

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 13 August 2008

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

Summary

The complainant requested details of the make and model of any vehicles provided to the chief officers within the public authority and that are put to personal use. The public authority confirmed that two Assistant Chief Constables are provided with vehicles that are put to personal use. The public authority withheld the details of the make and model of these vehicles, relying upon sections 31(1)(a), (b), and (c) (law enforcement) and 38(1)(a) and (b) (health and safety). The Commissioner finds that these exemptions are not engaged and the public authority is required to disclose the information withheld. The Commissioner also finds that the public authority failed to comply with section 10(1) in failing to disclose information about the cost incurred through the provision of vehicles to chief officers within 20 working days of receipt of the request and section 17(1)(b) in failing to cite the relevant subsections of the exemptions relied upon.

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. The information request was dated 17 May 2006 and was worded as follows:
 - i. *"What arrangements do your Chief Police Officers have with their Police Authority for the provision of motor vehicles for their own personal use?"*

- ii. *"Please provide details of the cost to the Police Authority."*
 - iii. *"Please provide the make and model of any vehicles."*
3. The public authority responded to this on 5 June 2006. In response to the first part of the request, the public authority stated firstly that the Chief Constable does not use the vehicle provided to him for personal use. Secondly, it was confirmed that the Deputy Chief Constable is not provided with a vehicle for personal use. Thirdly, it was confirmed that the two Assistant Chief Constables are provided with vehicles for their personal use.
4. In response to the second part of the request, the public authority stated that the Police Authority does not incur any cost in relation to the private use of vehicles by Chief Police Officers.
5. In response to the third part of the request the public authority cited the exemptions provided by sections 31 (law enforcement) and 38 (health and safety). In connection with section 31, the public authority stated that the release of details that may allow identification of these vehicles may reduce the effectiveness of these vehicles when used for policing and thus may reduce the ability of the public authority to carry out its core function of law enforcement.
6. In connection with section 38, the public authority stated that disclosure may lead to it being possible to identify the vehicles in question as belonging to chief officers within the public authority. The public authority believed that this could lead to an increased likelihood of these vehicles and the chief police officers being targeted by criminals, members of the public, or terrorists.
7. The public authority went on to confirm that it believed that the public interest favoured the maintenance of the exemption. The public authority recognised an argument in favour of disclosure where this would increase understanding of how public money is spent, but felt that this was outweighed by the public interest in ensuring that the public authority could carry out its law enforcement role and in ensuring that the health and safety of the senior officers in question would not be endangered.
8. 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 20 July 2006. In apparent contradiction to the refusal notice, the public authority disclosed details of the cost of vehicles provided to chief officers in response to the second part of the request. The citing of sections 31 and 38 in response to the third part of the request was upheld.

The Investigation

Scope of the case

9. The complainant contacted the Commissioner initially on 14 August 2006. The complainant specified that his complaint related to the citing of sections 31 and 38 in response to the third part of his request. The complainant also stated that similar information had been disclosed by “...almost every other police force in the country”.
10. The wording of the request specifies Chief Police Officers. The public authority interpreted ‘Chief Police Officers’ as covering Chief, Deputy Chief and Assistant Chief Constables. The complainant has not questioned this interpretation of the request and the Commissioner is therefore satisfied that the public authority was correct in its interpretation of the request.
11. The Commissioner’s investigation has focussed on the citing of sections 31 and 38 in response to the third part of the request, save where the procedural breaches in the refusal notice and in the initial response to the second part of the request are recorded.

Chronology

12. The Commissioner contacted the public authority on 2 April 2008. The public authority was informed of the complaint and asked to respond with further information about the exemptions cited. Specifically, in connection with section 31, the public authority was asked to state which subsections of 31(1) were believed to apply and to explain in detail why and how it believed that the prejudice described in the subsections relied upon would occur. The public authority was also asked to explain in detail why it believed that the public interest favoured the maintenance of the exemption.
13. In connection with section 38, the public authority was asked to specify whether it believed that subsection 38(1)(a) (health) and/or subsection 38(1)(b) (safety) was applicable and explain how the endangerment in question would occur and why it would be likely as a result of disclosure here. The public authority was also asked to explain in detail why the balance of the public interest was believed to favour the maintenance of the exemption.
14. It was noted that the complainant refers to the Police Authority in his request. Given this, the public authority was asked to state whether it is likely that the Police Authority would hold information falling within the scope of the request. The public authority was further asked to provide to the Commissioner a copy of the information withheld from the complainant.
15. The importance of a full and detailed explanation as to why the exemptions cited were believed to apply was stressed. The public authority was advised that its arguments should be specific to the information in question and that the issue of why this information could not be disclosed despite a number of other police

forces having disclosed similar information should be addressed.

16. The public authority responded to this on 30 April 2008. The public authority specified that it believed subsections 31(1)(a), (b) & (c) and 38(1)(a) & (b) were applicable. On the issue of why these exemptions were considered to apply or why the public interest favoured the maintenance of these exemptions, the public authority provided no further argument to that given in the refusal notice. On the issue of what information may be held by the Police Authority, the public authority stated that it was unable to comment on this. The public authority provided to the Commissioner a copy of the withheld information.
17. Included within the withheld information were details of the make and model of vehicle provided to the Chief Constable. Previously, the public authority had informed the complainant that the Chief Constable is not provided with a vehicle that is put to personal use. The Commissioner contacted the public authority again on 7 May 2008 and asked that it clarify whether information relating to the make and model of the vehicle provided to the Chief Constable would fall within the scope of the complainant's request for information about vehicles provided to chief officers that are put to personal use. The public authority responded to this on 7 May 2008 and confirmed that the vehicle provided to the Chief Constable is not put to personal use and thus information about this vehicle falls outside the scope of the request.
18. On 6 May 2008, the complainant contacted the Commissioner with clarification of what had been disclosed to him by other police forces, in the form of an article produced by John Connor Press Associates Ltd. This showed that a number of police forces had disclosed to the complainant information showing the make and model of vehicles provided to chief officers.

Findings of fact

19. A number of police forces have disclosed to the complainant similar information to that requested here, including the make and model of vehicles provided to senior officers.
20. The information withheld from the complainant consists of the make and model of vehicle provided to two Assistant Chief Constables.

Analysis

Procedural matters

Section 10

21. In failing to disclose to the complainant the cost information in response to the second part of the request within 20 working days of receipt, the public authority breached section 10(1).

Section 17

22. In failing to cite the relevant subsections of 31(1) and 38(1) (which were 31(1)(a), (b) & (c) and 38(1)(a) & (b)) at the time of the refusal and in failing to remedy this at the internal review stage, the public authority failed to comply with the requirement of section 17(1)(b).

Exemption

Section 31

23. The stance of the public authority is that subsections 31(1)(a), (b) and (c) are engaged here, indicating that the public authority believes that disclosure would prejudice the prevention or detection of crime, the apprehension or prosecution of offenders and the administration of justice. Section 31 can be cited only by those public authorities with functions relevant to the processes described in sections 31(1) and/or (2). As the public authority in this case is a police force, it is clear that it does exercise the functions described in subsections 31(1)(a), (b) and (c).
24. The task of the Commissioner is to consider whether disclosure would, or would be likely to result in prejudice to these functions. If the conclusion is that the prejudice identified would be likely to occur, it is necessary to go on to consider whether the balance of the public interest favours the maintenance of the exemption. If it does not then the information should be disclosed regardless of the likelihood of prejudice.
25. In *Hogan v Oxford City Council & ICO* the Tribunal stated there were a number of steps in considering what is meant by would be likely to prejudice:

“(a) First, the applicable interest has to be identified. In this case, the prevention of crime.

(b) Second, the nature of the prejudice must be considered. The burden is on the decision maker to show a causal relationship between the disclosure (if it took place) and the prejudice, which must be “real, actual or of substance”. The disclosure is to the public as a whole and may not be made subject to any conditions on subsequent use. The Tribunal may take into account the intended use or motive of the applicant in looking at the issue of prejudice.

(c) Third, the question of “likelihood” needs to be considered. The chance

of the prejudice must be more than a hypothetical or remote possibility. Referring to Mumbly J in R (on the application of Lord) v. Secretary of State for the Home Department [2003] EWHC 2003 (Admin), there are two possible limbs on which a prejudice based exemption might apply. First, that the occurrence of prejudice to the specified interest is more probable than not, and secondly that there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not. In general terms, the greater the likelihood of prejudice, the more likely that the balance of public interest will favour maintaining whatever qualified exemption is in question”.

26. In addition to the case in Hogan the Commissioner has carefully considered a number of other Tribunal decisions where the issue of evidence of prejudice was considered. In *Reith v ICO and London Borough of Hammersmith and Fulham (LBHF)* the Tribunal found that the public authority had not provided evidence of such a link and that the exemption in question, s31(1)(g) in conjunction with s31(2)(c), was therefore not engaged. LBHF had relied upon its own parking enforcement expertise in support of its belief that prejudice would occur but had not provided evidence beyond this. The Tribunal considered that “[its] evidence is not independent, and being unsupported amounts to a bare assertion. Such examples as given by LBHF do not demonstrate anything more than an unsupported fear that disclosure might increase illegal parking.” However, in *England v ICO and London Borough of Bexley (LBB)* the Tribunal stated that it was impossible to provide “evidence of the causal link between the disclosure of the list [of empty properties] and the prevention of crime. That is a speculative task, and as all parties have accepted there is no evidence of exactly what would happen on disclosure, it is necessary to extrapolate from the evidence available to come to the conclusion about what is likely”
27. The Commissioner’s approach is that although unsupported speculation or opinion will not be taken as evidence of the likelihood of prejudice, neither can it be expected that public authorities must prove that something will happen if the information in question is disclosed. Whilst there will always be some extrapolation from the evidence available, the public authority must be able to provide some evidence (not just unsupported opinion) to extrapolate from. For the test of “would” rather than “would be likely to” this evidence will need to be stronger in order to support the higher test.
28. The public authority has argued that disclosure would mean that it would be more likely that the vehicles in question would be identified as police vehicles. The Commissioner has considered firstly whether disclosure would make it more likely that these vehicles could be identified as police vehicles. The complainant has argued that the information that he has requested, showing the make and model of the vehicles in question, would give insufficient detail to enable identification. Whilst it is the case that the complainant has not requested information that would directly enable identification of individual vehicles, such as registration details, it is reasonable to conclude that disclosure of the information requested here would make identification of the vehicles in question more likely than where no details of these vehicles is disclosed. In the Commissioner’s view, knowing the make and

model would be particularly useful if they were not common vehicles within the force.

29. Having accepted that disclosure of the requested information would make it more likely that the vehicles in question could be identified as police vehicles, the Commissioner has considered how this could result in prejudice to the processes identified in subsections 31(1)(a), (b) or (c). The public authority has provided no description as to how this prejudice would occur, stating only that:

“Releasing details that may identify these vehicles may compromise their efficacy should they be required for any type of police operation or emergency purpose.”
30. In the absence of any description from the public authority as to how prejudice would occur, the Commissioner has considered what general arguments could be advanced on this point. It is likely that the public authority utilises unmarked vehicles where this is necessary for a specific policing purpose. If it were the case that a request had been made for the make and model of unmarked vehicles used in situations where it is operationally necessary to conceal police presence, it would be clearer how prejudice to the functions identified in subsections 31(1)(a), (b) and (c) could result. This argument has not been advanced by the public authority and there is no evidence that the vehicles in question are regularly required for policing operations where the use of unmarked vehicles is necessary.
31. It is appropriate to consider whether the contents of the withheld information give any indication as to how prejudice may occur. Where, to give an example relevant to the public authority in this case, withheld information describes a potential vulnerability of a policing operation, it would be clear from the contents of the withheld information how prejudice would occur. This is not the case here, however. In the absence of further explanation, how disclosure of the make and model of vehicles provided to two chief officers would be likely to result in the prejudice in question is not clear.
32. In order for the Commissioner to conclude that prejudice is likely, it must be clear that the risk of prejudice is real and significant and more than hypothetical or remote. The public authority has provided no explanation as to how prejudice would or would be to likely result from disclosure, either to the complainant or to the Commissioner. Neither has the public authority provided any evidence in support of its assertion that prejudice would or would be likely to occur as a result of disclosure. The likelihood of prejudice has, at best, only been established as a hypothetical or remote possibility. Having considered the content and nature of the withheld information the Commissioner has not been able to identify how or why prejudice would or would be likely to occur.
33. The complainant has stated that a number of other police forces disclosed similar information to that requested here. The public authority was asked by the Commissioner to comment on the issue of other police forces having disclosed similar information, but did not do so. He has therefore assumed that there is nothing specific to the circumstances of this case which would distinguish it from information held by other forces. For example, the public authority has not

indicated that it uses vehicles provided to the Assistant Chief Constables for policing operations where other forces do not. The Commissioner does consider the stance of the public authority to be further weakened by the disclosure of similar information by other police forces but it has not been the main determinative factor in his decision. The public authority's position is weakened by the fact that a substantial number of other Police forces have made a different assessment of the risks associated and the public authority have not set out any arguments to persuade the Commissioner that the circumstances of this case are different. The Commissioner also believes that the joined up nature of the police approach to FOI issues across the Country via the Association of Chief Police Officers (ACPO) would have led the public authority to be aware of evidence of any increased risks as a result of the other disclosures. This case is therefore to be distinguished from the case in *England v ICO and London Borough of Bexley (LBB)* where the Tribunal did not accept it was reasonable to use a similar disclosure by another public authority as an argument that the exemption was not engaged. This was because it was unreasonable to conclude that disclosure of the information (addresses of empty houses) had not led to an increase in crime. The Commissioner believes that relevance of disclosures by other public authorities must always be considered in the circumstances of the case.

34. In the absence of an explanation of the relationship between disclosure and the prejudice set out in the limbs of the exemption claimed, or evidence as to how or why prejudice would likely result from disclosure in this case, the Commissioner has concluded that the exemptions in sections 31(1)(a), (b) and (c) are not engaged. As the exemption is not engaged it has not been necessary to go on to consider where the public interest test.

Section 38

35. The public authority has stated that both subsections 38(1)(a) and (b) are engaged, indicating that it believes that disclosure would be likely to result in endangerment to physical or mental health and to safety. Similarly to section 31, when considering whether this exemption is engaged, the following must be established:

- what endangerment would occur, and
- why it is likely to as a result of disclosure here.

This exemption is also qualified by the public interest.

36. The public authority has provided a brief explanation as to how it believes that the endangerment would result here, stating that disclosure would make identification of the chief officer's vehicles more likely which in turn would increase the likelihood of the chief officers being targeted for violent attack by criminals, members of the public and terrorists. As covered above in the section 31 analysis, the Commissioner accepts that disclosure of the information in question would assist in identification of the vehicles and so also accepts in theory that the endangerment described by the public authority is a possibility. However, as explained previously, it is not sufficient for public authorities to speculate that the prejudice identified is a theoretical possibility. They must explain why the

prejudice would or would be likely to occur.

37. On the issue of why this endangerment would be likely, the public authority has provided no explanation or evidence. The Commissioner has independently tried to identify if there are any obvious arguments to justify the application of the exemption. The stance of the public authority is based on the notion that there are individuals and groups who resent the police to such an extent that they may target them for attack. It has not however suggested that there have been particular attempts on the officers in question or that there is intelligence to suggest that such attacks are planned or imminent. The Commissioner accepts the premise of the argument that there are people who would seek to target members of the police force for violent attack and that were the chief police officers to whom vehicles are provided targeted, this may endanger their health and safety.
38. Having accepted that police officers are in general at an increased risk of endangerment to their health and safety by virtue of their profession, it is necessary to consider whether this endangerment would be made more likely through disclosure of the information requested here. The identity of the two Assistant Chief Constables is not confidential; their names, photographs and biographies appear on the website of the public authority. It is not the case, therefore, that disclosure of the requested information here would assist in identifying as police officers individuals who have sought to keep their profession confidential.
39. The Commissioner's guidance on section 38 stresses the requirement for evidence of a significant risk of endangerment to health and safety in order for the Commissioner to conclude that this exemption is engaged. Had the public authority provided, for instance, an example of where a police officer has been targeted as a result of the make and model of their vehicle becoming known, or evidence of a specific endangerment to the health and safety of the Assistant Chief Constables, this would have strengthened its argument considerably. In actuality, no evidence has been provided in support of the stance of the public authority. Further, the argument given at paragraph 33 about other police forces having disclosed similar information is also relevant here.
40. As noted above, whilst the public authority has stated how it believes endangerment would result through disclosure, it has provided no argument or evidence as to why this would be likely and the Commissioner does not believe that there is a real and significant risk of endangerment to the health and safety of the Assistant Chief Constables stemming specifically from disclosure of the requested information. His conclusion is that the exemption is not, therefore, engaged and it has not been necessary to go on to consider where the public interest test.

The Decision

41. The Commissioner's decision is that the public authority failed to deal with the request for information in accordance with section 1(1)(b) in that it concluded incorrectly that the exemptions provided by sections 31(1)(a), (b) & (c) and 38(1)(a) & (b) were engaged.
42. The Commissioner also finds that the public authority failed to comply with section 10(1) in failing to disclose the cost information to the complainant within 20 working days of receipt of the request and 17(1)(b) in failing to cite the relevant subsections of the exemptions relied upon.

Steps Required

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

Disclose the withheld information to the complainant.

Other matters

44. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
45. When addressing the balance of the public interest in the refusal notice, the public authority cited as an argument in favour of the maintenance of the exemptions "*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.
46. 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 when considering where the balance of the public interest lies in connection with any single exemption. Consideration of the balance of the public interest is a separate test to whether the exemption is engaged and that multiple exemptions have been cited is of no relevance to this test.
47. Also, as noted above the issue of what information the Police Authority may hold that fell within the scope of the request was raised with the public authority. The response from the public authority to this point was to state only that it could not comment on what information may be held by the Police Authority. The Commissioner would stress to the public authority that the section 45 code of practice produced by the Ministry of Justice requires public authorities to consider transferring requests to any other public authority that may hold information that

falls within the scope of the request that is not held by the public authority to which the request was made.

48. In this case, the complainant specifically mentioned another public authority within the request and the fact that the public authority amended its initial response to the second part of the request at the internal review stage indicates that it may not have been entirely clear what cost was incurred to the Police Authority through the provision of vehicles to senior officers. Given this, it may have been appropriate for the public authority to consider transferring this part of the request to the Police Authority. The public authority should when dealing with future requests be aware of this requirement of the code of practice.

Failure to comply

49. 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

50. 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

51. 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 13th day of August 2008

Signed

Steve Wood
Assistant Commissioner

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