in this debate.

- 5.9 The Constabulary submitted that while an argument in favour of disclosure to ensure justice for an individual was important, the complainant was not, in this case, prejudiced by the refusal to provide the requested information under the Act. This was because some or all of the information may be available by other means, such as under the DPA, by order of a court or via the Independent Police Complaints Commission (IPCC). The Commissioner cannot accept this argument when considering the section 30 exemption because the Act already provides an exemption for information which is 'reasonably accessible by other means' (section 21). In order for this exemption to apply however, the Commissioner would expect evidence that requested information was indeed 'reasonably accessible'. In this case, the bald assertion that information may be available is inadequate and therefore this particular argument has been dismissed.
- 5.10 Despite the assertion in the previous paragraph, the Constabulary does appear to have taken into account the public interest in disclosure where release of the requested information would potentially allow the public to assess whether justice to an individual was served. In this case, the complainant has an interest in obtaining information about the nature of the investigation and disclosure of the information in question may improve his understanding of the events. It is clear that there must be a public interest in allowing individuals access to this kind of information to assess whether justice is being done. Further, there may be a wider public interest in releasing information in which someone has a personal interest. For example, information which showed evidence of police malpractice may be of both personal interest to the individual making the request as well as wider public interest in demonstrating that an authority had not acted properly.

For withholding the information

- 5.11 All the factors in favour of disclosure must be balanced against the public interest in maintaining the exemption. Again, there are a number of arguments which are relevant and these are dealt with below.
- 5.12 The Constabulary has made representations that the integrity of the prosecution process and the relationship between the CPS and police authorities would be harmed by release of the requested information. The relationship between these organisations is well-established and there are procedures and statutes laid down under which both operate. There is a clear public interest in having an effective system for administering justice and this is reviewed by the government of the day from time to time, with necessary procedural and statutory amendments put in place to ensure the effectiveness of the system.
- 5.13 The Commissioner has considered this issue and believes that the relationship between the bodies may be harmed in that the submissions between the parties may become less frank if they were subjected to public scrutiny. Discussions about the chances of a successful prosecution will be frank in order to ensure that

the relevant factors are taken into account. Were such discussions to be conducted in a more public manner, it is likely that the exchanges would become less candid, thereby making it inevitable that the effectiveness of the current system would be harmed. As stated above, the Commissioner considers that there is a strong public interest in the effectiveness of the current justice system being maintained. As disclosure would be likely to prejudice this, this is a strong argument in favour of maintaining the exemption.

- 5.14 Having reviewed the information in question, the Commissioner believes that the information contained in the documents could provide useful information about the criteria for obtaining a successful prosecution. While this was acknowledged as a factor in favour of disclosure, it could also provide useful information to those involved in criminal practices. Learning more about the evidence required to obtain a successful prosecution would allow criminals an insight into the operations of the CPS and the police authorities. This would likely prove to be a useful resource in trying to avoid criminal charges and therefore reduce the number of successful prosecutions. It is evidently in the public interest for those committing criminal offences to be successfully prosecuted so that law and order is maintained. As disclosure is likely to hinder this, there is a strong public interest in withholding the information.
- 5.15 It is recognised that release of this kind of information may involve disclosing details of people who were investigated by a police authority but were cleared of any wrongdoing. Releasing details of such investigations may harm the reputations of those who were investigated and exonerated. To prevent the assumption of guilt by association, there would be a strong public interest in maintaining the exemption to protect this class of information and the principle of justice in the UK that one is 'innocent until proven guilty'.
- 5.16 In view of the above, the Commissioner concludes that the public interest in maintaining the exemption outweighs the public interest in disclosure. Ensuring the proper administration of justice is of great importance to society and the potential damage to the functions of the Constabulary and the CPS outweigh the factors in favour of disclosure. The Commissioner does however recognise that the balance of the public interest will change over time, as disclosure would be less likely to affect future investigations where, for example, standards of proof and investigating techniques have changed.

Section 40

- 5.17 Having determined that the exemption applied under section 30(1) was validly used to withhold the requested information, the Commissioner has not gone on to consider the validity of the exemption applied under section 40 of the Act

Related matters

- 5.18 The Constabulary submitted that, at the time the request was made, there was an ongoing investigation into events surrounding the alleged criminal offence. The Coroner had yet to perform an inquest and there was also the reasonable

prospect of an investigation by the HSE. This was confirmed by the complainant, so the Commissioner is satisfied that there was an investigation (or investigations) ongoing when the request was made.

- 5.19 The information covered by parts i) and iii) of the request may, if disclosed, therefore be prejudicial to the ongoing investigation by the Coroner (now complete) and the HSE. If the section 30 exemption were found to be invalid, then in the alternative an exemption under section 31 may be appropriate in respect of this particular information. At the time the request was made, disclosure of the requested information would be likely to prejudice the Coroner's ongoing investigation and any future investigation by the HSE. The Commissioner has not considered this point in detail given that the exemption under section 30 has been found to be valid. However, he acknowledges some of the factors highlighted by the Constabulary to withhold the requested information may be relevant if a section 31 exemption were to be applied, though it is important to note that the arguments contained in the next three paragraphs have not been taken into account when assessing the balance of the public interest in relation to section 30.
- 5.20 The information contained within the documents relates to the police investigation into the alleged corporate manslaughter and contains the views and advice of the CPS. It is likely that disclosure of the requested information (and the subsequent release of details of the investigation and the views of the CPS such as evidence found, the offences that were considered and the reasons why they were considered) could adversely affect the impartiality of the Coroner's inquest and the HSE's investigation, by allowing external influences the opportunity to try and influence the decision-making process.
- 5.21 There is an inherent public interest in the current investigations process working effectively. Given both bodies' considerable experience in conducting such investigations, it must be presumed that they are aware of the information and evidence that they require to thoroughly investigate a particular matter. Further, both organisations have a history of operating in an independent and impartial manner, again without being subject to pressure from external sources. There is a strong public interest in continuing to allow the organisations a space in which to reflect and reach considered decisions so that they can continue to operate effectively.
- 5.22 So, allowing information into the public domain which may enable third parties to exert pressure on the process may reduce the ability of the Coroner and the HSE to operate independently. Further, it may prejudice the ability of those who were investigated to be treated impartially, as information released about them may unduly influence the current investigations. As there is a strong public interest in the current investigatory process working efficiently, there must also therefore be a strong interest in protecting this process by maintaining the exemption.
- 5.23 The Constabulary has alluded to the fact that legal professional privilege may attach to the advice provided by the CPS to the Constabulary. The Commissioner has sought some legal advice that suggests that privilege may attach to the information given that there was a reasonable prospect of litigation

occurring. However a possible exemption based on section 42 of the Act has neither been further investigated nor a conclusion reached in view of the finding that the section 30 exemption has been validly applied.

5.24 The Commissioner is aware that the letter which constitutes request i) has been read out to the complainant. There is a dispute as to whether the letter was read out verbatim as the complainant alleges or whether this was summarised as the Constabulary claims. There is not enough evidence to decide which of these claims is correct, but this aspect of the case is largely irrelevant. Disclosure of information under the Act is considered to be to the public at large rather than to individuals and therefore even if the complainant has been told what information is contained in the letter, this information cannot be considered to already be in the public domain.

6. Action Required

6.1 The Commissioner does not require the Constabulary to take any steps in this matter.

7. Right of Appeal

7.1 Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "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@dca.gsi.gov.uk

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

Dated the 9th day of October 2006

Signed

Reference: FS50073130



Information Commissioner's Office

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