

## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Date: 31 March 2011**

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

### **Summary**

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The complainant requested information concerning 'Executive Authority' to carry out surveillance in cases where misconduct by employees of the public authority is suspected. The public authority refused to confirm or deny whether it held information falling within the scope of this request and cited the exemptions provided by the following sections of the Act: 30(3) (information held for the purposes of an investigation), 31(3) (law enforcement), 40(5) (personal information) and 44(2) (statutory prohibitions to disclosure). The Commissioner finds that none of these exemptions were engaged and the public authority is now required to provide to the complainant confirmation or denial of whether relevant information is held. The Commissioner also finds, however, that the public authority failed to comply with the requirements of sections 17(1)(c) and 17(3)(a) of the Act in its handling of the request.

### **The Commissioner's Role**

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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**

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2. The complainant made the following information requests on 4 March 2010:

*"In the last 3 years, how many times has an 'executive authority' been authorised to conduct surveillance against police officers.*

*Please provide details of the misconduct alleged and the outcome of each operation with regards to any sanction imposed."*

3. The response to these requests was dated 16 March 2010. The public authority refused to confirm or deny whether it held information falling within the scope of the requests, with the exemptions provided by the following sections of the Act cited: 40(5) (personal information), 30(3) (information held for the purposes of an investigation), 31(3) (law enforcement) and 44(2) (statutory prohibitions). The refusal notice included very little explanation as to why it was believed that these exemptions were engaged, and none as to why the balance of the public interest was believed to favour the maintenance of sections 30(3) and 31(3).
4. The complainant responded on 17 May 2010 and asked the public authority to carry out an internal review. The response giving the outcome of the internal review was dated 11 June 2010 and upheld the refusal to confirm or deny under the exemptions cited previously. No reasoning for this outcome of the review was given.

## **The Investigation**

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### **Scope of the case**

5. The complainant contacted the Commissioner's office on 11 June 2010. The complainant indicated that he did not agree with the reasoning given by the public authority for refusing to confirm or deny whether it held the information requested.

### **Chronology**

6. The Commissioner contacted the public authority in connection with this case on 6 October 2010. The public authority was asked to respond with background as to what it understood the complainant to

mean by 'executive authority' as it was used in the wording of the request and with further explanation for the exemptions cited.

7. The public authority responded on 29 October 2010. Its explanation of 'executive authority' is set out below. The public authority also provided further explanation of its reasoning for the exemptions cited.

## **Background**

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8. The public authority provided the following description of 'Executive Authority':

*"Executive Authority is essentially an authority for surveillance where no crime has been committed but where the force believes that an officer or member of staff may be guilty of misconduct. It is a form of surveillance where the bar criteria for RIPA – ie. the committal of a criminal offence – has not been reached but where intelligence-led information leads the force to believe that a breach of Police Regulations has occurred."*

9. Further information was provided about Executive Authority in a document supplied to the Commissioner's office by the public authority that sets out the procedure for the use of Executive Authority. This also states that Executive Authority to carry out surveillance of staff members is used in cases of misconduct short of criminal conduct. It is made clear that, where criminal conduct is suspected, authorisation to carry out surveillance must be sought via the Regulation of Investigatory Powers Act.

## **Analysis**

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### **Exemptions**

#### **Section 40**

10. The public authority cited section 40(5)(b)(i). This provides an exemption from the duty to confirm or deny where to do so would involve the disclosure of the personal data of any individual aside from the requester and where the disclosure of that personal data would breach any of the data protection principles. This is a class-based exemption; if the confirmation or denial in question has the effect

described in section 40(5)(b)(i), the exemption is engaged. Consideration of this exemption is a two-stage process: first, confirmation or denial in response to the request must disclose personal data; and secondly, this disclosure must be in breach of at least one of the data protection principles.

11. Covering first whether confirmation or denial in response to the complainant's requests would involve the disclosure of personal data, section 1(1) of the Data Protection Act 1998 provides the following definition of personal data:

*“personal data means data which relate to a living individual who can be identified-*  
*(a) from those data, or*  
*(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller”.*

12. As the request does not specify information relating to any individual, it is clear that confirmation or denial alone would not disclose information that identifies any individual. However, part (b) of the DPA quote above makes clear that information can constitute personal data if it can be combined with any other information in the possession of the data controller to enable identification of any individual. Confirmation or denial via the Act would be made into the public domain. This means that the question here is whether the confirmation or denial could be combined with other information in the possession of any person to enable identification of an individual.
13. The argument of the public authority is based on the limited time frame specified by the complainant within the request and the fact that the use of Executive Authority is rare. The public authority argues that those with knowledge of events within the public authority, such as employees, would have existing knowledge of events relating to other employees of the public authority that would enable them to link the confirmation or denial to individuals. For example, an employee of the public authority may be aware of other individuals who have been disciplined or dismissed for misconduct during the period specified by the complainant and this may mean that confirmation or denial could be linked to those individuals.
14. Whilst the Commissioner considers it conceivable that the situation described by the public authority could occur, he does not, however, accept that this explanation establishes to an appropriate level of certainty that confirmation or denial would involve the disclosure of personal data. Overall, this argument does not make clear that

confirming whether or not Executive Authority has been used over a three year period would lead to the identification of an individual.

15. The approach of the Commissioner to this exemption is that there needs to be a degree of certainty that confirmation or denial would reveal information about an identifiable individual for it to be engaged. In the absence of a sufficient degree of certainty in this case, the conclusion of the Commissioner is that the exemption provided by section 40(5)(b)(i) is not engaged. Having reached this conclusion at this stage, it has not been necessary to go on to consider if disclosure would result in a breach of any of the data protection principles.

### Sections 30

16. The public authority cited section 30(3), which provides an exemption from the duty to confirm or deny in relation to information that conforms, or would if it were held, to any of the classes described in sections 30(1) and 30(2). Consideration of this exemption is a two stage process; first the exemption must be engaged as a result of the request being for information that would fall within any of the relevant classes. Secondly, this exemption is subject to the public interest, meaning that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
17. The public authority specified that it believed that, if it held any information that fell within the scope of the requests, this information would conform to the classes described in subsections 30(1)(a), 30(1)(b), 30(1)(c) and 30(2). For information to fall within the class described in any of these exemptions, it must have been held for the purposes of a *criminal* investigation. This is made clear in the Commissioner's published guidance on section 30<sup>1</sup>.
18. The Commissioner considers it clear from the background description provided by the public authority about Executive Authority, and from the document outlining the procedure for this that the public authority also provided, that Executive Authority is used specifically where the misconduct in question falls short of being criminal. Whilst the public authority also argued that it may later emerge that the misconduct in question was criminal, the procedure document makes clear that this would mean that the use of Executive Authority would be inappropriate

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[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/s30\\_exemption\\_for\\_investigations\\_and\\_proceedings\\_v3.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/s30_exemption_for_investigations_and_proceedings_v3.pdf)

and that in such circumstances authorisation for surveillance should be sought through RIPA.

19. Given that it appears clear that Executive Authority was devised and is used specifically for situations where misconduct short of criminal conduct has been alleged, the conclusion of the Commissioner is that any information held by the public authority falling within the scope of the complainant's requests could not be accurately characterised as having been held for the purposes of a *criminal* investigation.
20. On section 30(2) the Commissioner also notes that, whilst this provides an exemption for information held for the purposes of an investigation *and* that relates to the obtaining of information from confidential sources, the public authority did not address how any information falling within the scope of the request would conform to the description of having been obtained from confidential sources.
- 21 The conclusion of the Commissioner is therefore that the exemption provided by section 30(3) is not engaged. Having reached this conclusion at this stage, it has not been necessary to go on to consider the balance of the public interest.

### **Section 31**

22. The public authority cited section 31(3), which provides an exemption from the duty confirm or deny where to do so would, or would be likely to, prejudice any of the matters specified in section 31(1). Consideration of this exemption is a two stage process; first the exemption must be engaged as a result of relevant prejudice being at least likely to result through disclosure. Secondly, this exemption is qualified by the public interest.
23. The public authority specified that it believed that prejudice would, or would be likely to, occur to the matters mentioned in sections 31(1)(a) and 31(1)(b) through confirmation or denial. Section 31(1)(a) refers to crime and 31(1)(b) refers to offenders. The view of the Commissioner is, therefore, that the exemption provided by section 31(3) is not engaged for similar reasons to those given above in connection with section 30(3); as any information held by the public authority falling within the scope of the request would not relate to criminal investigations, it is not sustainable to argue that prejudice to the matters mentioned in sections 31(1)(a) and 31(1)(b) would, or would be likely to, be prejudiced through confirmation or denial in response to the complainant's request. As this conclusion has been reached, it has not been necessary to go on to consider the balance of the public interest.

## **Section 44**

24. The public authority has cited section 44(2) and stated that it believed that to confirm or deny whether it held information falling within the scope of the requests would constitute or be punishable as a contempt of court. This is a class based exemption and is not subject to the public interest. This means that if the confirmation would have the result argued by the public authority, the exemption would be engaged.
25. In explanation for the citing of this exemption, the public authority stated that the complainant specified a period of three years prior to the requests and so any information held relevant to the requests could relate to future court proceedings. Aside from whether it is accurate to state that any information falling within the scope of the requests could relate to future court proceedings, the public authority did not explain how disclosure of a confirmation or denial in response to the complainant's requests would have constituted or been punishable as a contempt of court in respect to any such proceedings. In the absence of an explanation on this point, the conclusion of the Commissioner is that the exemption provided by section 44(2) is not engaged.

## **Procedural Requirements**

### **Sections 1 and 10**

26. In failing to provide confirmation or denial as to whether it held relevant information within 20 working days of receipt of the request on the grounds of exemptions that the Commissioner now finds were not engaged, the public authority breached the requirements of sections 1(1)(a) and 10(1).

### **Section 17**

27. In failing to adequately explain at either refusal notice or internal review stage why the exemptions cited were believed to be engaged, or, in relation to the qualified exemptions cited, why the balance of the public interest in the maintenance of the exemptions was believed to outweigh the public interest in disclosure, the public authority failed to comply with the requirements of sections 17(1)(c) or 17(3)(a).

## **The Decision**

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28. The Commissioner's decision is that the public authority did not deal with the request in accordance with the Act in that it breached sections 1(1)(a) and 10(1) in refusing to confirm or deny whether the requested information was held on the basis of exemptions that the Commissioner now finds were not engaged. The Commissioner has also found that the public authority failed to comply with the procedural requirements of sections 17(1)(c) and 17(3)(a) in its handling of the request.

## **Steps Required**

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29. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Provide to the complainant confirmation or denial as to whether information falling within the scope of the request is held.

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

## **Failure to comply**

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30. 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.

## **Other matters**

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31. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. As referred to above at paragraph 4, when giving the outcome to the internal review, the public authority gave no reasoning for concluding that the refusal of the request should be upheld. Paragraph 39 of the section 45 Code of Practice states the following:

*"The complaints procedure should provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about the where the public interest*



*lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue."*

32. The internal review response from the public authority did not reflect that a reconsideration of the request conforming to the description above took place. The Commissioner would advise the public authority that a response giving the outcome to an internal review should state the reasoning for why the initial refusal was upheld and should reflect that there has been a genuine reconsideration of the request.

## Right of Appeal

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33. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

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

**Dated the 31<sup>st</sup> day of March 2011**

**Signed .....**

**Gerrard Tracey  
Principal Policy Adviser FOI**

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

## **Legal Annex**

### **Section 17(1) provides that -**

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies."

### **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 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 30(3) provides that –**

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

**Section 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".

**Section 31(3) provides that –**

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1)."

**Section 40(5) provides that –**

"The duty to confirm or deny-

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either-

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

**Section 44(1) provides that –**

"Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

(a) is prohibited by or under any enactment,

(b) is incompatible with any Community obligation, or

(c) would constitute or be punishable as a contempt of court."

**Section 44(2) provides that –**

"The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1)."