

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 13 August 2009**

**Public Authority:** Her Majesty's Court Services (an executive agency of the Ministry of Justice)

**Address:** 102 Petty France  
London  
SW1H 9AJ

### Summary

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The complainant requested information from Her Majesty's Courts Service (HMCS) regarding forcible search and entry powers under the Domestic Violence, Crime and Victims Act 2004. HMCS provided some redacted information and relied upon sections 31(1)(a) and 31(1)(c) of the Act to withhold the remaining information. Following the Commissioner's intervention, the MoJ agreed to disclose most of the redacted information. The MOJ now sought to rely on the exemption under section 38(1)(b) for the remainder of the withheld information. It also continued to withhold some information on the basis of section 31(1)(c). The Commissioner finds that HMCS applied the section 38(1)(b) exemption correctly and that it applies to all of the withheld information, therefore he has not made a decision relating to the exemption under section 31(1)(c). However the Commissioner finds that HMCS incorrectly applied the section 31(1)(a) exemption, and he has also recorded several procedural breaches.

### 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.

### Background

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2. The Commissioner notes that under the Act HMCS is not a public authority itself, but is actually an executive agency of the Ministry of Justice (the MOJ) which is responsible for HMCS. Therefore, the public authority in this case is actually the MoJ rather than HMCS. The Commissioner also notes that at the time of the request for information the relevant public authority was the Department for

Constitutional Affairs. However, for the sake of clarity, this decision notice refers to HMCS as if it were the public authority.

3. At the time of the request the complainant was in correspondence with HMCS regarding the National Standards for Enforcement Agents over the issue of forced search and entry powers. The complainant had concerns about the behaviour of bailiffs and feared that many would abuse these new powers bestowed under the Domestic Violence, Crime and Victims Act 2004 (the DVCV Act).
4. Prior to the DVCV Act, Civilian Enforcement Officers (CEOs) and Approved Enforcement Agencies (AEAs) contracted to enforce magistrates' court warrants on behalf of HMCS did not have the powers to force entry into premises to execute a warrant for arrest, commitment, detention or distress arising from criminal proceedings and they had no powers to search a person whom they had arrested. The powers of search and entry under the DVCV Act are designed to make executing warrants of arrest, commitment, detention and distress more effective and to ensure that fines remain an effective sentence.
5. The MOJ has stressed that the Guidance document requested by the complainant is not provided to all bailiffs but only to 'specific people enforcing specific warrants', namely CEOs and AEAs. Furthermore, the powers of search and entry under the DVCV Act only apply to CEOs and AEAs where there is a warrant for arrest, detention or commitment in proceedings or in connection with any criminal offence. They cannot therefore be used to enforce civil debts.
6. The MOJ has confirmed that AEAs have only used the search and entry powers twice since the enforcement of contracts commenced in 2006 and as far HMCS is aware, there have been no complaints made against AEAs regarding its use.

## The Request

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7. During the course of correspondence with the complainant as referred to above, HMCS advised that the powers bestowed under the DCVC Act would only be used in extreme circumstances and as a last resort. On 10 July 2006 the complainant asked HMCS:

*"Who decides when the last resort has been reached? Please may we see the appropriate guidance?"*
8. In relation to the enforcement officers' powers to search an arrested person the complainant asked:

*"Again please may we see the guidance?"*
9. HMCS issued a refusal notice on 31 October 2006. It did not confirm what information it held but cited section 31(1)(c) of the Act to refuse the request on the basis that disclosure of the requested information would prejudice the

- administration of justice. HMCS argued that the disclosure of methods used by enforcement agents could assist defaulters to evade Enforcement Officers.
10. On 1 November 2006 the complainant requested that HMCS conduct an internal review of its decision.
  11. On 27 January 2007 HMCS notified the complainant of the outcome of its internal review. HMCS informed the complainant that the relevant document which contained the requested information was HMCS Magistrates' Courts Guidance: Search and Entry Powers (Domestic Violence, Crime and Victims Act 2004). HMCS disclosed some information to the complainant, but redacted substantial parts of the document on the basis of section 31(1)(c). HMCS also cited section 31(1)(a) as it concluded that disclosure of some of the guidance would prejudice the prevention and detection of crime.
  12. The complainant wrote to Baroness Ashton regarding his request on 15 February 2007 and on 27 February 2007 the Department for Constitutional Affairs responded on behalf of Baroness Ashton. The letter reminded the complainant of his section 50 rights under the Act if he was not satisfied with the outcome of the public authority's internal review. It also clarified queries raised by the complainant concerning some of the redactions.

## The Investigation

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### Scope of the case

13. During the course of the Commissioner's investigation some of the originally redacted information was disclosed to the complainant informally. As the Commissioner felt it should have been released at the time of the original request this therefore constitutes a procedural breach. Although the main focus of this Notice concerns the withheld information, the procedural breaches noted cover the whole investigation and therefore all of the information.

### Chronology

14. On 23 April 2007 the complainant contacted the Commissioner to complain about HMCS's handling of his request.
15. On 18 June 2008 the Commissioner contacted HMCS to request a full copy of the withheld information, further arguments in support of both the section 31(1)(a) and section 31(1)(c) exemptions and details of the public interest arguments considered in relation to these exemptions.
16. HMCS responded to the Commissioner on 5 August 2008. It provided an unredacted copy of the Guidance document and further arguments in respect of the exemptions cited but it did not provide further details of its public interest test.

17. On 29 September 2008 the Commissioner informed the MOJ that he did not consider that section 31(1)(a) was engaged for the bulk of the redacted information. The Commissioner considered that section 31(1)(c) was in fact engaged for a substantial part of the redacted information although the public interest test favoured disclosure of most of this information.
18. Following the Commissioner's recommendation, the MOJ released further information to the complainant. The complainant remained of the view that his request had not been fully answered, and the Commissioner therefore proceeded with his investigation.
19. The Commissioner then carefully considered the remaining withheld information. Given the nature of some of some of the information the Commissioner asked the MOJ whether it had considered the exemption at section 38 of the Act. The MOJ subsequently confirmed that it now sought to rely on that exemption.
20. On 16 March 2009 the complainant sent the Commissioner a response to his preliminary views and requested that these should be considered before making a final decision. On 5 May 2009 the complainant sent further correspondence to the Commissioner in respect of his preliminary views.
21. In response to both of the above letters, the Commissioner wrote to the MOJ on 27 May 2009 requesting details of the training, regulation and complaints procedure the enforcement officers are subject to.
22. Following further exchanges, the MOJ provided the Commissioner with a substantive response on 26 June 2009.

## Analysis

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### Exemptions

23. All sections of the Act referred to in this Notice are reproduced in full in the attached Legal Annex.

### Section 38 (1): health and safety

24. Section 38 relates to health and safety and is a qualified prejudice based exemption. However, unlike the other exemptions in the Act subject to the prejudice test, the word 'endanger' is used for this exemption rather than 'prejudice'. Section 38(1) states:

*"Information is exempt information if its disclosure would or would be likely to -*

*endanger the physical or mental health of any individual, or  
endanger the safety of any individual."*

25. In order for section 38 to be engaged therefore, it must be the case that release of the specified information would or would be likely to endanger the physical or mental health and safety of any individual. In this case, although the public authority did not originally cite this exemption, as part of the Commissioner's investigation of the disputed information it became apparent that it contained information relating to the safety of individuals and in particular to the safety of the enforcement officers. Whilst the Commissioner would not normally consider it his role to indicate potential exemptions to public authorities, failure to alert the public authority to the likelihood of endangerment to the safety of any individual would be inconsistent with his role as a responsible regulator.

### The prejudice test

26. In considering the prejudice test for this exemption the Commissioner is assisted by the Information Tribunal's view as expressed in *Hogan v the ICO and Oxford City Council (EA/2005/0026, 0030)*. The Tribunal stated that the application of the 'prejudice' test should be considered as involving three steps. Firstly, the need to establish the applicable interest(s) within the exemption, secondly there must be consideration of the nature of the 'prejudice' being claimed and finally the likelihood of occurrence of prejudice. As explained in paragraph 24, the Commissioner considers 'endanger' and 'prejudice' to be essentially the same for the purposes of the prejudice test.
27. The prejudice test is not a weak test and the public authority must be able to point to prejudice which is 'real, actual or of substance' and to show some causal link between the potential disclosure and the prejudice.
28. The prejudice test has two limbs, "would be likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote, whereas "would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not. In the present case the limb being relied upon is "likely to prejudice".
29. In his assessment of the likelihood of this occurring, the Commissioner has taken into account the decision of the Information Tribunal in the case of *John Connor Press Limited v The Information Commissioner [EA2005/0005]*, in which the Tribunal confirmed that:
- "...the chance of prejudice being suffered must be more than a hypothetical possibility; there must have been a real and significant risk."* (para 15).
30. This interpretation follows the judgement of Mr Justice Munby in *R (on the application of Lord) v Secretary of State for the Home Office [2003]*. In that case, the view was expressed that 'likely' connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests.
31. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not. Therefore,

the risk of prejudice need not be more likely than not, but must be substantially more than remote.

32. With the benefit of having viewed the disputed information, the Commissioner can confirm that the disputed information relates specifically to the safety of the enforcement officers. Any information relating to the defaulters contained within the Guidance document has now been disclosed. Furthermore, the disputed information relates to circumstances where the enforcement officers should withdraw from the premises or abandon their search of an individual for purposes of their own safety.
33. The Commissioner is concerned that an in-depth discussion of the disputed information risks disclosing details of the information itself. However, in the Commissioner's view, disclosure of the disputed information into the public domain would be likely to endanger the safety of the enforcement officers since if it was widely known, some of the defaulters may act violently towards the enforcement officers. Without going into the details of the disputed information itself, it provides guidance to enforcement officers about how to respond in specific situations of direct risk to their safety. Indeed, section 1.3 of the document states:

*"It is recognised that these additional powers will be a departure from the traditional practices of a CEO/AEA, which is why it is important to use the powers safely and with due consideration in order to avoid any situations where a CEOs/AEAs health and safety could be at risk."*

34. For the reasons set out above, the Commissioner is of the view that the exemption is engaged. However, as section 38 is subject to the public interest test, the Commissioner has gone on to consider whether the exemption can be maintained in this respect.

### **Public interest arguments in favour of disclosing the requested information**

35. There is a general public interest in disclosure of information by public authorities to promote transparency and accountability in relation to the activities of public authorities. The complainant has also commented along similar lines.
36. Transparency in this particular case would demonstrate that the guidance given to the enforcement officers in terms of the practical application of the powers bestowed under the DVCV Act is proportionate and fair. As this is an issue which can impact significantly on an individual, there is perhaps a strong public interest in informing the public about the way enforcement officers work. The complainant would agree with this and has argued that his organisation needs to know precisely what will constitute 'last resort' so as to assist in ensuring CEOs/ AEAs keep within the rules when (or before) threatening what he considers to be vulnerable households. He has stressed that any individual struggling with debt would be likely to find the arrival of a CEO/AEA, claiming entitlement to enter their home, at the very least a daunting prospect. He also adds that this in itself is a compelling reason for making public the precise nature of the full guidance.



37. The complainant refers to longstanding concerns over the qualifications and fitness to practice of bailiffs (CEOs / AEAs) and has further stated that the enforcement industry is fragmented and unregulated. He has argued that bailiffs are generally employed by private companies, motivated by fees and profit. The complainant has further argued that the power of forcible entry is an extreme power and believes it is vital that he sees the full information about the circumstances in which it will be exercised, including how enforcement officers will conduct themselves. Disclosure of the disputed information would therefore help to promote confidence in the accountability of enforcement officers should they contravene the guidance.

### **Public interest arguments in favour of maintaining the exemption**

38. The disputed information under this exemption relates specifically to the safety of the enforcement officers themselves. The enforcement officers carry out a difficult but necessary job which can put them in contact with highly distressed individuals. Disclosure of this information would be likely to endanger the safety of the enforcement officers in that if it was widely known, some defaulters may use it to avoid arrest or detention. These attempts would be likely to put the enforcement officers in more danger. There is an inherent public interest in avoiding any action which may compromise the safety of an individual.
39. Disclosure of the information would not assist defaulters or their representatives to judge whether there were grounds for complaint regarding the conduct of an individual enforcement officer.
40. Disclosure of the information into the public domain would not further the understanding or participation in a public debate regarding the search and entry powers of the enforcement officers.

### **Balance of the public interest arguments**

41. When balancing the public interest test in relation to this exemption, it is necessary to demonstrate that there is a real and significant risk that disclosure would be likely to endanger the safety of an individual. The Commissioner recognises that there is clearly a very strong public interest in protecting individuals from such harm. Therefore before ordering the release of such information the Commissioner must be satisfied that the public interest arguments in favour of disclosure are at least equally as strong.
42. The Commissioner has therefore paid particular attention to the likelihood of the endangerment to the safety of the enforcement officers against the general public interest in transparency and accountability. The Commissioner also accepts that disclosure of the information would be likely to promote confidence that the enforcement officers can be held accountable for any infringement of their powers. However, the very nature of the information would do nothing to enable defaulters or their representatives to determine whether there were suitable grounds for complaint against an individual enforcement officer. The relevant information for this is now in the public domain since it has been disclosed to the complainant. The Commissioner therefore considers that the balance of the

public interest test favours maintaining the exemption for the disputed information falling within the section 38 exemption.

### **Section 31(1)(c): administration of justice**

43. The Commissioner notes that HMCS initially sought to rely on section 31(1)(c) in relation to the withheld information. As the Commissioner is satisfied that the information is exempt by virtue of section 38 he is not required to make a decision relating to the public authority's application of other exemptions in this case.

### **Procedural Requirements**

#### **Section 1(1)(b): duty to provide information**

44. Section 1(1)(b) of the Act requires a public authority to provide information to an applicant in response to a request. As a result of the Commissioner's intervention, further information was released to the complainant, but as he is of the view that some of this ought to have been disclosed to the complainant at the time of the request he concludes that HMCS failed to comply with section 1(1)(b) of the Act.

#### **Section 10(1): time for compliance**

45. Section 10(1) of the Act states that any public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt. The public authority did not send the complainant any part of the guidance document until it responded to his request for an internal review which was well in excess of the time for complying. As with the section 1(1)(b) breach, although this does not form part of the withheld information the Commissioner considers that it should have been released at the time of the original request and therefore represents a breach of section 10(1) of the Act.

#### **Section 17(1): refusal notice**

46. Any public authority intending to refuse a request for information must do so in compliance with the requirements of section 17 of the Act. Section 17(1) of the Act requires a public authority to provide an applicant with a refusal notice that states that fact, specifies the exemption(s) in question and (if necessary) to explain why the exemption applies. This notice must be issued within the time for complying with section 1(1) – that is twenty working days.
47. HMCS did not respond to the complainant's request for information dated 10 July 2006 until 31 October 2006 which exceeded the twenty working day requirement and therefore breached section 17(1) of the Act.

#### **Section 17(1)(b)**

48. The Commissioner notes that HMCS did not cite the section 38 exemption until after his initial investigation of the disputed information. Section 17(1)(b) of the Act places an obligation on the public authority that its refusal notice '*specifies the*



*exemption in question*'. In failing to specify an exemption it has later relied on, HMCS breached section 17(1)(b) of the Act.

### **Section 17(3)(b)**

49. The refusal notice cited section 31(1)(c) of the Act. Section 31 is a qualified exemption and therefore subject to the public interest test. HMCS made no reference to the public interest test in its refusal notice and its discussion in the internal review was vague. In failing to adequately explain why the public interest favoured maintaining the exemption, the public authority breached section 17(3)(b) of the Act.

### **The Decision**

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50. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- HMCS correctly withheld information in reliance on section 38(1) of the Act, albeit following the intervention of the Commissioner.
51. However, the Commissioner finds that the public authority failed to comply with the procedural requirements of sections 1(1)(b), 10(1), 17(1), 17(1)(b) and 17(3)(b) as covered in paragraphs 44 to 49 of this Notice.

### **Steps Required**

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52. The Commissioner requires no steps to be taken.

### **Other matters**

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53. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
54. The complainant requested an internal review in a letter dated 1 November 2006 yet the public authority delayed responding to this until 27 January 2007. Although there is no specific time requirement under the Act, the Section 45 Code of Practice recommends that the internal review should be considered promptly.
55. The Commissioner has also produced Good Practice Guidance in relation to this matter and considers 20 working days from the date of the request for a review to be a reasonable time in most cases. He does nevertheless recognise that there may be a small number of cases where it may be reasonable to take longer. However, the Commissioner expects the public authority as a matter of good

practice to notify the requestor and explain why more time is needed. The Commissioner's view is that no case should exceed 40 working days.

56. The Commissioner notes that the internal review exceeded 40 working days and that HMCS offered no explanation for this to the requestor.
57. The Commissioner is also concerned that the MOJ failed to meet deadlines set by the Commissioner throughout the course of the investigation. This includes a deadline of 16 July 2008 not responded to until 5 August 2008 and a further deadline of 5 June 2009 not fully responded to until 18 and 26 June 2009.

## Right of Appeal

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58. 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](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.

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 2009**

**Signed .....**

**Anne Jones  
Assistant Commissioner**

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

## Legal Annex: Relevant statutory obligations

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1. **Section 1(1)** provides that:

Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.

**Section 1(2)** provides that -

Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

2. **Section 10(1)** provides that:

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

3. **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.

4. **Section 31(1)** provides that:

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

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment."

5. **Section 38(1)** provides that:

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

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

**Section 38(2)** 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, have either of the effects mentioned in subsection (1).