

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 November 2011

Public Authority: The Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested details of any 'section five' authority issued by the Home Office to the Association of Chief Police Officers (ACPO). Such an authority would allow it to possess, purchase or acquire firearms. The Home Office refused to confirm whether or not it had issued such an authority to ACPO on the basis that to do so would be likely to prejudice the prevention or detection of crime.
2. The Commissioner agrees with the Home Office's decision and has concluded that it does not need to confirm whether or not it holds the requested information.

Request and response

3. On 8 April 2011 the complainant submitted the following request to the Home Office:

'(1) Details (if any) of a Section Five Home Office Authority issued to The Association of Chief Police Officers (ACPO).

(2) A copy of this Authority (if it exists) detailing the items that The Authority authorises ACPO to possess, purchase or acquire.

(3) Date of issue of said Authority (if it exists).

(4) Note this request refers to The Association of Chief Police Officers of England, Wales and Northern Ireland.¹

4. The Home Office responded on 6 May 2011 and confirmed that it held the requested information but explained that it was exempt from disclosure on the basis of sections 31(1)(a), 31(1)(c) – the law enforcement exemptions – and sections 38(1)(a) and 38(1)(b) – the health and safety exemptions - of FOIA.
5. The complainant contacted the Home Office on 11 May 2011 and asked for an internal review of this response.
6. Following an internal review the Home Office contacted the complainant on 21 June 2011 and explained that the response issued in the refusal notice was incorrect. Although the refusal notice had confirmed that information was held this was simply a generic reference to the fact that the Home Office holds information about section 5 authorities – it was not a direct comment on whether or not information was held relating to ACPO. The correct response should have been to refuse to confirm or deny whether information was held. The internal review response therefore explained that the Home Office was now seeking to rely on section 31(3) to refuse to confirm or deny whether or not it held the requested information. The response explained that sections 38(2) and 24(2) – the national security exemption - should also have been cited if relevant.

Scope of the case

7. The complainant contacted the Commissioner on 1 July 2011 in order to complain about the way his request for information had been handled. The complainant explained that he did not accept that the Home Office was entitled to refuse to confirm or deny whether it held the information that he had requested.

¹ Under section 5 of the Firearms Act 1968 any individual or organisation which wishes to possess, purchase, acquire, manufacture, sell or transfer prohibited weapons and/or ammunition must apply to the Home Secretary for authority to do so.

Reasons for decision

8. The right of access to information under FOIA is provided by section 1(1) of the legislation which states 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.”

9. The right of access is therefore in two parts – firstly the right to be told whether information is held; and secondly, if information is held, the right to be provided with that information. Both parts of the right of access are subject to the exemptions contained within FOIA. That is to say, in responding to a request a public authority can choose to confirm that it holds the information – and thus comply with its duty at section 1(1)(a) – but refuse to provide the information itself on the basis that a particular exemption means that it does not have to comply with the duty contained at section 1(1)(b). Alternatively, a public authority could simply refuse to comply with the duty contained at section 1(1)(a) of the Act on the basis that one of the exemptions contained in the Act means that it is exempt from having to do so.
10. In submissions to the Commissioner the Home Office explained that it was seeking to rely on the exemptions contained at on sections 31(3), 38(2) and 24(2) of FOIA as a basis to refuse to confirm whether or not it held the requested information. The Commissioner has initially considered the Home Office’s application of section 31(3).

Section 31 – law enforcement

11. Section 31(3) states 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)‘.

12. The particular subsection which the Home Office believes is relevant to this case is that contained at section 31(1)(a) which provides an exemption for information if its disclosure would, or would be likely to, prejudice the prevention or detection of crime.

13. In order for a prejudice based exemption, such as section 31(3), to be engaged the Commissioner believes that three criteria must be met:
- Firstly, the actual harm which the public authority alleges would or would be likely to occur if it confirmed whether or not it held the requested information has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between confirming whether or not the requested information is in fact held and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met. In the circumstances of this case confirming whether or not information is held would be likely to result in prejudice or confirming whether or not information was held would result in prejudice. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.

The Home Office's position

14. The Home Office has argued that the interests protected by section 31(1)(a) would be prejudiced if information were disclosed which allows for a picture to be built up of which organisations, companies or individuals may, or may not, be in possession of section 5 authorities. This because such information would weaken the ability of legal authorities, i.e. the police, to fulfil their goals of preventing or detecting crime.
15. Although the general public may assume that a section 5 authority would have been issued to an individual or organisation, it is important that any assumptions remain just that, i.e. an assumption rather than a statement of fact. If those who aim to commit crime or disrupt the prevention of crime were able to pinpoint which individuals or organisations were in possession, or not, of section 5 authorities and, therefore, were or were not authorised to be in possession of firearms, they would be able to direct any criminal activities to specific locations where they would be able to avoid police forces which are authorised to carry guns whilst on duty or target locations where firearms were stored. The Home Office argued that the increasing role of gun related crime in the UK strengthened the requirement to withhold any information that would help in the creation of a picture with regard to the locations of firearms.

16. Therefore the Home Office explained that it was its policy to withhold information about section 5 authorities on a consistent basis through the use of section 31(3) of FOIA.
17. In submissions to the Commissioner, the Home Office acknowledged that one of the arguments set out in the internal review, namely that releasing information about weapon authorisations held by ACPO – if indeed such information was even held – would allow criminals to construct a more accurate picture of police operations and capabilities, was incorrect in its focus. The Home Office noted that as ACPO is not a police force informing the public whether or not it had any section 5 authorities would not specifically have an impact on the public's knowledge of police capabilities. However, it argued that the public do not generally recognise the difference between ACPO's role and that played by individual police forces. In maintaining the consistent use of section 31(3) with relation to any police force, or body such as ACPO which is involved with the police, the Home Office believed that the assumptions taken by those with an interest in firearms would remain as assumptions rather than be based upon specific knowledge.

The Commissioner's position

18. With regard to the first criterion the Commissioner accepts that the harm the Home Office envisages occurring if it confirmed whether or not the requested information was held clearly falls within the scope of the exemption contained at section 31(1)(a).
19. With regard to the second criterion the Commissioner accepts that the ability of the authorities, primarily the police but not exclusively so, to prevent and detect crime could be impaired if the identity of individuals or organisations who had been issued with section 5 authority was placed into the public domain. This is on the basis that if criminals could identify locations where firearms were held they may attempt to gain access to them. The Commissioner accepts that the nature of this prejudice is clearly one that may be described as of substance.
20. However, the Commissioner does not accept that prejudice could occur in the second way described by the Home Office. In the Commissioner's opinion confirming whether or not information is held in response to this request - and thus also complying with the requirements of section 1(1)(a) for all similar requests in the future – does not risk revealing the firearms capabilities of particular police forces to the extent that their ability to prevent or detect crime could be harmed. That is to say, individuals will establish which police forces do not have firearms capabilities and will then direct their criminal activities to the geographical area covered by such forces. That is to say, the Commissioner notes that for the vast majority of police forces, if not all,

details are already in the public domain which confirm that they have officers equipped with firearms. In many cases such information is in fact available on the forces' own websites.² Thus the Commissioner believes that a mosaic type picture of the operational firearms capabilities of police forces – simply in terms of whether or not police forces actually use firearms - is already effectively in the public domain.

21. In making this point the Commissioner is not rejecting the importance of a public authority adopting a consistent neither confirm nor deny response when receiving similar requests. Furthermore, he accepts the Home Office's point that there is a value in the public's assumptions about whether an organisation has been issued with a section five authority remaining simply assumptions. However, the Commissioner is of the view that despite a consistent response to such requests being the default position, the Home Office should still consider whether a neither confirm nor deny response is a logical one when taking into account the information that has already been officially disclosed and placed into the public domain. Given the information that is already in the public domain about individual police forces use of firearms, the Commissioner does not accept that there is a causal link between confirming whether individual police forces have been given section 5 authorities and any prejudice to the prevention or detection of crime.
22. The Commissioner would also reject the Home Office's suggestion that the public's lack of understanding about ACPO's role could lead it to be confused with a police force. In the Commissioner's opinion even a brief review of ACPO's website confirms that it is not a police force.³ Furthermore, the Commissioner does not accept that those individuals with criminal intentions who would use information disclosed under FOIA to identify the location of firearms would make such a similar mistake, especially not if they have gone to the trouble of using disclosures made under FOIA to identify the potential locations of firearms.
23. To summarise, the Commissioner accepts the Home Office's first line of argument that there is a causal relationship between confirming whether or not particular individuals or organisations have been granted section 5 authority and appropriate authorities ability to prevent and detect crime. However, does not accept such an argument in respect police forces. Furthermore, the Commissioner does not accept that there is a

² For example, <http://www.lincs.police.uk/Departments/Operations-Support/Roads-Policing-Unit.html>

³ <http://www.acpo.police.uk/Info/Whodoyouneedtocontact.aspx>

causal relationship between confirming whether individual police forces have been granted section 5 authorities and individuals intent on criminal activity then targeting the geographic areas covered by forces without such authorisations.

24. With regard to the third criterion, in submissions to the Commissioner the Home Office was not explicitly clear as to which threshold of likelihood it was seeking to rely on. The Commissioner has therefore simply considered whether the lower threshold is met. He has concluded that it is for the following reasons:
25. It could be argued that if the Home Office simply complied with the requirements of section 1(1)(a) in respect of this request, then the likelihood of prejudice occurring is one that is not necessarily anything more than hypothetical or remote (depending of course as to whether ACPO has in fact been issued with any section 5 authorities). However, the Commissioner has concluded that the threshold is met because of the need in circumstances such as this for a public authority to maintain a neither confirm not deny response on a consistent basis.
26. For example, if ACPO had not in fact been issued with a section 5 authority the Home Office could confirm this in response to this request and it would not therefore be revealing that a particular organisation held firearms. However, if the Home Office received a further request about a different organisation or individual which had in fact been issued with a section 5 authority, but adopted a neither confirm not deny response to this further request, by inference it would in effect be confirming that this organisation had been granted such an authority. Therefore the Commissioner accepts that a uniform approach has to be adopted in responding to all requests of this nature - namely neither confirming nor denying whether a particular organisation or individual had been issued with a section 5 authority. If such an approach is not adopted then over time, as the Home Office envisages, a picture of which organisations or individuals may hold firearms could be built up through the mosaic effect of numerous requests. The Commissioner does not consider that this would be a particular problem in terms of particular police forces for the reasons discussed above. However, he does accept that this is problem with regard to the Home Office adopting a neither confirm not deny in respect of the types of organisations, such as ACPO, who on the face of it, the public would not be clear, or aware, or able to establish whether they had in fact been issued with section 5 authorities. The Commissioner therefore accepts that section 31(3) is engaged.

Public interest test

27. Section 31 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption to confirm whether or not the requested information is held outweighs the public interest in complying with the duty contained at section 1(1)(a) of FOIA.

Public interest arguments in favour of maintaining the exemption

28. The Home Office argued that it was clearly in the public interest that information was not disclosed which led to the authorities' ability to prevent and detect crime being impaired. It was not simply in the public interest that those intent on criminal activities could, through a series of FOI requests, establish at which locations firearms were likely to be kept.

Public interest arguments in confirming whether or not the requested information is held

29. The Home Office acknowledged that there was an increasing desire for the public to have transparency with regard to how government works and what actions it takes in response to public and government concerns. Specifically, the public has an interest knowing what is being put in place to deal with levels of crime in general and particular types of crime.

Balance of public interest arguments

30. The Commissioner believes that significant weight needs to be given to maintaining the exemption because it is very clearly against the public interest that the authorities' ability to prevent and detect crime is harmed. Although the public may be interested to know whether ACPO has been granted a section 5 authority, the Commissioner does not believe that knowledge as to whether this is indeed the case would serve, to any great degree, any particular legitimate public interest. Complying with the requirements of section 1(1)(a) in respect of this request would simply reveal whether or not ACPO had been granted a section 5 authority. In contrast, confirmation as to whether information was in fact held would begin to undermine the Home Office's ability to maintain a neither confirm nor deny response in relation to future cases involving individuals or organisations where it is not clear whether they would have section 5 authority and thus have wider prejudicial implications as described above. The Commissioner is therefore satisfied that in the circumstances of this case the public interest in maintaining the exemption contained at section 31(3) outweighs the public interest in confirming whether or not the requested information is held.

31. In light of this conclusion the Commissioner has not considered the Home Office's reliance on section 24(2) and 38(2).

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

33. 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.

Signed

Lisa Adshead
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF